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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through Utah Department of Social Services,	:	
Plaintiff-Respondent.	:	CASE NO. 18161
vs.	:	
D. JOHN MUSSELMAN, and LINDA ANN CORAM,	:	
Defendants-Appellants.	:	

BRIEF IN ANSWER TO PETITION FOR REHEARING

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

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FILED

SEP 24 1982

Clerk, Supreme Court, Utah

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CASES CITED

<u>DUCHENEAU v. HOUSE</u> 11 P.2d 618 (1886). 5

<u>JONES v. HOUSE</u> 11 P.2d 618 (1886) 5

RULES CITED

Utah Rules of Civil Procedure 76(e) 1 and 2 3,5,6

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BRIEF IN ANSWER TO PETITION FOR REHEARING

STATEMENT OF THE NATURE OF THE CASE

Defendant appealed to this Honorable Court from a denial of a motion to set aside a judgment by default in the Third District Court, the Honorable G. Hal Taylor, presiding. The appeal was denied by this Court and defendant now petitions this court for re-hearing.

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 proposed answer failed to state a defense. Thereafter, Defendant-appellant appealed to this court to set aside the ruling of the lower court. This court on July 26, 1982 in a per curiam opinion affirmed the ruling of the lower court in its refusal to set aside default judgment entered against Defendant-appellant.

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RELIEF SOUGHT ON PETITION FOR REHEARING

Plaintiff-respondent seeks a denial of the Petition of defendant-appellant for Rehearing.

RESPONSE TO ARGUMENT BY APPELLANT

POINT I

DEFENDANT-APPELLANTS BRIEF MATERIALLY MISCONSTRUES THE RULING OF THIS COURT.

Defendant-appellant in his brief in support of a petition for rehearing has materially misconstrued and thereby misstated the holding of this court in its per curiam decision to affirm the holding of the court below.

Defendant-appellant states that: "This court implicitly held Mr. Musselman's conduct to be excusable."

This is an improper representation of the statements made by the court. The court in its opinion states:

> The excuse was based on his assertion that because of a week's stay in a hospital and a two-or three-week convalescent period, he excusably neglected to file a timely responsive pleading to protect and preserve any defenses he may have had to the suit. (Emphasis added.)

This statement clearly does not hold the above conduct excusable. It is merely a statement acnowledging the existence of defendant-appellant's "assertion" and is not in any way an "implicit holding" thereon.

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Defendant-appellant also claims that the court erroniously assumed that the Defendant-appellant admitted a right of subrogation and thereby an assignment of that right. It is of little consequence whether Defendant-appellant <u>affirmatively admits</u> to the acts stated above when the very <u>conduct of Defendant-appellant,</u> as recognized by this court in its opinion, is an obvious admission of the above stated facts and cannot be thereafter denied by Defendant-appellant. The court in its holding stated:

> His <u>proposed answer</u> filed along with his Motion to Vacate the Judgment <u>substantially concedes all the above-mentioned pertinent facts.</u> This being so, what he had to offer the court in support of his Motion to Vacate, in no way could satisfy the rule that the Motion must be suported by facts showing a meritorious defense; and <u>the trial court in this case, having before it the facts conceded, would have committed error had the Motion been granted.</u> (Emphasis added.)

Clearly the court has reviewd the briefs filed by counsel and has come the conclusion that the facts speak for themselves in this instance, and no belated denial of those facts by defendant-appellant should alter in any way the holding of this court.

<u>POINT II</u>

THE UTAH RULES OF CIVIL PROCEDURE DO NOT ALLOW A REHEARING UNDER THE PRESENT CIRCUMSTANCES

Under Utah Rules of Civil Procedure 76(e) 1 and 2 the procedural guidelines for a petition for re-hearing are set.

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Implicit in these guidelines is the duty of the party petitioning the court to show in a clear and convincing manner that the original findings of the court were in error and to present to the court new arguments which the court may have somehow overlooked in its original findings.

