

1982

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

Utah Supreme Court

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Recommended Citation

Reply Brief, *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.	:	

REPLY BRIEF OF APPELLANT ON REHEARING

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

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FILED

DEC 23 1982

Clerk, Supreme Court, Utah

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6 Moore's Federal Practice, ¶54.6111

NATURE OF THE CASE

This is a rehearing on the appeal of defendant-appellant D. John Musselman from a denial by the District Court on his 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 judgment. This Honorable Court initially issued an opinion on July 26, 1982 affirming the District Court. On October 8, 1982, this Court granted Mr. Musselman's Petition for Rehearing. Mr. Musselman's principal brief on rehearing and the brief of the respondent State of Utah on rehearing have been submitted to the Court. Mr. Musselman therefore submits his reply.

RELIEF SOUGHT ON APPEAL

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

PRELIMINARY COMMENT

The substantive reasons mandating the relief sought in this appeal are set forth in Mr. Musselman's

principal brief on rehearing. The court is respectfully referred to that brief, filed November 9, 1982, for Mr. Musselman's primary argument. The analysis in this reply brief is necessitated by the substantial confusion created by the arguments asserted by counsel for the State.

STATEMENT OF FACTS

The essential facts are set forth in the Statement of Facts and Procedural Background sections of Mr. Musselman's principal brief on rehearing (see pp. 1-7), and there is no need to repeat that statement of facts here.

It is necessary here to address several substantial inaccuracies in the "Statement of Facts" contained in the brief on rehearing of the respondent State of Utah which are highly relevant to the determination of the issues in this case. In its "Statement of Facts," counsel for the State has made several material assertions which are not supported by the record and which are, indeed, untrue. These include the following:

1. The State asserts in its brief (p. 2) that Mrs. Coram "assigned to the State the right to recover as against any liable third party these medical expenses" No such assignment is evidenced anywhere in the record. Moreover, though a copy of the alleged assignment was requested by Mr. Musselman and has subsequently been requested on several occasions by his counsel, no such

assignment has ever been provided to Mr. Musselman or his counsel.

2. The State asserts in its brief (p. 2) that Mr. Musselman was retained to represent Mrs. Coram in 1979. In fact, Mr. Musselman was first contacted by Mrs. Coram and retained in the Fall of 1977, and the medical malpractice action on behalf of Mrs. Coram was commenced in the United States District Court for the District of Utah in October 1978, a period of several months prior to the enactment of the Medical Benefits Recovery Act.

3. The State further asserts in its brief (p. 3):

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 the said sum out of any recovery, taking for his services the statutory 25% contingency fee.

This assertion is totally without support in the record. Mr. Musselman's correspondence with the State is found on pp. 40-43 and 46-48 of the record (hereinafter "R."). It is readily apparent that this correspondence contains no agreement that Mr. Musselman would act to collect the State's claim out of any recovery or represent the State of Utah. Mr. Musselman first contacted the State in June, 1979 approximately 8 months subsequent to the filing of the complaint in the medical malpractice action, and it is plainly discernible from Mr. Musselman's letter of

June 15, 1979 (R., p. 40) that he merely makes inquiry to ascertain whether the State intended to make any claim.

The record contains nothing more than belated, self-serving, and unsupported declarations by counsel for the State that Mr. Musselman agreed to represent the State. The record is devoid of evidence of any such agreement on the part of Mr. Musselman. Other arguments relied upon by the State in its attempt to show that Mr. Musselman was supposedly representing the State which are found in the "Statement of Facts" and elsewhere in the State's brief will be considered in Section III of the argument below.

4. In its brief (p. 4), counsel for the State accuses Mr. Musselman of diverting State monies to his own use. This allegation is without foundation and the inference of misconduct which counsel for the State intends the reader to draw is untrue. Mr. Musselman has at all times held and exercised control over the settlement proceeds consistently with the desires and wishes of his client, Mrs. Coram.

Moreover, it has nowhere been established that the funds held by Mr. Musselman were the State's funds. Indeed, the State's "Statement of Facts" simply assumes a conclusion to all of the legal issues raised by the defenses which Mr. Musselman asserts and which are now before the court in considering Mr. Musselman's motion to set aside the default judgment.

