1982

Linda K. Larsen and State of Utah v. Douglas Collina : Brief of Appellant

Utah Supreme Court

Steven L. Hansen; Attorney for Appellant;

Original

IN THE SUPREME COURT OF THE STATE OF UTAH

LINDA LARSEN and the STATE OF UTAH by and through Utah State Department of Social Services Plaintiffs-Respondents, vs DOUGLAS COLLINA Defendant-Appellant.	Case No. 18328

BRIEF OF RESPONDENTS

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT

STATE OF UTAH

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TABLE OF CONTENTS

AUTHORITIES CITED

CASES

CASES (Cont'd)

OTHER AUTHORITIES AND STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

LINDA LARSEN and the STATE OF UTAH by and through Utah State Department of Social Services Plaintiffs-Respondents. vs DOUGLAS COLLINA Defendant-Appellant	Case No. 18328

BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

This is a paternity action on appeal from the Third Judicial District Court where Appellant's Motion to Set Aside Default and for Relief From Judgment brought pursuant to Rule 60(b) of the Utah Rules of Civil Procedure was denied.

DISPOSITION OF THE LOWER COURT

Appellant's Motion was denied by the Honorable Maurice D. Jones following a hearing in the Third Judicial District Court on February 17, 1982.

RELIEF SOUGHT ON APPEAL

Respondents seek an affirmance of the lower Court's Order denying Appellant's Motion.

STATEMENT OF FACTS

Respondents desire to supplement and clarify the

Statement of Facts contained in Appellant's Brief as follows:

On February 9, 1980, a copy of the Summons and Complaint was served personally upon the Appellant (T. 6). On March 31, 1980, Appellant answered the Complaint by and through his attorney, Bradley Parker (T. 7).

Pursuant to Stipulation of the Parties and Order of the Court, blood tests were taken in May of 1980 (T. 9-10). In his report, a copy of which was attached to Appellant's Memorandum to the lower Court, Dr. C. W. DeWitt stated that on the basis of the blood tests, Mr. Collina cannot be excluded as the father on the basis of either ABO or HL-A typing, and further stated that the statistical probability that he is the father of the co-Plaintiff Larsen's child would be 100 per cent with one consort and 74 per cent with two consorts (T. 64-65).

As indicated by Defendant's Answers to Interrogatories, there is no evidence that co-Plaintiff had sexual relations with any person other than the Appellant during the period from December of 1975 to April of 1976, the period of conception (T. 52).

On June 23, 1980, Interrogatories to Defendant were sent to Appellant's attorney, Bradley Parker and on August 13, 1980, Deputy Salt Lake County Attorney, Gerald Conder, sent a letter to Mr. Parker stating that Plaintiff's attorney had not received the Answers and requested that the Answers be for-

warded as soon as possible, or that we be advised if there were some problem (T. 78).

On August 25, 1980, Gerald Conder filed a Motion to Strike Defendant's Answer based upon Defendant's failure to answer the Interrogatories, and the Motion was set for hearing on September 17, 1980. At that hearing, Gerald Conder represented to the Court that the Appellant's attorney (Bradely Parker) indicated that he had been unable to obtain cooperation from his client, and Judge Sawaya ordered that Defendant be granted 15 days from September 17, 1980 in which to answer the Interrogatories. If the Interrogatories were not answered, it was the order of the Court that the Answers be stricken and default entered (T. 18-21).

On October 20, 1980, the County Attorney's Office received Mr. Parker's Withdrawal of Counsel dated October 15, 1980. Thereafter, on October 21, 1980, Notice to Obtain New Counsel was sent to the Appellant instructing him to obtain new counsel immediately to represent him in the matter, or in the alternative, to appear in his own behalf (T. 23-24).

Because Appellant failed to comply with the Notice to Obtain New Counsel, his answer was stricken and Default Judgment was entered against him on December 17, 1980, more than two months subsequent to the Order of the Court entered on October 10, 1980. Furthermore, Appellant had taken no action to preserve his position in the 57 day elapse of time between the Notice to Obtain New Counsel and entry of

the Default Judgment (T. 25-28).

Subsequent to the entry of Judgment Appellant filed a Complaint against Mr. Parker with the Utah State Bar. Mr. Parker filed a response dated April 29, 1981, and the Complaint was dismissed (T. 93).

At the hearing from which this appeal is taken, Mr. Parker's testimony was presented at the request of the Court by proffer of counsel, including the contents of Mr. Parker's response letter to the Utah State Bar (T. 93, 79-81). Counsel for Appellant made no objection to the proffer. Mr. Parker was present at the hearing pursuant to a Subpoena Duces Tecum and would have taken the stand to present the facts articulated in his response letter had not the Court asked for a proffer (T. 92).

The response letter of Mr. Parker sets forth the facts as discussed thus far and further states:

> "Not only did Mr. Collina fail, after repeated requests, to contact our office, but he failed to pay his bill as well. Mr. Collina, when he finally did make contact with our office in February of this year, informed me that he had received a copy of the filed Withdrawal of Counsel (filed October 15, 1980), yet chose to take no action upon receiving this notice. The judgment in this matter was not entered until two months later on December 17, 1980."
>
> Mr. Collina, by his own admission in his complaint, received our billings and by his own admission to me received the Withdrawal of Counsel. It is difficult to believe that he did not receive our other corresponsence regarding the tissue tests and Interrogatories." (T. 79-80).

