

1982

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

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *State v. Musselman*, No. 18161 (Utah Supreme Court, 1982).
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IN THE SUPREME COURT

STATE OF UTAH

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

Plaintiff & Respondent, :

v. : Case No. 18161

D. JOHN MUSSELMAN and :
LINDA ANN CORAM, :

Defendants & Appellant. :
:

BRIEF OF APPELLANT ON REHEARING

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

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FILED

NOV - 9 1982

Clerk, Supreme Court, Utah

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NATURE OF THE CASE

This is a rehearing on the appeal of Defendant-Appellant D. John Musselman from a denial by the District Court of Mr. Musselman's motion to set aside a default and default judgment entered against him in the Third Judicial District Court of Salt Lake County.

DISPOSITION

The court below, the Honorable G. Hal Taylor, presiding, entered its order denying Mr. Musselman's motion to set aside the default and default judgment. This Honorable Court issued an opinion on July 26, 1982 affirming the District Court. On October 8, 1982 this Court granted Mr. Musselman's Petition for Rehearing.

RELIEF SOUGHT ON APPEAL

Appellant Musselman seeks a reversal of the District Court's denial of his motion to set aside the default and default judgment.

STATEMENT OF FACTS

In order to fully understand the issues presented on this appeal, it is essential to set forth the underlying facts which preceded and resulted in the Default Judgment against Mr. Musselman.

In April, 1977, Linda Ann Coram, one of the named defendants in this action, sought treatment from a medical doctor in Nephi, Utah, for a severe skin rash. After an office visit and a brief physical examination, the physician prescribed a series of drugs commonly referred to as steroid drugs.

After two to three weeks of treatment, Mrs. Coram developed severe stomach pains and internal bleeding. During the last week of April, 1977, Mrs. Coram was hospitalized at the Juab County Hospital where she remained for approximately one week. During that week, her physician, who had prescribed the steroids, failed to perceive the nature of her medical condition. On or about April 29, 1977, Mrs. Coram was transferred to the Utah Valley Hospital in Provo, Utah, under the care of other physicians, where she underwent surgery shortly thereafter. Two large peptic ulcers were discovered in her stomach.

As a result of the ulcers and related problems, Mrs. Coram remained in critical condition through the remainder of the year 1977. She underwent several major surgeries and spent substantial time in an intensive care unit. (See generally, Record on Appeal, hereinafter "R.," pp. 41-42, 47.)

The professional medical opinion was that Mrs. Coram's initial physician was negligent in administering the steroid

treatments and in failing to timely and properly diagnose her medical condition.

Pursuant to the Medical Assistance Act (the former Title 55, Chapter 15a, Utah Code Ann.) the State of Utah undertook to pay various medical costs and expenses for Mrs. Coram's care. All of the disbursements made by the State of Utah on behalf of Mrs. Coram were made directly to various health care providers and were paid prior to the effective date of the Medical Benefits Recovery Act.

During the fall of 1977, Mrs. Coram contacted appellant, D. John Musselman, an attorney, and retained him to represent her in a medical malpractice lawsuit. Mr. Musselman commenced a medical malpractice action on behalf of Mrs. Coram in the United States District Court for the District of Utah in October, 1978.

Mr. Musselman subsequently corresponded with the Utah State Department of Recovery Services and informed the Department that an action had been commenced. Mr. Musselman requested information on any amounts paid by the State and to whom, and whether or not the State intended to make any claim for reimbursement. (R., p. 40.) The Department of Recovery Services responded in a letter from an employee of the Department, providing the requested information and simply stating that the State of Utah intended to make a claim for subrogation. No further communications of any nature, however, were received from the State, nor did the

State ever become a party to Mrs. Coram's action. The State never filed any verified lien with the United States District Court as required by the Medical Benefits Recovery Act (at that time codified as §55-15d-10, Utah Code Ann.).

In February, 1981, Mrs. Coram's claim was settled for the sum of \$150,000.00. This sum did not adequately compensate Mrs. Coram for the life-threatening and permanent injuries that she suffered. Nevertheless, insurance limitations effectively mandated settlement for the \$150,000.00. (R., pp. 42-43, 47-48.)

Ninety thousand (\$90,000) dollars of the settlement proceeds were disbursed to Mrs. Coram, out of which she paid her attorney's fees and costs. The sum of \$60,000 was retained by Mr. Musselman at the request of and for the benefit of Mrs. Coram pending resolution of the potential claim of subrogation by the State. The \$60,000 was held and secured by Mr. Musselman pursuant to the express wishes and direction of Mrs. Coram.