5. The State also asserts in its brief (p. -) that the State commenced the instant case "after many promises to account were not kept." The record is devoid of any such alleged "promises to account." To the contrary, the record clearly shows that Mr. Musselman, as Mrs. Coram's counsel, was negotiating with representatives of the State for settlement of a disputed claim.

The "Statement of Facts" in the State's brief contains several serious inaccuracies and unsupported allegations, and assumes conclusions to issues now before this Honorable Court.

ARGUMENT

I. THE STATE HAS FAILED TO EVEN ADDRESS ANY OF THE MERITORIOUS DEFENSES ANALYZED IN MR. MUSSELMAN'S PRINCIPAL BRIEF. AND ATTEMPTS TO DISMISS COMPELLING REASONS FOR REVERSAL MERELY BY THE USE OF INFLAMMATORY ACCUSATIONS

In its brief, the State concedes that the two general issues presented by a motion to set aside a default judgment are (1) whether excusable neglect is shown and (2) whether a meritorious defense has been tendered, at least so as to justify a trial of the issues thus raised.

In his principal brief on rehearing, Mr. Musselman has demonstrated that the cause of action upon which the default judgment is predicated does not assert any claim against him upon which any relief may be granted, and that

he, as Mrs. Coram's attorney, has no primary personal obligation for any debt of his client or beneficiary, and, therefore, that no judgment may be had against him personally.

Mr. Musselman further demonstrated that the State could not assert any claim at all under the Medical Benefits Recovery Act, inasmuch as the statute is not retroactive and did not take effect until after the last payment on behalf of Mrs. Coram. Moreover, the statute of limitations had run prior to the filing of the State's complaint in this action.

Mr. Musselman demonstrated that the State failed to follow the prescribed statutory procedure to perfect a lien, and that the State failed to pursue the proper remedy prescribed by the statute to enforce a subrogation claim. The State also failed to adjust its claim by the statutorily required formula.

Mr. Musselman also showed that the State made no claim based on any written assignment.

Finally, Mr. Musselman demonstrated that regardless of whether the State's claim was based on a written assignment or upon the Medical Benefits Recovery Act, the State has no subrogation claim inasmuch as Mrs. Coram was not made whole by the settlement of the medical malpractice action.

In its brief, counsel for the State has not addressed any of the substantive meritorious defenses,

several of which are compelling as a matter of law. Instead, the State simply attempts to dismiss them by nothing more than the use of inflammatory accusations. Counsel for the State's only response is to claim that Mr. Musselman 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. . . ." (Brief of Respondent on Rehearing, p. 9). The State goes on to assert that "The brief of the defendant-appellant is an insult to the intelligence and integrity of this court and is a last gasp attempt by the defendant" (Brief of Respondent on Rehearing, p. 13).

The State has not provided even a single sentence in support of these unprofessional accusations and Mr. Musselman refuses to dignify them with any further response.

The several meritorious defenses which compel reversal of the lower court's denial of Mr. Musselman's motion to set aside remain uncontradicted.

II. THE DEFAULT JUDGMENT WAS NECESSARILY PREDICATED ONLY UPON THE "FIRST CAUSE OF ACTION" OF THE STATE'S COMPLAINT, AND ANY QUESTION OF WHETHER MR. MUSSELMAN REPRESENTED THE STATE IS THEREFORE IRRELEVANT

In its brief, the State bases its claim that the default judgment should be sustained solely on the ground that Mr. Musselman was supposedly acting as a lawyer for the State. The State does not even assert any other ground on which it claims the default judgment should be sustained.

To make this argument, however, the State must try to dodge express rules of law respecting default judgments and the unavoidable implications of its own actions.

A. If It Had Been Intended that the Default Judgment be Based at All on the "Second Cause of Action," It Could Easily Have Been So Formulated

In its complaint, the State asserted two separate "causes of action," each with a separate prayer for relief. In the "First Cause of Action," the State demanded recovery of \$82,522.22. Though both Mr. Musselman and Mrs. Coram were named as defendants, this claim was based solely on the State's claimed right of subrogation to the settlement proceeds received by Mrs. Coram, and specifically alleged that Mr. Musselman did not represent the State (see ¶9, R., p. 3). In the "Second Cause of Action," the State pled specifically in the alternative that Mr. Musselman

represented the State, with a specific prayer for \$61,891.66 plus exemplary damages.

