

1982

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

Utah Supreme Court

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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, :

Defendants-Appellants. :
:

BRIEF OF RESPONDENT ON REHEARING

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

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FILED

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STATUTES CITED

PAGE

Utah Code Annotated, Section 55-15d-1 through 17
(Re-enacted in 1981 as Section 26-19-1 through 17) . . . 2

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BRIEF OF RESPONDENT ON REHEARING

STATEMENT OF THE NATURE OF THE CASE

This is a rehearing on the appeal of defendant-appellant, D. John Musselman from a denial by the Third Judicial District Court, in and for Salt Lake County , State of Utah, the Honorable G. Hal Taylor presiding, of defendants motion to set aside a default judgment entered against him.

DISPOSITION

The lower court denied the motion of the defendant-appellant to set aside the default judgment on the grounds that the defendant-appellant's proposed answer failed to state a defense and thereafter entered its order accordingly. The lower court made no finding or ruling, whatsoever, on the issue of excusable neglect. This honorable court issued a per curiam opinion on July 26, 1982 affirming the District Court's

ruling. On October 8, 1982 this honorable court granted defendant's petition for rehearing of the matter.

RELIEF SOUGHT ON APPEAL

Plaintiff-respondent, again, seeks a judgment and order affirming the denial of defendant-appellant's motion to set aside the default judgment.

STATEMENT OF FACTS

The statement of facts (as previously submitted) are restated for the purpose of this rehearing.

Linda Ann Coram obtained a Medicaid grant from the State of Utah, Department of Social Services, whereby she received the benefit of a total sum of \$82,522.22 paid by the State of Utah to her medical providers all of which payments allegedly resulted from improper treatment by her doctor. She assigned to the State the right to recover as against any liable third party these medical expenses and in 1979 the Utah Legislature enacted the Medical Benefits Recovery Act, Section 55-15d-1 through 17 (re-enacted in 1981 as Section 26-19-1 through 17), Utah Code Annotated 1953, as amended. (Complaint and proposed answer.)

Defendant-appellant was retained in 1979 to represent Linda Ann Coram in a malpractice action against the doctor who

allegedly caused the need for the Medicaid grant which resulted in a pre-trial settlement of \$150,000.00. Prior to proceeding with the case, defendant-appellant contacted the State of Utah, Office of Recovery Services and inquired as to the State's Medicaid claim of \$82,522.22 and thereafter agreed to collect said sum out of any recovery, taking for his services the statutory 25% contingency fee. When the case was settled, the insurance carrier issued two settlement drafts; one was in the sum of \$67,477.78; payable to Linda Ann Coram, her husband and D. John Musselman (defendant-appellant); the other was in the sum of \$82,522.22 (the exact amount of the State's Medicaid claim), and was payable to Linda Ann Coram, her husband, D. John Musselman and the State of Utah Office of Recovery Services (emphasis added). Both drafts were issued on February 5, 1981. The draft in the sum of \$82,522.22 shows endorsements as follows: "Linda Ann Coram," "William Dyerl Coram," "D. John Musselman" and "State of Utah Office of Recovery Services by: D. John Musselman its Attorney at Law and in Fact." (Emphasis added). Affidavit in Opposition of Motion to Set Aside Judgment and Transcript of Hearing of August 18, 1981).

The draft of \$82,522.22, hereinafter called "settlement draft," was deposited by defendant-appellant in Bank Account No. 71-31544-3 in the name of D. John Musselman and Associates at the Central Bank and Trust Company, Riverside Plaza Office, Provo,

Utah, on or about March 10, 1981, from which account funds were taken by D. John Musselman and loaned or otherwise used by him. The sum of \$50,000.00 was loaned out of this same bank account to Vernon Herbst of Blackfoot, Idaho, on April 15, 1981, by means of check no. 160, drawn on said Account No. 71-31554-3, whereby said Vernon Herbst executed a promissory note which carried interest at the rate of 180% per annum (15% per month) and secured the promissory note with a deed of trust in which D. John Musselman was the named beneficiary. The state did not authorize the diverting of its funds obtained from the said settlement draft of \$82,522.22. (Affidavit in Opposition of Motion to Set Aside Judgment and Affidavit on Order to Show Cause).