In June, 1981, the State of Utah filed the present action in the Third Judicial District Court of Salt Lake County against Mrs. Coram and Mr. Musselman. (R., pp. 2-5.) The complaint asserted two causes of action. The "First Cause of Action" alleged a claim for subrogation against Mrs. Coram in the amount of \$82,522.22. The "Second Cause of Action," abandoned by the State and not a part of this appeal, alleged an alternative claim against Mr. Musselman

under a breach of contract of representation theory. The summons and complaint were served upon Mr. Musselman, but, curiously, were never served upon Mrs. Coram and she is not a party to these proceedings.

During the month of June, 1981, Mr. Musselman conferred by telephone with the attorney for the State concerning the lawsuit and possibilities of settlement. On approximately June 29, 1981, however, Mr. Musselman was admitted to the Utah Valley Hospital at Provo, Utah, on an emergency basis with a severe stomach ailment. Mr. Musselman remained in the Utah Valley Hospital for approximately one week, during which time various medical procedures were performed and during which time Mr. Musselman remained under medication and heavy sedation for pain. (R., pp. 26-27, and medical records and affidavit appended to the original Brief of Appellant as Appendices A and B.)

During the several days following his release from the hospital and during his convalescence at home, Mr. Musselman attempted to contact Mr. Halgren, the attorney for the State, in order to inform him of the untimely medical emergency and the reason that the complaint remained unanswered. On July 13, 1981, Mr. Musselman did in fact reach Mr. Halgren's secretary and waited on the line for approximately 9 minutes in an attempt to speak with Mr. Halgren. Without returning Mr. Musselman's call, Mr. Halgren, on the next day, July 14, 1981, entered a Default Judgment against

Mr. Musselman. On the same day, Mr. Musselman was finally able to speak to Mr. Halgren on the telephone, but was informed by Mr. Halgren that a Default Judgment had already been entered. (R., pp. 26-27, Transcript of November 3, 1981 hearing, pp. 13-14.)

The Default Judgment was entered against Mr. Musselman only on the "First Cause of Action" of the complaint. The "Second Cause of Action" of the complaint does not form a part of the Default Judgment.

PROCEDURAL BACKGROUND

Subsequent to entry of the Default Judgment, Mr. Musselman timely filed, on August 13, 1981, his Motion to Set Aside Judgment (R., p. 32). Concurrently with his motion to set aside, Mr. Musselman filed his affidavit and tendered a proposed answer to the complaint (R., pp. 26-31).

The motion to set aside was originally noticed for hearing on August 18, 1981, but the Third Judicial District Court of Salt Lake County, the Honorable G. Hal Taylor, presiding, declined to hear the motion on that date, and the motion was instead continued and heard on November 3, 1981, again with the Honorable G. Hal Taylor presiding. After both sides had presented arguments which related chiefly to the issue of excusable neglect, the lower court ruled from the bench, stating that, in its opinion, the proposed answer did not set forth a defense (Transcript of November 3, 1981

hearing, pp. 20-21). The motion to set aside the default was therefore denied. This was the only ground stated for the lower court's ruling, and thus, the finding of excusable neglect must be inferred. The lower court entered its formal order on November 18, 1981 (R., p. 87) and Mr. Musselman appealed to this Court on December 10, 1981 (R., p. 90).

This Honorable Court rendered its initial opinion on July 26, 1982, affirming the lower court and holding that Mr. Musselman had not tendered a meritorious defense. On August 30, 1982, Mr. Musselman petitioned this Court for a rehearing on the basis that controlling facts assumed by this Court in support of its initial ruling were not admitted or conceded by Mr. Musselman and on the basis that plaintiff had failed to state any claim for relief against Mr. Musselman. This Court granted Mr. Musselman's Petition for Rehearing on October 8, 1982. Mr. Musselman therefore submits this Brief on Rehearing.

GENERAL ISSUES PRESENTED

There are two issues to resolve in determining whether or not the Default Judgment against Mr. Musselman should be set aside. Those issues are: (1) was Mr. Musselman's conduct in failing to timely answer excusable; and (2) did Mr. Musselman tender a meritorious defense to the complaint?

In the first paragraph of its initial opinion, this Honorable Court set forth Mr. 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. As more fully set forth below, both the lower court and this Court implicitly held Mr. Musselman's conduct to be excusable.