The same counsel for the State who prepared the complaint, Mr. Leon Halgren, also prepared the default judgment (see R., p. 9). (Mr. Halgren has represented the State throughout these proceedings.) The default judgment provided that default judgment was entered against Mr. Musselman in the sum of \$82,522.22, the exact amount of relief demanded in the prayer of the "First Cause of Action." It is readily apparent that counsel for the State prepared the default judgment based upon the first claim only.

Had the State intended that default judgment be entered on the "Second Cause of Action," or on both causes of action, the default judgment could easily have been formulated to reflect either of those positions.¹ Instead,

¹This would, of course, require a provision that the amount of punitive damages, requested in the "Second Cause of Action," would be determined by the Court at a later hearing, inasmuch as it would be error to award punitive damages without proof. Security Adjustment Bureau, Inc. v. West, 20 U.2d 292, 437 P.2d 214 (1968). It would have been a simple matter for counsel for the State to include such a provision.

the default judgment provided only for judgment in the amount prayed for in the "First Cause of Action," and made no mention of the specific sum requested in the "Second Cause of Action." The State admits this fact in its brief (p. 14). Indeed, it is apparent that the State desired that the default judgment be entered on the "First Cause of Action" because it desired relief in the greater of the two amounts.

B. If the Default Judgment Were Based on the "Second Cause of Action," It Would be Void Because the Relief Granted is Different in Kind and Greater in Amount than that Requested in the "Second Cause of Action"

The State now faces the difficulty of having contradicted itself, attempting now to sustain the default judgment entered on the "First Cause of Action," where it specifically alleges that Mr. Musselman was not the lawyer for the State, on the ground that Mr. Musselman supposedly was the lawyer for the State. Counsel for the State attempts to avoid this problem by arguing that the default judgment was not based upon either of the specific claims of the complaint. This argument runs afoul of the mandate of Rule 54(c)(2), Utah Rules of Civil Procedure, which provides:

Judgment by Default. A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment. [Underlining supplied.]

This rule is practically identical to the first sentence of Rule 54(c), Federal Rules of Civil Procedure, from which the Utah rule is derived. As stated by Professor Moore:

A default judgment cannot give to the claimant greater relief than the pleaded claim entitles him to, and Rule 54(c) provides that such a judgment "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." Since the prayer limits the relief granted in a judgment by default, both as to the kind of relief and the amount, the prayer must be sufficiently specific that the court can follow the mandate of the Rule.

6 Moore's Federal Practice ¶54.61 at 231 [underlining supplied].

A default judgment entered in violation of this rule is void. As the court held in Davis v. Bafus, 3 Wash.App. 164, 473 P.2d 192 (1970):

A default judgment granting relief which differs from the prayer of the complaint is a void judgment.

473 P.2d at 193 [underlining supplied]. Similarly, the court in Southern Arizona School for Boys, Inc. v. Chery, 119 Ariz. 277, 580 P.2d 738 (Ariz.App., 1978) held:

A judgment in a default case that awards relief that either is more than or different in kind from that requested is null and void.

580 P.2d at 744. [underlining supplied].

A default judgment awarding a specific sum of \$82,522.22 with no reference to punitive damages is one

which awards relief different in kind and greater in amount than that requested in a claim which demands \$61,891.66 plus punitive damages. The latter is the relief demanded in the "Second Cause of Action" of the State's Complaint. Therefore, the "Second Cause of Action" cannot be the basis of a default judgment awarding the relief granted here, and any such judgment based thereon would be void.

C. The Default Judgment Could Only Be Sustained If at All, on the "First Cause of Action" and the State's Theory that Mr. Musselman Supposedly Acted as a Lawyer for the State is Therefore Irrelevant

The default judgment can only be sustained, if it can be sustained at all, on the "First Cause of Action," where the State specifically alleges that there was no attorney-client arrangement between Mr. Musselman and the State.