It is the position of Plaintiff-respondent that in Defendant-appellants' brief in support of the Petition for Rehearing no new arguments are made, and in that brief Defendant-appellant only rehashs and reargues the facts which were at issue and decided in the original action and on appeal. It is clear that under Utah law Defendant-appellant is not entitled to a rehearing based on the repetitive arguments presented.

The basic contention of Defendant-appellant as stated in his original appeal brief is that:

> 1. Defendant-appellant demonstrated an uncontorverted showing of inadvertance and excusable neglect, and 2. Defendant-appellant has tendered a meritorious defense and the default judgment must be set aside to prevent clear and manifest injustice.

In Defendant's reply brief on appeal Defendant-appellant states that:

> Defendant-appellant'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.

This statement is a direct reiteration of the position taken by Defendant-appellant in his appeal brief. In Defendant-

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appellant's brief in support of Petition for Rehearing he concludes:

> It is submitted and reiterated that there exist only two issues that are properly and appropriately before this court. First, was the defendant Musselman's conduct and failure to answer excusable? . . . [And] . . . Did the defendant Musselman tender a meritorious defense? (Emphasis added.)

Defendant-appellant has stated no new arguments or facts to this court which merit a petition for rehearing and has brought to light no new issues or arguments for the court to consider on this matter. Defendant-appellant is merely rehashing old arguments on which this court has already ruled. Therefore, the Petition for Re-hearing requested by Defendant-appellant should be denied.

Under the Utah Rules of Civil Procedure a re-hearing on appeal should only be granted if the party petitioning brings to the court new information or arguments not already made. From the very early history of the Supreme Court of the State of Utah until this time it has been the rule of the Court that no petition for re-hearing should be granted unless it states new facts or grounds for reversal of the judgment of the lower court and the decision of this court on appeal. Ducheneau v. House, 11 P.2d 618 (1886) and Jones v. House, 11 P.2d 619 (1886). These vernable cases, which are still cited in the Utah Code as controlling, state that;

> We have repeatedly called to the attention the fact that no re-hearing will be granted

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> where nothing new and important is offered for our consideration. . .
> We cannot grant a re-hearing unless a strong showing therefore be made. A re-argument, or an argument with the court upon the points of the decision, with no new light given, is not such a showing.

CONCLUSION

It is the position of the Plaintiff-respondent that the brief in support of Petition for Re-hearing submitted by Defendant-appellant states no new theories or legal concepts not already submitted to and considered by this court. A petition for re-hearing under Utah Rules of Civil Procedure, 76(e) 1 and 2 should only be granted if there is a clear showing that the decision of this court lacked of adequate factual information, was based upon mistake, and was in error. This court made no error in its findings and conclusions on this case which were filed July 26, 1982, and, therefore, the Petition for Re-hearing filed by Defendant-appellant should be summarily denied.

Dated this 24th day of September, 1982.

DAVID L. WILKINSON
Attorney General

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Assistant Attorney General

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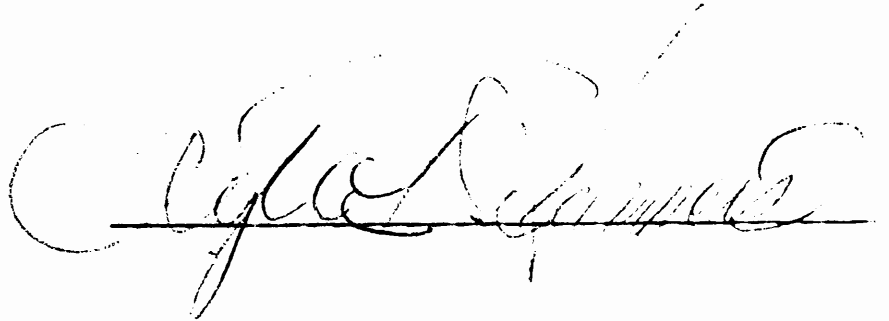
MAILING CERTIFICATE

This is to certify that I mailed three complete and exact copies to the Attorney for Appellant, Richard I. Ashton, FOX, EDWARDS & GARDINER, American Plaza II, Suite 400, 57 West 200 South, Salt Lake City, Utah 84101 on this 24th day of September, 1982.



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