Therefore, the only issue remaining for decision is whether or not Mr. Musselman in his tendered answer proffered a meritorious defense to the "First Cause of Action" of plaintiff's complaint, upon which the default was entered.

This Honorable Court affirmed the lower court's denial of Mr. Musselman's motion to set aside the default on the basis of controlling facts set forth in the second paragraph of the Court's opinion rendered July 26, 1982. In that opinion, the Court assumed that Mr. Musselman had admitted a right of subrogation in favor of the plaintiff pursuant to the Medical Benefits Recovery Act as well as a right of subrogation pursuant to a written assignment executed by Mrs. Coram.

Neither of these two controlling facts are admitted or conceded by Mr. Musselman, nor are they supported by the record.

This Court's initial opinion also indicated that the Court was under the impression that Mr. Musselman had agreed to represent or act on behalf of the State. As more fully explained below, no such agreement is to be found in the record, nor was such an agreement even pled by the State anywhere in the claim upon which the Default Judgment was based. Inasmuch as the assumed facts which controlled this Court's initial decision are disputed and at issue, it is apparent that Mr. Musselman's tendered answer sets forth several meritorious defenses to plaintiff's complaint. This brief focuses primarily on these defenses. Mr. Musselman's motion to set aside is well taken and he must be given his day in court.

ARGUMENT

I. DEFENDANT MUSSELMAN HAS TENDERED SEVERAL MERITORIOUS DEFENSES TO THE CLAIM UPON WHICH THE DEFAULT JUDGMENT ENTERED AGAINST HIM PERSONALLY WAS BASED

The central issue for determination on this appeal is whether Mr. Musselman proffered any "defense of at least ostensible merit as would justify a trial" with respect to the claim upon which the Default Judgment against him

personally was entered. Downey State Bank v. Major-Blakeney Corp., 545 P.2d 507, at 510 (Utah, 1976).

It has previously been noted above, and is readily apparent from the District Court record, that the Default Judgment was taken only on plaintiff's "First Cause of Action" (the claimed right of subrogation) 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 only on the "First Cause of Action" for the exact amount prayed in the sum of \$82,522.22.¹

¹Indeed, had the Default Judgment been entered on the "Second Cause of Action," summary reversal would have been mandated. In Security Adjustment Bureau, Inc. v. West, 20 U.2d 292, 437 P.2d 214 (1968), this Court held that it was error for the District Court to award punitive damages without proof. This error in and of itself justified vacating the defendant's default in that case. In this case, the record reveals no evidentiary hearing or findings of fact. This Court's holding in Security Adjustment Bureau would require setting aside any default based on the State's "Second Cause of Action."

A. Plaintiff's "First Cause of Action" Fails To
State Any Claim for Relief Against Mr. Musselman

1. No Claim with Respect
to Mr. Musselman is Even
Asserted

In substance, the State alleges in its "First Cause of Action" as follows: (1) Mrs. Coram received Medicaid assistance from the State; (2) Mrs. Coram made a written assignment of benefits to the State; (3) the Medical Benefits Recovery Act provides for subrogation rights; (4) Mr. Musselman was retained by Mrs. Coram as her attorney in a medical malpractice action; (5) the defendants failed to comply with certain notice provisions of the Medical Benefits Recovery Act; (6) the State gave written notice to the defendants of its alleged lien rights; (7) Mrs. Coram settled her medical malpractice action without the consent of the State; (8) Mr. Musselman placed \$60,000.00 of the settlement funds into a separate account and disbursed the balance; and (9) there was no attorney-client contract between the State and Mr. Musselman (R., pp. 2-5).

These allegations may suggest a possible claim for relief against Mrs. Coram, but do not state any claim against Mr. Musselman. The first four paragraphs make no mention of Mr. Musselman other than that he was retained by Mrs. Coram.

Paragraphs 5, 6, and 7 allege only that Mrs. Coram, through Mr. Musselman, failed to comply with certain notice

and consent provisions set forth in the Medical Benefits Recovery Act. Mr. Musselman's tendered answer not only denies these specific allegations, but, moreover, even assuming that the State could establish such disputed allegations as to notice and consent, those allegations do not form the basis of any claim against Mr. Musselman.