Thus, the State's repeated protestations that Mr. Musselman supposedly acted as counsel for the State are irrelevant to the default judgment, and cannot be used as a basis to support the default judgment. Consequently, the State has failed to advance even a single argument contrary to the several meritorious defenses set forth in Mr. Musselman's principal brief on rehearing.

III. EVEN IF THE "SECOND CAUSE OF ACTION" WERE
RELEVANT TO THE DEFAULT JUDGMENT, IT IS NOWHERE
ESTABLISHED IN THE RECORD THAT MR. MUSSELMAN ACTED
AS AN ATTORNEY FOR THE STATE, AND MR. MUSSELMAN IN FACT
DID NOT REPRESENT THE STATE

Even assuming, arguendo, that the "Second Cause of Action" of the State's complaint could somehow be regarded as a part of the default judgment, it would be a meritorious defense to demonstrate that Mr. Musselman was not acting as an attorney for the State. (The State, of course, as the plaintiff in this action, has the burden of proving its allegation in the first instance.) Though the initial decision of this Court indicated an assumption that Mr. Musselman had agreed to act for the State, it will be seen that the record contains no such agreement.

A. Mr. Musselman's Tendered Answer Contains
No Admission or Assertion that He Acted as
a Lawyer for the State

In his tendered answer (R., p. 30), Mr. Musselman denied the allegations contained in paragraph 11 of the complaint (R., p. 4), wherein Mr. Halgren asserted specifically that Mr. Musselman represented the State.

In its Brief, the State simply ignores this response and attempts to construe another portion of Mr. Musselman's tendered answer as an admission that he acted as an attorney for the State. In paragraph 9 of the complaint, in the claim based upon the State's subrogation theory, the State alleged that there was no contract between Mr.

Musselman and the State providing for payment of an attorney's fee for recovery of the \$82,522.22, and that the State was therefore entitled to recover the entire sum from Mr. Musselman. Mr. Musselman responded to this allegation with a general denial.

The import of the general denial of the allegations of paragraph 9 is simply to deny that the State is entitled to recover against Mr. Musselman. Mr. Musselman's denial of the State's right to recover cannot be construed as an admission of the existence of an attorney-client relationship. That relationship is expressly denied in Mr. Musselman's answer to the State's second claim. Counsel for the State would have us believe the tortuous argument that the general denial of paragraph 9, through the process of an inferred double negative, was in fact an affirmative assertion on the part of Mr. Musselman that a contract of representation did exist between Mr. Musselman and the State. Such an attempted construction of the pleadings is not credible and warrants little comment.

B. The State Seriously Misconstrues the Meaning of the Statutory Adjustment Provision and Mr. Musselman's References Thereto, and Mr. Musselman Had No Expectation of Being Paid Any Attorney's Fee by the State

The State misconstrues and takes out of context two sentences from Mr. Musselman's letter of February 3,

1981 to the Office of Recovery Services, and ignores Mr. Musselman's specific testimony regarding this letter. It is apparent from the text of the letter that Mr. Musselman, as Mrs. Coram's attorney, is negotiating with the State for the settlement of a disputed claim of the State. The portion of the letter quoted on page 10 of the State's brief is Mr. Musselman's calculation of the approximate maximum amount of any potential claim by the State according to the statutory adjustment formula set forth in the section then codified as §55-15d-8, Utah Code Ann.

Though Mr. Musselman refers to this provision perhaps somewhat inarticulately by referring to it as the "statutory 25% for attorney's fees," the reference to the statutory provision is nonetheless apparent and nowhere does Mr. Musselman indicate that he had any expectation of being paid any attorney's fee by the State. The attempt by the State to place such an interpretation on this language seriously misconstrues the clear meaning of the statutory provision and the language of Mr. Musselman's letter. Section 55-15d-8(4), Utah Code Ann. (subsequently recodified as §26-19-7(4), Utah Code Ann.) provides:

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. [Underlining supplied.]

It is thus readily apparent this provision does not provide that the State pays any fees to an attorney in exchange for some sort of work on behalf of the State in obtaining a recovery, but is instead an adjustment of the amount the State is allowed to recover in order to reflect a reasonable share of the burden of the personal liability for attorney's fees incurred by the beneficiary.

