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Frank T. Mohlman; Vernon & Mohlman; Attorney for Appellant;
Allen Sims; BIele, Haslam & Hatch; Attorney for Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

VALLEY LEASING, a Division of
Intermountain Loan Corporation,
a Utah Corporation,

Respondent,

vs.

RICHARD W. HOUGHTON,

Appellant.

Case No. 18259

BRIEF OF APPELLANT

Appeal from the Order of the Third District
Court of Salt Lake County, State of Utah,
James S. Sawaya, District Judge, Presiding

FRANK T. MOHLMAN
VERNON & MOHLMAN
275 South Main Street
Tooele, Utah 84074

Attorney for Appellant

ALLEN SIMS
BIELE, HASLAM & HATCH
80 West Broadway, Suite 300
Salt Lake City, Utah 84101

Attorney for Respondent

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Clerk, Supreme Court, Utah

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BIELE, HASLAM & HATCH
80 West Broadway, Suite 300
Salt Lake City, Utah 84101

Attorney for Respondent

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a final order in the Third District Court denying Appellant's Motion for Relief from Judgment.

DISPOSITION IN THE DISTRICT COURT

Judge James S. Sawaya held a hearing on October 1, 1981, and ordered judgment in favor of Respondent. Appellant did not appear and was not represented by counsel at the hearing. Appellant filed a motion for Relief from Judgment under Rules 60(b)(1) and (7) of the Utah Rules of Civil Procedure. This motion was argued on November 25, 1981, and the Court denied the motion.

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RELIEF SOUGHT ON APPEAL

Appellant seeks an order reversing the decision of the lower court and remanding the case to the lower court for trial.

STATEMENT OF FACTS

The Complaint in this case was served upon the appellant on September 17, 1980. Appellant's counsel at that time filed an Answer to the Complaint on or about October 7, 1980. Thereafter, Appellant and his counsel had a misunderstanding regarding attorney's fees to be paid. (Nov. 25 R.,p.2) On or about September 29, 1981, Appellant received a letter at his St. George, Utah, address dated September 25, 1981, from his attorney, Thomas N. Arnett, Jr. This letter referred to a notice that had been previously sent to Appellant by Mr. Arnett advising Appellant of the trial date on October 1, 1981. The letter also referred to a pre-trial which was held by the Court on September 22, 1981. Appellant did not receive any previous notices of the trial date or the pre-trial or any notice of the withdrawal of his prior counsel. When Appellant received the letter on September 29, 1981, in St. George, Utah, he contacted his wife who was in Salt Lake City and asked her to go to the Salt Lake County Clerk's Office and attempt to get the trial postponed. Appellant's wife, Susan,

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went to the Clerk's office on September 30, 1981, and attempted to get the matter postponed. That afternoon she was told the case could not be continued. She appeared the next morning at the trial thinking she would be able to explain Appellant's position and defenses to the Court but was not allowed to participate or speak at that time. (Nov. 25 R.p.3) Appellant filed a Motion for Relief from Judgment on November 3, 1981, which Motion was argued to the Court on November 25, 1981.

ARGUMENT

THE COURT TREATED APPELLANT'S CONDUCT AS A DEFAULT WHICH DEFAULT SHOULD BE SET ASIDE BECAUSE OF APPELLANT'S EXCUSABLE NEGLECT FOR NOT APPEARING AT THE TRIAL

It is clear from the record of this case that the Court treated this matter as a default on the part of the Appellant. At the hearing on October 1, 1981, the Court made a record of the fact that Appellant was not present but that Appellant's wife was present but was not appearing on Appellant's behalf. The Court also noted on November 25, 1981, (Nov. 25 R., p.8-9) that he considered Appelant's conduct as having the effect of a default.

A default judgment has always been regarded as fragile. It was stated in Mayhew v. Standard Gilsonite Co., 14 Utah 2d 52, 376 P.2d 951 (1962) that the Court "should be generally

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indulgent toward permitting full inquiry and knowledge of disputes so they can be settled advisedly 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 Appellant's argument that the lower court abused its discretion by not granting his Motion for Relief from Judgment. This court in Helgesen v. Inyangumia, 636 P.2d 1079 (Utah 1981) stated that the "decision to relieve a party from a final judgment under Rule 60(b)(1) is subject to the discretion of the trial court. But discretion should be exercised in furtherance of justice and should incline towards granting relief in a doubtful case to the end that the party may have a hearing." See also Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 741 (1953).

Despite respondent's arguments to the contrary the record shows that Appellant did use "due diligence" to protect his interests as required in Airkem Intermountain, Inc. v. Parker, 30 Utah 2d 65, 513 P.2d 429 (1973). As soon as Appellant became aware of the trial date, he initiated actions to either get the matter postponed or be represented at the trial. When Appellant asked his wife to appear on his behalf on October 1, 1981, he assumed that she would be allowed to speak in his

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defense. The lower court did not allow Mrs. Houghton to speak and therefore no defense was allowed to be presented. It is Appellant's contention that these actions by Appellant constituted "excusable neglect" under Rule 60(b) of the Utah Rules of Civil Procedure.

CONCLUSION

Because Appellant exercised "due diligence" to protect his interests, Appellant respectfully requests that the judgment be set aside and the matter remanded for trial.

SUBMITTED this 7TH day of May, 1982.

Frank T. Mohlman

FRANK T. MOHLMAN
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing to Allen Sims, Biele, Haslam & Hatch, Attorney for Respondent, 80 West Broadway, Suite 300, Salt Lake City, Utah 84101, this 7TH day of May, 1982.

Frank T. Mohlman

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