Paragraph 9 alleges that no contract of representation existed between the State and Mr. Musselman. Such an allegation certainly does not form the basis of any claim for relief against Mr. Musselman. Interestingly, although the State in this paragraph specifically alleges that there was no contract of representation between the State and Mr. Musselman, plaintiff asserted at some length in its initial brief to this Court that Mr. Musselman had agreed to represent the State and that he had admitted to such an arrangement. On that basis, this Court stated in its initial opinion that Mr. Musselman had "agreed to honor and assist" in asserting plaintiff's alleged subrogation claim.

Such an alleged representation agreement, however, is not only without support in the record, but was not even pled by plaintiff anywhere in the claim upon which the Default Judgment was based. Indeed, in paragraph 9, plaintiff pleads directly to the contrary. Mr. Musselman has nowhere conceded and does not now concede that any such representation agreement existed.

The only other paragraph that makes any reference to Mr. 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. . . ." Mr. Musselman admits giving such notice. Mr. Musselman did indeed place such funds in trust for his client Mrs. Coram. The fact that Mr. Musselman placed funds in trust for his client, however, cannot form the basis of any claim for relief against Mr. Musselman.

Plaintiff's "First Cause of Action" thus pleads essentially only that Mr. Musselman was counsel for Mrs. Coram in a medical malpractice suit, that he effected a settlement for the injuries which Mrs. Coram had sustained, that he held \$60,000.00 of Mrs. Coram's settlement funds in trust, and that the State alleges a lien on Mrs. Coram's settlement funds based on a claimed right of subrogation. Nothing in these allegations states any claim against Mr. Musselman upon which any relief may be granted.

By taking the Default Judgment against Mr. Musselman on its "First Cause of Action," the State contends that Mr. Musselman is somehow personally liable for a potential claim which the State may have but has never attempted to assert against his client Mrs. Coram. Such a theory is obviously without merit and has no support in the law.

2. Mr. Musselman Acted Only
as an Attorney for Mrs. Coram,
and Thus No Judgment can be had
Against Mr. Musselman Personally

From the very allegations of plaintiff's complaint, it is clear that the relationship of Mr. Musselman to Mrs. Coram was one of attorney-client and trustee-beneficiary. It is elementary law that an attorney or trustee has no primary personal obligation for the debts of the client or beneficiary. See, e.g., Davis v. Ciancio, 172 Colo. 54, 470 P.2d 30 (1970) and Moran v. Loeffler-Greene Supply Co., 316 P.2d 132 (Okla., 1957).

Therefore, with respect to any debts of Mrs. Coram, the liability of Mr. Musselman is limited to those assets held by him in trust for Mrs. Coram. His liability, as Mrs. Coram's attorney, is not and cannot be primary, and a judgment therefore cannot be had against him personally for any debt or obligation of Mrs. Coram. If the State had obtained a judgment against Mrs. Coram, any assets of Mrs. Coram held by Mr. Musselman could presumably be garnished or attached under proper procedure. See, Annotation, "Funds in Hands of His Attorney as Subject of Attachment or Garnishment by Client's Creditor," 35 A.L.R.3d 1094. The State has not followed any such procedure, and, moreover, has not even sought a judgment against Mrs. Coram. Indeed, the State has not even served or attempted to serve Mrs. Coram in this action.

B. Plaintiff Has No Right of Subrogation under the
Medical Benefits Recovery Act

1. Plaintiff Cannot Assert
Any Right of Subrogation or
Any Lien Based on the
Medical Benefits Recovery
Act Inasmuch as the Act is
Not Retroactive

The Medical Benefits Recovery Act, upon which plaintiff pleads its "First Cause of Action", was enacted in 1979. Utah Code Ann., §§55-15d-1 et. seq., recodified at Utah Code Ann., §§26-19-1, et. seq. All benefits paid by the State had, however, been paid prior to the effective date of the Medical Benefits Recovery Act.

The Medical Benefits Recovery Act contains no clause making the statute retroactive to benefits paid before its effective date. Under §68-3-3, Utah Code Ann., which codifies well-established rules of construction, a statute is not retroactive unless expressly so declared. The Medical Benefits Recovery Act contains no such declaration or clause, and thus it cannot apply to the benefits paid on behalf of Mrs. Coram.

2. No Statutory Subrogation
Claim May Be Asserted Because the
Statute of Limitations Has Run

Even if the State could assert a claim under the Medical Benefits Recovery Act, the Act, by its own terms, limits any action brought thereunder as follows:

Any action brought under this chapter shall be commenced within two years on employee benefits plan[s] and four years on all other plans after the date of injury or onset of the illness or six months after the date of the last medical payment, whichever is later.