At the hearing held in the District Court on August 18, 1981, Mr. Halgren asked Mr. Musselman if he was talking about taking a fee from the State in this portion of his letter of February 3, 1981. Mr. Musselman pointed out in testimony:

In that paragraph I mention attorney's fees. I did not ever indicate that I would be paid by the State of Utah in attorney fees. What I did indicate was that pursuant to the statute citation, which I don't recall at the moment, that Mrs. Coram was entitled to reimbursement for her attorney fees, and I believe that is the way the statute reads, and that was I believe the content of that paragraph.

Transcript of Hearing August 18, 1981, pp. 12-13 [underlining supplied]. The State, however, ignores the

plain import of the statutory language as well as Mr. Musselman's direct testimony in the matter.

In its "Statement of Facts" (p. 5), counsel for the State claims that in his testimony at this hearing, Mr. Musselman "admitted under oath the fee arrangement." The testimony quoted above, however, is only testimony pertaining to the issue. It is difficult to see how Mr. Musselman "admitted under oath the fee arrangement" when his testimony above is directly to the contrary.

The State then asserts in its brief (p. 10) that in "every subsequent letter," Mr. Musselman mentioned attorney's fees "which the State of Utah is expected to pay him for his legal services." (Emphasis by counsel for the State.) Contrary to this interesting assertion, there is not one instance in any subsequent letter of Mr. Musselman indicating any expectation that the State of Utah would pay him anything for any legal services. The State's further allegation in its Brief (p. 15) that Mr. Musselman "still maintains" in his principal brief on rehearing before this court that "he expected the statutory fee of 25% of the recovery as his attorney's fees" is similarly a plainly unsupportable interpretation of the defense set forth in that section of the argument in Mr. Musselman's principal brief. Nowhere in Mr. Musselman's principal brief does he make any claim that he expected a fee of 25% of any recovery, or any other fee, from the State.

C. Mr. Musselman Had Specific Authority to Negotiate the Settlement Draft Which He Endorsed, and Mr. Musselman's Endorsement Does Not Demonstrate that He Acted as Counsel for the State

The State places great emphasis on the settlement draft which was issued to the respective payees Linda Ann Coram, William Dyerl Coram, D. John Musselman, and the Office of Recovery Services, and which was endorsed by Mr. Musselman for the Office of Recovery Services. The State's argument that this demonstrates that Mr. Musselman had acted as counsel for the State ignores the fact that Mr. Musselman had been given specific authority to endorse the particular instrument and withhold the amount which would represent the State's possible claim.

At the hearing held on August 18, 1981, Mr. Halgren made the same argument made here as follows:

He also -- and I have an exhibit here which I think he won't deny his signature on -- it's the settlement draft in the sum of \$82,522.22 showing that it was payable to the State of Utah as recovery services, and it was endorsed by John D. Musselman [sic]. It's attorney at law, and in fact I don't see how at this point he can deny that he was representing the State of Utah unless he wants to admit that signature is a forgery on that draft.

Mr. Musselman responded:

With regard to the check which was endorsed, Your Honor, that was drafted after a telephone conversation with an employee of the State of Utah where that was stated and agreed to, and I stated

to the employee, and I think Mr. Hubbard is aware of this, I believe it's Mr. George Martindale, I stated to Mr. Martindale I intended to withhold from distribution to Mrs. Corum [sic] the amount which I would calculate under the statute that the state had a first claim of lien, the first lien claim upon. I have done that, and that's really the issue in this case. But to allow the state to go on with execution on my personal and real property pending a determination or litigation of that claim, I think would be absolutely improper. . .

Transcript of Hearing, August 18, 1981, pp. 5-6 [underlining supplied].

At that hearing, in response to a question by Mr. Halgren as to whether he was representing the State "in the \$82,522.22 recovery," Mr. Musselman also testified:

If you are asking about the \$82,000.00 check, the answer is that I had felt that I had specific authority to cash that check and withhold the statutory amount which the State of Utah would have a lien claim on.

Transcript of Hearing, August 18, 1981, p. 13 [underlining supplied]. Nothing to the contrary appears in the record.