Numerous letters were written to defendant-appellant, demanding payment to the state of the money recovered in the settlement draft and after many promises to account were not kept, the plaintiff-respondent filed a lawsuit, No. C-81-4425, in the District Court of the Third Judicial District, County of Salt Lake, State of Utah. (Affidavit in Opposition of Motion to Set Aside Judgment).

After defendant-appellant was served summons and copy of said complaint, on June 4, 1981, he promised to account to plaintiff-respondent for said settlement draft funds which promises he failed to keep. On July 5, 1981, defendant-appellant talked on the telephone to a Mr. George Martindale, Investigator

for the Office of Recovery Services, and was advised by Mr. Martindale that unless he made an immediate accounting to the State of Utah for the settlement draft funds or filed a responsive pleading, the attorney for the State of Utah in Case No. C-81-4425 would have to default him. (Affidavit in Opposition of Motion to Set Aside Judgment).

No communication was ever received from defendant-appellant thereafter and a default certificate was entered on the 9th day of July, 1981, and judgment by default was granted and docketed on July 14, 1981. (Affidavit in Opposition of Motion to Set Aside Judgment, Default Certificate and Judgment by Default).

On August 13, 1981, defendant-appellant filed a motion to set aside the judgment and noticed said motion for argument on the 18th day of August, 1981, at 2:00 o'clock p.m. The court ruled that notice of the motion did not comply with the rules as to time and, therefore, ruled that defendant-appellant would have to renotice his motion to set aside the judgment. (Transcript of August 18, 1981, p.7, lines 7 through 11).

A hearing on a supplementary order was set for the same day before the Honorable G. Hal Taylor and defendant-appellant was then and there sworn under oath to answer questions concerning the disposition of the settlement funds. He admitted under oath the fee arrangement and acknowledged his endorsement of the settlement draft as the "Attorney in Law and in Fact" of

the State of Utah Office of Recovery Services but thereafter took the Fifth Amendment on all other questions regarding the funds obtained from the settlement draft. (Transcript of Hearing on August 18, 1981).

Defendant-appellant was ordered to appear on the 3rd day of November, 1981, at 2:00 o'clock p.m. before the court of the Third Judicial District, Salt Lake County, Utah, in Civil Case No. C-81-4425, to then and there show cause, which order to show cause was supported by an affidavit. Defendant-appellant did not file a counter-affidavit, nor did he offer to counter any of the statements in the supporting affidavit by sworn testimony. (Motion, Affidavit and Order to Show Cause).

The motion of defendant-appellant to set aside the default judgment was not noticed up on November 3, 1981, when the order to show cause was heard by the Honorable G. Hal Taylor; however, counsel for plaintiff-respondent agreed to waive the notice requirement and the court thereafter heard oral argument on the motion to set aside the judgment from both counsel. Upon conclusion of the oral argument, the court denied the motion of defendant-appellant to set aside the default judgment on the grounds that the purported answer did not state a defense and entered its order accordingly, from which order defendant-appellant appeals. (Transcript of Hearing of November 3, 1981).

This Honorable Court on July 26, 1982, ruled in a per curiam decision that the holding of the lower court should be affirmed. Thereafter defendant-appellant petitioned this court for a rehearing of the matter claiming that this honorable court had misconstrued the facts and issues at hand and that defendant-appellant should be allowed a second hearing on the matter. The State of Utah therefore submits this brief on rehearing.

PRELIMINARY STATEMENT

This case comes before this Honorable Court on a rehearing based upon the allegations of the defendant-appellant that this court materially misconstrued the actions of the lower court and the factual situation existing in this case. Defendant-appellant claims that his failure to timely answer the complaint filed against him by the State of Utah was excusable and that he tendered a meritorious defense to the complaint filed against him by the State of Utah. It is the position of the State of Utah that this court was correct in its initial holding and a close examination of the record in the court below will sustain that original holding. The defendant-appellant now claims that the controlling facts of the case (to which the court below found he had no defense and which decision this court previously sustained) were "neither . . . admitted or conceded by the defendant." An examination of the record of the Third

Judicial District Court will prove that the factual situation existing did not require the defendant-appellant to admit or concede any material facts; these being matters which are all clearly evident and uncontroverted in the record on file herein.

From the outset of this case defendant-appellant has maintained that there are only two issues involved in this case which the court should take into consideration those being: 1. Was the conduct of the defendant excusable in failing to timely answer the complaint which the State was forced to file against him for failuire to account for funds collected on the State's behalf? 2. Was there a viable defense available to the defendant to the complaint filed against him by the State of Utah?