Section 55-15d-9(1), recodified at §26-19-8(1), Utah Code Ann. [emphasis added].

Plaintiff's complaint filed on June 1, 1981 is, by its terms, an action under the Medical Benefits Recovery Act. The last payments made on behalf of Mrs. Coram were made well in excess of six months prior to the filing date of the State's complaint. Moreover, the date of injury or onset of illness for Mrs. Coram was prior to the end of April, 1977. The complaint in this action was therefore filed more than four years "after the date of injury or onset of the illness."

In short, the statute of limitations had run prior to the filing of the complaint.

3. Plaintiff Failed to Follow the Prescribed Statutory Procedure to Perfect a Lien Necessary to Assert a Subrogation Claim

In the "Fourth Defense" of his tendered answer, Mr. Musselman asserted that the plaintiff failed to comply with prescribed statutory notice and filing requirements contained in the Medical Benefits Recovery Act. Thus, even if the State could assert a claim under the Medical Benefits Recovery Act, the State failed to perfect any lien under the

Act. Absent a perfected lien, the State has no claim of subrogation:

When a cause of action has been instituted in court by a beneficiary, the state's lien shall be perfected by its filing with the court a verified lien statement. . .

Section 55-15d-10(2), recodified at §26-19-9(2), Utah Code Ann. [emphasis added]. No verified lien statement was ever filed with the court. See the Affidavit of Paul L. Badger, Clerk of the United States District Court for the District of Utah, a copy of which is appended to the original Brief of Appellant as Appendix C.

4. The State has Not
Pursued the Remedy
Prescribed by the Statute
on which it Bases its Claim

The Medical Benefits Recovery Act, upon which the State's "First Cause of Action" is predicated, provides the procedure for the State to enforce a subrogation claim:

55-15d-10. (1) Any amount paid by the State of Utah on behalf of a beneficiary as medical assistance shall become a lien against any cause of action, recovery, settlement, judgment, award, or claim of a beneficiary against any liable third party or carrier.

(2) When a cause of action has been instituted in court by a beneficiary, the State's lien shall be perfected by its filing with the court a verified lien statement.

55-15d-12. (1) When the department has perfected a lien upon a judgment in favor of

a beneficiary against any third party or carrier for an injury or illness for which the beneficiary has received benefits, the department is entitled to execute upon the judgment as a lien claimant, in the same manner as if it were a named party to the original judgment, . . .

(2) In the event the amount of the judgment or settlement so recovered has been paid to the beneficiary, the department shall be entitled to a writ of execution against the beneficiary to the extent of the department's lien, with interest and other accruing costs as in the case of other executions.
[emphasis added]

Thus, plaintiff's remedy to enforce a claim of subrogation would have been to obtain a writ of execution after perfecting a lien in the original action brought by Mrs. Coram. Plaintiff cannot now follow this procedure, however, because no verified lien statement was ever filed and, therefore, no lien was ever perfected. As set forth in the "Fifth Defense" of Mr. Musselman's tendered answer, the plaintiff has failed to follow required statutory procedure and cannot pursue the claims asserted in its "First Cause of Action."

5. Plaintiff Has Failed
to Adjust the Total
Amount of its Claim as
Required by Statute

In the "Third Defense" of his tendered answer, Mr. Musselman points out that plaintiff's maximum recovery is limited according to the formula set forth in the Act:

Where the action is brought by the beneficiary alone, and the beneficiary incurs a personal liability to pay attorney's fees and costs of litigation, the department's claim for reimbursement of the benefits provided to the beneficiary shall be limited to the amount of the medical expenditures for the benefit of the beneficiary less 25 percent, which percent represents the department's reasonable share of attorney's fees paid by the beneficiary, and less that portion of the cost of litigation expenses determined by multiplying the cost of litigation expenses by the ratio of the full amount of expenditures over the full amount of the judgment, award, or settlement.

Section 55-15d-8(4), recodified at §26-19-7(4), Utah Code Ann. [emphasis added].

The State alleges that a total of \$82,522.22 in medical bills were paid on behalf of Mrs. Coram. No adjustment of 25 percent or of the proportional cost of litigation as required by §55-15d-8(4) was made. The plaintiff not only erroneously claims that full amount, but took Default Judgment for that amount.