In short, Mr. Musselman was authorized to negotiate the draft and withhold the funds until the potential claim by the State could be resolved, which was then the subject of negotiations between Mr. Musselman, acting on behalf of Mrs. Coram, and counsel and representatives of the State.

The draft upon which the State relies does not establish that Mr. Musselman represented the State.

Similarly, the State's assertion in its brief (p. 11) that Mr. Musselman admitted that he accepted the settlement amount "as a representative of the State" is without support in Mr. Musselman's testimony and simply misconstrues his testimony quoted above.

D. It is Unrealistic to Believe that the State Did or Would Have Entered Into An Arrangement Involving Obvious Conflict and Risk to Its Own Interest in the Present Circumstances

Aside from the inconsistencies between the State's argument and the record and testimony before this Court, the implausibility of the State's theory that Mr. Musselman acted as a lawyer on behalf of the State is perhaps more forcefully demonstrated by the State's negotiating with Mr. Musselman for the settlement of a potential claim. It is apparent from the correspondence in the record (see pp. 41-43, 46-48) that Mr. Musselman was negotiating for a reduction of the State's potential claim and was doing so on behalf of and in the interest of his client, Mrs. Coram. Mr. Martindale, for the Office of Recovery Services, would not have been negotiating on this basis with Mr. Musselman and discussing counteroffers or possible counteroffers had Mr. Musselman in fact been acting as the lawyer for the State. Not only would Mr. Musselman not have permitted himself to be placed in such a position of obvious conflict,

but, perhaps more importantly, it is unrealistic to believe that the State would have entered into such an arrangement which would involve such risk to its own interest in the first place.

E. Mr. Musselman Has At a Minimum Proffered a Defense of at Least Sufficient Ostensible Merit as to Require a Trial of the Issue

In summary, even if the allegation that Mr. Musselman had acted as an attorney for the State were of any relevance to or were any part of the default judgment here, it is readily apparent that the record does not support the State's theory that Mr. Musselman acted as a lawyer for the State, and the default judgment cannot be sustained on such a theory. For the reasons analyzed above, Mr. Musselman has, at a very minimum, proffered a defense "of at least sufficient ostensible merit as would justify a trial of the issue thus raised." Downey State Bank v. Major-Blakeney Corp, 545 P.2d 507, at 510 (Utah, 1976). Therefore, even if the question of whether Mr. Musselman had acted as an attorney for the State had any bearing on the default judgment, the default judgment must nonetheless be set aside.²

²The State is not deprived of the opportunity at trial, after the default judgment is properly set aside, to try to prove its theory that Mr. Musselman acted as counsel for the State.

IV. EXCUSABLE NEGLIGENCE WAS BOTH NECESSARILY FOUND BY THE
LOWER COURT AND THIS COURT AND ESTABLISHED IN THE
RECORD

In its brief (p. 8), the State takes the interesting position that excusable neglect is both not an issue before this court and is, supposedly, conclusively negated by the record. This argument is intriguing in light of the fact, which the State admits in its brief no less than three times, that the ruling of the lower court denying Mr. Musselman's motion to set aside was based solely on the lower court's view that no meritorious defense had been shown.

If the question of excusable neglect is, as the State asserts, not properly before this court, then the default judgment certainly cannot be sustained on an argument that no excusable neglect was shown. If the issue of excusable neglect is before the court, then the import of the lower court's ruling and the initial opinion of this court must be addressed.

As demonstrated in Mr. Musselman's principal brief on rehearing, the lower court necessarily found that excusable neglect was shown, inasmuch as it proceeded to rule upon the issue of whether a meritorious defense had been tendered. The initial opinion of this Court did so also. The State now attempts to get around the implication of these decisions by arguing that the lower court did not

need to rule on the issue of excusable neglect since it ruled on the question of a meritorious defense.

The State's argument overlooks and is inconsistent with the principle established in this court's decision in Board of Education of Granite School District v. Cox, 14 U.2d 285, 384 P.2d 806 (1963). Therein, this court held that the question of a meritorious defense arises only after consideration of the question of excusable neglect, and a sufficient excuse being shown. (This opinion is quoted in Mr. Musselman's principal brief on rehearing at p. 25.) Therefore, it is necessarily implicit in the lower court's ruling that excusable neglect or inadvertence was found.