It is the position of the State of Utah that an examination of the record will show that 1. the defendant's failure to timely answer the complaint filed against him by the State of Utah was not excusable (which issue is not properly before this court) and that 2. there is no meritorious defense which the defendant may rely upon against the complaint filed against him by the State of Utah. However, the ruling of the lower court did not require a decision or finding as to No. 1, above, since it ruled as a matter of law that based on the facts in the record the defendant did not profer a valid defense to the allegations in the complaint.

The brief of defendant-appellant on rehearing fails to address any issues not heretofore presented before this honorable court in defendant-appellant's prior briefs. Defendant-appellant in attempting to present some kind of a meritorious defense has employed a myriad of arguments presented in an obscure, and alternative array, many of which actually contradict each other. This production of weak if not insipid and redundant attempts at defenses should not deter this honorable court from examining what actually happened in the court below, what was actually stated, under oath, by the defendant-appellant and supported by unopposed affidavits all of which was the basis for the ruling of the lower court.

POINT I

THE DEFENDANT BY HIS ACTIONS AND REPRESENTATIONS TO THE STATE WAS ACTING AS A REPRESENTATIVE, AND LEGAL COUNSEL FOR THE STATE OF UTAH.

The defendant-appellant claims that he at no time admitted to the fact that he was representing the State of Utah in the civil action of Ms. Coram against her personal physician. That defendant-appellant in this appeal denies that he was, in fact, representing the State of Utah in this instance does not alter the facts as they appear on the record. The original complaint filed by the State of Utah against the defendant in its first cause of action states:

"That there is no contract between the State of Utah and defendant, D. John Musselman providing for payment of an attorney's fee to said defendant by plaintiff for a recovery of the said Eighty-two Thousand Five Hundred Twenty-two and 22/100 Dollars (\$82,522.22) lien claim and that plaintiff is, therefore, entitled to recover the entire sum of Eight Two Thousand Five Hundred Twenty-two and 22/100 Dollars (\$82,522.22)."

In defendant's answer to these allegations as found upon page 30 of the record before this court the defendant denied paragraph 9 of the State's complaint. A denial of the fact that no contract existed between the State of Utah and the defendant would be an assertion that in fact a contract did exist between the parties. Further in a letter from the defendant to the Office of Recovery Services dated February 3, 1981 addressed to George Martindale the defendant stated:

"The total claim of the State of Utah is ascertained by deducting from \$82,522.22 the statutory 25% for attorney's fees which would total \$20,630.56, which would leave a claim for the State of Utah of \$61,891.66, minus the proportionate share of costs attributable to the State. I believe the costs at this time would reduce that figure to something in the neighborhood of \$59,000.00."

This letter is on page 43 of the record before this court. In every subsequent letter on record before this court the defendant makes mention of the attorney's fee which the State of Utah is expected to pay him for his legal services, expecting fully one quarter of the recovery due to the State of Utah under

the assignment of benefits to the State of Utah by his other client, Linda Ann Coram. These material representations and claims, in and of themselves, are clear proof that the defendant represented himself as being the legal counsel for the State of Utah in this particular recovery.

Even more convincing than the representations of the defendant which he made (as to this attorney-client relationship) to the members of the Department of Social Services, Office of Recovery Services of the State of Utah, and to his other client Linda Ann Coram, is the representation of being the State's attorney which he made to the insurance company of Doctor Boston (the defendant in the original medical malpractice suit) that he was in fact the attorney representing the State of Utah. On the reverse side of the actual draft in settlement of this assigned claim of the State of Utah (R.52) is written:

D. John Musselman

State of Utah
Office of Recovery Services by: D. John
Musselman

Its: Attorney at law and in fact

This settlement draft was the object of close examination in the court below (R.120-122) in which the defendant admitted that he did sign the drafts and did withhold the settlement amount which he accepted as a representative of the

State of Utah, Department of Recovery Services.