6. Plaintiff Has No Right of Subrogation Because Mrs. Coram Has Not Been Made Whole

The "Sixth Defense" of Mr. Musselman's tendered answer asserts that plaintiff is not entitled to any recovery because Mrs. Coram was not made whole and was not fully compensated for her injuries. It is a well-established principle of law that an injured party is entitled to be made whole before any benefits received by the injured party are subject to any claim of subrogation. This principle was

succinctly stated by this 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.

505 P.2d at 786 [emphasis added]. The right of the injured party to first be made whole is likewise established in Lyon v. Hartford Accident and Indemnity Co., 25 U.2d 311, 480 P.2d 739 (1971) and Allstate Insurance Co. v. Ivie, 606 P.2d 1197 (Utah, 1980).

Mrs. Coram was not made whole in the settlement of her medical malpractice claim. Thus, even if the State could assert a subrogation claim, a determination by the lower court would be necessary to fix the proper amount, if any, which the State could recover.

C. Plaintiff Has No Right of Subrogation Based on Any Written Assignment and Could Not Assert Any Such Claim Against Mr. Musselman

The only mention of an alleged written assignment of benefits in plaintiff's complaint is contained in paragraph 2, where plaintiff simply asserts that Mrs. Coram made such an assignment. Though Mr. Musselman's tendered answer initially admitted paragraph 2, this response was made only because of the positive assurance by plaintiff's counsel that such an assignment existed and the promise by plaintiff's counsel to provide a copy thereof to Mr. Musselman. No such assignment was ever provided to Mr. Musselman or

to his counsel, although a copy has been requested on several occasions.

1. Plaintiff Made No
Claim Based on Any
Written Assignment in Its
"First Cause of Action"

Even if such an assignment exists, plaintiff's complaint states no claim based thereon. The "First Cause of Action" is based solely upon the claimed right of plaintiff to recover under the Medical Benefits Recovery Act, and the allegation of the existence of an assignment executed by Mrs. Coram is superfluous to the remaining allegations of the "First Cause of Action." It is elementary law that a default judgment cannot be upheld on the basis of a potential claim that was never pled.

2. No Claim for Relief
May Be Asserted Against
Mr. Musselman on the Basis
of an Assignment Executed
by Mrs. Coram

Even if the plaintiff's complaint were construed to contain a claim based upon a written assignment, such a claim is obviously not against Mr. Musselman. Such a claim could only be asserted against Mrs. Coram. No claim for relief is stated or can be stated against Mr. Musselman personally by virtue of an alleged assignment of benefits executed by Mrs. Coram.

3. A Claim of Subrogation
Based on a Written Assignment
is Likewise Barred on the
Ground that Mrs. Coram Has
Not Been Made Whole

The well-established principle that an injured party is entitled to be made whole before any portion of a recovery is subject to any subrogation claim has been discussed above. This equitable principle bars any subrogation claim based on a written assignment until Mrs. Coram has been made whole.

II. MR. MUSSELMAN'S SHOWING OF INADVERTENCE AND
EXCUSABLE NEGLIGENCE IS UNCONTROVERTED AND HAS BEEN
IMPLICITLY RECOGNIZED BY BOTH THIS COURT AND THE
LOWER COURT

Rule 60(b)(1), Utah Rules of Civil Procedure, provides as follows:

On motion and upon such terms as are just, the Court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;
. . . .

As expressed by this Court in Board of Education of Granite School District v. Cox, 14 U.2d 285, 384 P.2d 806 (1963):

The courts will generally grant relief in doubtful cases so that a party may have a hearing. As the court stated in Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 741:

"The allowance of a vacation of judgment is a creature of equity designed to relieve against harshness of enforcing a judgment, which may occur through procedural

difficulties, the wrongs of the
opposing party, or misfortunes
which prevent the presentation of a
claim or defense."

384 P.2d at 807 [emphasis added]. This Court went on to say:

It is an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification for the defendants' failure to appear and answer.

384 P.2d at 807. This Court in Cox noted with approval the lower Court's setting aside of the default of Mrs. Cox due to illness. Serious illness is likewise the basis of excusable neglect in the present case.

In Heathman v. Fabian & Clendenin, 14 U.2d 60, 377 P.2d 189 (1962), this Court observed:

Judgments by default are not favored by the
courts nor are they in the interest of
justice and fair play. The courts, in the
interest of justice and fair play, favor,
where possible a full and complete
opportunity for a hearing on the merits of
every case.