The State also now goes on to argue that Mr. Musselman cannot claim that excusable neglect or inadvertence was involved in his not filing a timely answer. The basis for this argument is that Mr. Musselman was admitted to the Utah Valley Hospital a few days after the 20-day period from the time of service had run. While this is so, Mr. Musselman's illness, hospitalization, and subsequent period of convalescence prevented him from communicating further with counsel for the State during that period. In his argument to the Court below, Mr. Halgren asserted a lack of communication from Mr. Musselman during the same period of time in which Mr. Musselman was hospitalized as the reason that he (Mr. Halgren) had contacted Mr. Martindale of the Office of Recovery Services

and instructed him to contact Mr. Musselman. (See Transcript of Hearing, November 3, 1981, p. 17.)

In his affidavit filed with the court below (see R., pp. 26-27), Mr. Musselman sets forth the understanding which he had with counsel for the State that they would endeavor to settle the matter and that no default judgment would be taken without prior notice to allow Mr. Musselman time to answer the complaint. Further, in the hearing held in the court below on Mr. Musselman's motion to set aside on November 3, 1981, Mr. Musselman stated to the Court:

The other ground is that from the initial filing and service of the complaint in this matter within a few days of that, I did talk with Mr. Halgren. This was before I was hospitalized. I had a telephone conversation with him. And my understanding in that conversation was the conclusion of which that each of would endeavor to settle the matter without the necessity of filing an answer, and that he would not take a default judgment without at least contacting me before entering it.

Transcript of Hearing, November 3, 1981, pp. 13-14. Mr. Halgren alleges in his affidavit, though it is hearsay, that Mr. Martindale talked to Mr. Musselman on July 6, 1981 and informed him that counsel for the State was preparing to enter a default. On that date, Mr. Musselman had barely returned home from the hospital, having been released on July 4, and was just beginning a two-week recuperation period. Because of his illness, Mr. Musselman was still in

no position to prepare and file an answer to the State's complaint at that time.

Mr. Musselman did, however, beginning on July 7, 1981 and on several occasions thereafter, attempt to contact Mr. Halgren by telephone, as demonstrated by his affidavit in the record (R., p. 27). Indeed, on July 13, 1981, the day prior to the entry of the default judgment, Mr. Musselman reached Mr. Halgren's office and waited on the line for a substantial period of time waiting to speak with him. For some reason, Mr. Halgren did not take the call from Mr. Musselman, and the next day arranged for entry of the default judgment without returning Mr. Musselman's call. (See Transcript of Hearing, November 3, 1981, p. 13.) Under these circumstances, Mr. Musselman's conduct clearly constituted inadvertence or excusable neglect. Indeed, the facts suggest that the State knowingly took advantage of Mr. Musselman's condition.

The understanding between Mr. Musselman and Mr. Halgren that default would not be entered was entirely consistent with the parties' prior negotiations and the circumstances surrounding the filing of the complaint. It is apparent from the documents which Mr. Halgren attached to his own affidavit and which are part of the record (see pp. 49-50) that the complaint was filed prior to the time that Mr. Halgren received Mr. Musselman's most recent settlement offer in writing, at a time when Mr. Halgren was under the

impression, which turned out to be incorrect, that no settlement offer was forthcoming. Mr. Musselman and representatives of the State had engaged in substantial settlement negotiations prior to that time. In such circumstances, an understanding that no default would be taken without notice and opportunity to answer, in order to avoid the difficulties of litigation and facilitate the negotiations, is both reasonable and common.

In short, both the lower court and the prior opinion of this Court were correct in the view that Mr. Musselman had demonstrated excusable neglect.

V. THE STATE HAS FAILED TO ESTABLISH ANY OF THE ASSUMED FACTS RELIED UPON BY THIS COURT IN ITS INITIAL DECISION

In the initial opinion of this Court rendered on July 26, 1982, it was assumed that Mr. Musselman had admitted a right of subrogation in favor of the State pursuant to the Medical Benefits Recovery Act, as well as a right of subrogation pursuant to a written assignment executed by Mrs. Coram. These assumptions appear to have been based upon the unsupported allegations asserted by the State. Not only were neither of these assumed facts supported by the record or admitted by Mr. Musselman, but the State has failed to produce any support for them whatsoever. Indeed, the State has not even addressed these questions.