It is the position of the State of Utah that the defendant cannot deny that he was acting as the legal counsel for the State of Utah in the recovery of the assigned medicaid claim in the legal action taken against Dr. Boston. It is clear on the face of the record that representations made by the defendant-appellant to the Department of Social Services Office of Recovery Services of the State of Utah when preparing to take legal action and thereafter that he undertook, as the State's attorney, the recovery of the medicaid claim and that by admissions before the court below that he did, in fact, sign the settlement draft as the representative and attorney of the State of Utah, Department of Recovery Services. Therefore, he need not formally admit, nor may he deny the fact that he was acting as attorney for the State of Utah and that he owed a fiduciary obligation to his client, the State of Utah, in this matter. The facts in the record speak for him. It is also unnecessary for the defendant to admit the fact that after negotiating and obtaining from the said draft the sum of Eighty-two Thousand Five Hundred Twenty-two and 22/100 Dollars (\$82,522.22) in the name of the State of Utah as settlement of an assignment of Benefits claim from his other clients (Mr. and Mrs. Coram), he intentionally withheld and misused those funds to his own personal gain.

The brief of the defendant-appellant is an insult to the intelligence and the integrity of this court and is a last gasp attempt by the defendant to avoid facing the consequences of his actions.

POINT II

THE JUDGMENT AGAINST THE DEFENDANT BY THE COURT BELOW WAS NOT BASED UPON EITHER SPECIFIC PLEADING OF THE COMPLAINT.

In defendant's brief it is alleged that because of the amount of the judgment against defendant that the judgment of the court could only be based upon one of the two causes of action filed in the original complaint (R.2-5). This is an incorrect assumption upon the part of the defendant, the trial court having the discretion to rule upon the causes of action individually and grant whatever judgment it deemed fit. Because the amount prayed for in the first cause of action was the amount awarded by the court, defendant assumes that this is the only cause of action ruled on by the court. This is a misinterpretation of the record and the facts in this case. Nowhere on the record does the court specifically exclude the plaintiff-respondent's second cause of action, nor does it rule only on the first cause of action. The court's initial judgment was one of default for reasons of defendant's failure to timely answer the complaint against him. Upon hearing in the court below on the 3rd day of

November, 1981, defendant orally requested the court to set aside the judgment to which the court stated (R.111)

I have read your proposed answer and I don't think it states any defense. Motion to set aside the default is denied.

The court never addressed the issues of the complaint individually but only held that the defendant failed to state a defense which would merit the setting aside of the judgment (R.87)

The original default judgment (R.9) stated only that the State of Utah would be awarded a certain sum of money, that sum being the amount requested in the first cause of action. However if this honorable court will examine that judgment and the following documents on the record before this court, it will find that there was no specific ruling on either of the causes of action listed in the complaint of the plaintiff-respondent and therefore defendant's allegations that the first cause of action is the only controlling issues is fallacious in nature.

POINT III

THE RIGHT OF THE STATE TO PURSUE ITS
ASSIGNMENT OF BENEFITS CLAIM AGAINST MRS.
CORAM IS ANCILLARY TO THIS CASE

A good deal of defendant's brief is taken up in discussing the merits and statutory requirements concerning the rights of the State of Utah against his former clients, Mr. &

Mrs. Coram. This discussion has little bearing on the case at hand. The issue which is squarely before this court is whether the defendant by signing the settlement draft as "the attorney at law and in fact" for the State of Utah after making representations to departments of the State of Utah that he was acting as the attorney for the State and that he expected the statutory fee of 25% of the recovery as his attorney's fees, [which incidently he still maintains in argument I B(5) page 18 of his brief on rehearing before this court,] was in violation of his fiduciary duty to the State of Utah in withholding the above stated funds and thereafter misappropriating those funds for his own personal benefit. The court below recognized that the pleadings of the defendant to this end were merely delaying tactics which stated no actual defense to the charges leveled against him.

POINT IV

DEFENDANT'S CLAIM OF INADVERTENCE AND EXCUSABLE NEGLECT IS WITHOUT MERIT

In the motion to set aside the judgment made before the court below and every subsequent attempt to set aside that judgment the defendant-appellant has claimed that because of a medical condition [from which the defendant-appellant alleges he was suffering] he inadvertently failed to answer the complaint filed against him by the State in the time required by statute.