377 P.2d at 190 [emphasis added]. In Mayhew v. Standard
Gilsonite Co., 14 U.2d 52, 376 P.2d 951 (1962), this Court held:

It is undoubtedly correct that the trial court is endowed with considerable latitude of discretion in granting or denying such motions [motions to set aside default judgments]. However, it is also true that the court cannot act arbitrarily in that regard, but should be generally indulgent toward permitting full inquiry and knowledge of disputes so they can be settled advisably and in conformity with law and justice. To clamp a judgment rigidly and irrevocably on a

party without a hearing is obviously a harsh and oppressive thing. It is fundamental in our system of justice that each party to a controversy should be afforded an opportunity to present his side of the case. For that reason it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside.

376 P.2d at 952 [emphasis added]. In accord: Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876 (Utah 1975).

In this case, Mr. Musselman demonstrated through his affidavit to the district court (R., pp. 26-27) that his reason for not timely answering plaintiff's complaint was his sudden illness and subsequent hospitalization. Illness of the incapacitating nature and severity as is present here, requiring hospitalization for approximately a week and subsequent convalescence at home, certainly constitutes a reasonable excuse for failure to appear and answer, at least until a reasonable recovery can be made.

The lower court was quite specific in its ruling, denying Mr. Musselman's motion to set aside solely on the ground of failing to state a defense. (Transcript of November 3, 1981 hearing, pp. 20-21.) It is therefore implicit in the lower court's ruling that excusable neglect was shown. The lower Court would have had no reason to address the issue of a meritorious defense unless it

believed excusable neglect had already been established. Indeed, as this Court held in Cox:

This latter question [that of a meritorious defense] arises only after consideration of the first question [that of excusable neglect] and a sufficient excuse therefrom being shown.

384 P.2d at 808. [emphasis added].

Similarly, there would have been no reason for this Court in its initial opinion to go beyond the question of excusable neglect had excusable neglect not been shown. No contradiction whatsoever is contained in the record as to Mr. Musselman's serious illness, hospitalization, and his subsequent convalescence. Indeed, there could be none. Therefore, as the lower court and this Court in its initial opinion have implicitly held, Mr. Musselman's conduct necessarily constitutes excusable neglect, requiring that the default judgment be set aside.

CONCLUSION

The "First Cause of Action" of plaintiff's complaint, the sole basis upon which the Default Judgment is predicated, does not assert any claim against Mr. Musselman upon which any relief may be granted. Mr. Musselman, as Mrs. Coram's attorney, has no primary personal obligation for any debt or obligation of his client or beneficiary, and, therefore no judgment may be had against Mr. Musselman personally. Plaintiff may not assert any claim under the

Medical Benefits Recovery Act, inasmuch as (1) the statute is not retroactive and did not take effect until after the last payment made on behalf of Mrs. Coram, and (2) the statute of limitations had run prior to the filing of plaintiff's complaint. Moreover, the State failed to follow the prescribed statutory procedure to perfect any lien, a prerequisite to any subrogation claim. Finally, the State has not pursued the proper remedy prescribed by the statute to enforce a subrogation claim.

Mr. Musselman has demonstrated that plaintiff has failed to adjust its claim by the statutorily-required formula. Mr. Musselman has also shown that plaintiff has no subrogation claim, inasmuch as Mrs. Coram has not been made whole by the settlement.

Plaintiff has not made any claim in its "First Cause of Action" based on any written assignment. Even if there were such an assignment and even if the complaint were construed to include such a claim, no claim for relief against Mr. Musselman personally can be stated on the basis of such an assignment executed by Mrs. Coram. Moreover, a subrogation claim based on such a written assignment would be barred on the ground that Mrs. Coram has not been made whole.

For each and all of these reasons, plaintiff's claim against Mr. Musselman fails either as a matter of law or as a result of substantive defenses proffered by Mr. Musselman.

The Default Judgment must not only be set aside, but an instruction should also be given to the lower court to dismiss plaintiff's "First Cause of Action" as to Mr. Musselman.

Mr. Musselman's showing of inadvertence and excusable neglect is uncontroverted and has been implicitly recognized by both this Court and the court below.

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.


Respectfully submitted this 9 day of November, 1982.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief of Appellant on Rehearing was served upon respondent by mailing two true and correct copies to their attorney, Leon Halgren, 236 State Capitol, Salt Lake City, UT 84114, this 9 day of November, 1982.