The State has, therefore, entirely failed to demonstrate any basis upon which the default judgment could be sustained.

CONCLUSION

In summary, the State has failed to address any of the meritorious defenses analyzed in Mr. Musselman's principal brief, and the State has done nothing more than to attempt to dismiss them by the use of inflammatory accusations. Mr. Musselman's defenses remain uncontradicted. Several are compelling as a matter of law, and, indeed, require dismissal of the "First Cause of Action" in the court below as well as setting aside the default judgment.

The State has not advanced even a single argument to show how the "First Cause of Action" states any claim for relief against Mr. Musselman or how he has any primary personal obligation for any debt of his client. Nor has the State advanced any argument contrary to Mr. Musselman's showing that the State has no claim under the Medical Benefits Recovery Act, inasmuch as the Act is not retroactive and the statute of limitations had run. Nor has the State advanced any argument contrary to Mr. Musselman's showing that the State has no claim of subrogation under any theory inasmuch as Mrs. Coram was not made whole.

The default judgment was necessarily predicated upon the "First Cause of Action" only. Had it been intended that it be based to any extent on the "Second Cause of Action," it could easily have been so formulated. More importantly, had the default judgment here been based upon the "Second Cause of Action," it would be a void judgment inasmuch as the relief granted is different in kind from and exceeds the relief demanded in the "Second Cause of Action." The default judgment can therefore only be based on the "First Cause of Action," where the State specifically alleges that Mr. Musselman was not the lawyer for the State. The default judgment, therefore, cannot be sustained on the basis of the State's lengthy assertions that Mr. Musselman acted as a lawyer for the State.

Moreover, even if the State's assertion that Mr. Musselman acted as a lawyer for the State were relevant, the record does not establish that Mr. Musselman acted in any such capacity. The State's argument twists the meaning of Mr. Musselman's tendered answer and seriously misconstrues the relevant statutory provisions and the references thereto by Mr. Musselman. The State's theory also overlooks Mr. Musselman's specific authority to negotiate the settlement draft on which the State relies, and is, in addition, implausible under the circumstances of the present case.

Finally, excusable neglect or inadvertence on the part of Mr. Musselman was necessarily and correctly found by

the lower court and this Court, and the fact of excusable neglect is amply supported by the record.


It is therefore unavoidable that the lower court's denial of Mr. Musselman's motion to set aside must be reversed. The fundamental principle, consistently recognized by this Court, that courts should act to permit full inquiry and that each party to a controversy should be afforded an opportunity to present his side of the case, Mayhew v. Standard Gilsonite Co., 14 U.2d 52, 376 P.2d 951 (1962), finds no more appropriate application than in the instant case. If the State's position were meritorious, then it has nothing to lose by that inquiry. If it is not, then to permit the default judgment to stand only perpetuates injustice.

To allow the default judgment against Mr. Musselman to stand under these circumstances, allowing the State to seize his assets, pursue his income, and disrupt his family when in fact the State has no claim against him, and affording him no opportunity to present the defenses which he has set forth, would be both contrary to law and a grave miscarriage of justice.

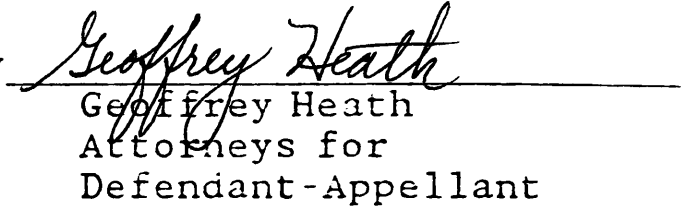
Respectfully submitted this 23 day of December,
1982.

FOX, EDWARDS & GARDINER

By


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By


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CERTIFICATE OF SERVICE

The foregoing Reply Brief of Appellant on Rehearing was served upon respondent by mailing two copies thereof to its attorney, Leon A. Halgren, Assistant Attorney General, 236 State Capitol Building, Salt Lake City, UT 84114, this 23 day of December, 1982.

Geoffrey Heath