Rule 55A(1) of the Utah Rules of Civil Procedure states the elements of a default judgment. Rule 3B of the Utah Rules of Civil Procedure states the time on which the allotted number of days begins to run, that being the time of service upon the party defendant to the suit. Rule 12A of the Utah Rules of Civil Procedure states that 20 days shall be allowed after service of a complaint for the reply of the party defendant to said complaint. After this statutory period of time has run under Utah law a default judgment may be entered against the party defendant at any time as provided by Rule 55A(1) above. The summons required by the above stated statutory rules of civil procedure was served on the 4th day of June, 1981 by Deputy Sheriff Vest (R.7). Thereafter defendant had 20 days, as allowed by the above stated rules to file an answer to the complaint which was filed against him by the State of Utah. An examination of the calendar for June of 1981 will disclose that statutorily the defendant was required to file his answer by the 24th of June, 1981 (a Wednesday). At any point thereafter the State of Utah would have been justified in defaulting the defendant. In the brief of the defendant-appellant (Page 5) he states that on approximately June 29, 1981, he was admitted to the Utah Valley Hospital, Provo, Utah, for severe stomach ailment. This admittance to the Hospital was on an emergency basis and it can be assumed that up and until this point and time the defendant was fully capable to

carry on his business affairs. From the return of service above stated on the record before this court the defendant had failed to reply to the complaint of the State of Utah before being admitted to the hospital for his stomach condition. Therefore, the defendant cannot in good faith claim that excusable neglect or inadvertance caused him to fail to reply to the complaint of the plaintiff's in the time allotted by the statute, he being admitted to the hospital on the fifth day after the statutory period of time for filing of his answer had run and another twelve days elapsed after his release from the hospital in which to file a responsive pleading. The record indicates that the defendant was stalling for time and that he continued to stall for time to collect on his "investment of the \$50,000.00 and with the collection of this principal sum and interest of \$7,500.00 a month from April 14, 1981, he hoped to pay off the state's claim before any of these sordid facts came to light.

CONCLUSION

The uncontroverted facts in the record before this court show that the defendant by his representations to employees of the Department of Social Services and the Office of Recovery Services of the State of Utah, by his demand for the statutorily allowed 25% attorney's fees for the recovery, and, finally, and the most convincing, his signature upon the settlement draft as "

attorney at law and in fact" for the State of Utah, had a fiduciary duty to the Office of Recovery Services and the State of Utah to pay over the settlement funds of the formally executed assignment of benefits of Mrs. Coram to the Department. His acquisition of the funds as the State's attorney and misuse of those funds for his own personal benefit, which are all clearly established by the record in the court below, are the issues squarely before this court. His position in this case, as was recognized by the court below, is indefensible, and, therefore, the decision of the court below to deny his motion to set aside the default judgment was proper and should be upheld by this court.

The defendant's only claim before the court below to support his motion was that of inadvertance and excusable neglect. As has been demonstrated by the plaintiff-respondent, the statutory period of time allowed under the Utah Rules of Civil Procedure for an answer after the date of service upon the defendant had run many days, both prior to the defendant's unfortunate, and sudden medical condition and thereafter before the entry of the default judgment. The defendant can not in good faith claim that his medical condition was the reason for his failure to answer the complaint filed against him by the State of Utah his medical problem accounting for only four of the twenty days beyond the defaulting period) and, therefore, even the claim

of excusable neglect is totally without defense or justification in this matter. One can only surmise and draw conclusions, based on the foregoing established facts, that defendant-appellant's failure to join issue and thereby open the door of discovery and the consequences from such inquiry was weighed by him against the chances of recovery of the \$50,000.00 with accrued interest and the subsequent settlement with his client the State of Utah (which would have closed the door on any litigation and discovery on the misuse of the recovery funds, and he chose to gamble on the latter and lost. The record in this conclusion speaks for itself.

The decision of the court below to deny the defendant's motion to set aside the default judgment was, as can be clearly ascertained by a review of the record before this court, justified and therefore this court should, on the basis of the foregoing facts and the law peviously cited, affirm the decision of the lower court as it did previously.

Dated this 10 day of December, 1982.

DAVID L. WILKINSON
Attorney General

LEON A. HALGREN
Assistant Attorney General

MAILING CERTIFICATE

This is to certify that I mailed a true and exact three copies to the Attorneys for Appellant, Richard I. Ashton, FOX, EDWARDS & GARDINER, American Plaza II, Suite 400, 57 West 200 South, Salt Lake City, Utah 84101 on this 12th day of Dec, 1982.

A handwritten signature in cursive script, reading "Stephen L. Summers", written over a horizontal line.