The letter of Bradley Parker, which was proffered into evidence without objection by Defendant, further states that the Appellant "was represented in this matter to the fullest extent his cooperation would allow." (T. 80).

Consequently, the Court denied Appellant's Motion for Relief from Judgment (T. 82).

ARGUMENT

POINT I

THE ACTION OF THE LOWER COURT IN DENYING APPELLANT'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT WAS NOT AN ABUSE OF DISCRETION AND SHOULD BE AFFIRMED.

This Court stated in Airkem Intermountain, Inc., v. Parker, (Ut.) 513 P.2d 429 (1973) that "(t)he trial court is endowed with considerable latitude of discretion in granting or denying a motion to relieve a party from final judgment under Rule 60 (b)(1), U.R.C.P. and this court will reverse the trial court only where an abuse of this discretion is clearly established." (At p. 431; see also Board of Education of Granite School District v. Cox, (Ut.) 384 P.2d 806 (1963); Mayhew v. Standard Gilsonite Co., (Ut.) 376 P.2d 951 (1962).) The Court in Airkem further recognized an interest in the successful parties to protect their judgment and its effect with the least hardship once a default judgment has been entered. It has been consistently stated that more than a claim that Appellant "did not have his day in court" is

required for a default judgment to be overturned (Airkem, supra; Warren v. Dixon Ranch Co., (Ut.) 260 P.2d 741 (1953).)

It has also been held that the courts should not be indulgent toward a defaulted party if such indulgence would work an injustice, inequity or hardship on the opposing party. (Warren, supra; Chrysler v. Chrysler, (Ut.) 589 P.2d 995 (1956).) In Pitts v. Pine Meadows Ranch Inc., (Ut.) 589 P.2d 767 (1978) this Court refused to reverse a default judgment because the successful litigants had moved from the country. To require their presence for a new trial would work an undue hardship because they most likely would not be able to attend the proceedings.

The same rationale applies to the facts in this case since co-Plaintiff Linda Larsen closed her public assistance case on September 30, 1981, and counsel for the State of Utah has been unable to contact her and is unaware of her present whereabouts. Therefore, it would work an undue hardship and injustice to require the State to go forward with the presentation of its case absent the testimony and presence of the co-Plaintiff.

In both Airkem and Warren, this Court held that a party seeking to vacate a default judgment must show that he used due diligence in the prosecution of his case and that he was prevented from appearing by circumstances over which he had no control.

In the case of Heath v. Mower, (Ut.) 597 P.2d 855 (1979),

this Court refused to vacate a default judgment under facts virtually identical to those in the present case. In Heath, a Motion to Set Aside a Default Judgment brought pursuant to U.R.C.P. Rule 60(b) was denied where Defendant failed to respond to repeated attempts to contact him regarding the status of a lawsuit he knew was pending and where he knew that a hearing had been scheduledand that his counsel had withdrawn. The Court stated that these actions of the Defendant vitiated any claims of due diligence and were therefore fatal to his Motion to Set Aside a Default Judgment.

In the present case, the facts show that Appellant was represented by counsel and participated in the answering of the Complaint; he then failed to cooperate with counsel and further failed to respond to attempts by counsel to contact him regarding the status of the pending lawsuit. Finally, Appellant knew that his counsel had withdrawn but failed to timely appoint new counsel. Under these facts and the holding of Heath, the Appellant has not in the least complied with the due diligence requirement and the default judgment should be affirmed.

In the Brief of the Appellant, an argument is made concerning the probability of Appellant being the father of the co-Plaintiff's child. In Chrysler, (supra), it was held that a default appeal is to be decided purely on the circumstanced surrounding occassion of default. The merits of the case are not to be at issue and are not a basis for appeal.

Since the arguments of Appellant go to establishment of paternity (a merit of the case), such contentions should be ignored by the Court and have no bearing on the final disposition of this case.

Appellant also contends (without cited authority) that his Affidavit was unopposed and should therefore be taken as true. This is patently false. The Affidavit was opposed and successfully contradicted at the hearing by the proffered testimony of Bradley Parker. In Chrysler (supra) this Court held that the trial court doesnot have to accept as true the facts alleged in affidavits of a party or his attorney despite the fact that there was no cross-examination on the facts alleged in those affidavits. It should also be noted that Appellant failed to appear at the hearing.

Appellant cites both Mayhew (supra) and Ney v. Harrison, (Ut.) 299 P.2d 1114 (1956) as supportive of the position that his default should be overturned. These cases can be easily distinguished from the one at the bar on their facts. In Ney and Mayhew, the parties against whom default had been entered relied to their detriment upon a person who was neither their attorney nor their agent. In Ney, a wife relied on her husband to answer the Complaint; and in Mayhew process was served on a person who had previously been, but was no longer president of a company whose stockholders subsequently had a default entered against them without any notice of the pending lawsuit. In these cases, the appellants were granted

relief when they, through no fault of their own, mistakenly relied on a private individual to represent their interest.

The present case and facts are much different. The person that Appellant herein alleged relied upon was his attorney. However, this reliance was not justifiable since the Appellant made no effort to contact his attorney when he knew the case was pending and that the Interrogatories needed to be answered. Furthermore, reliance on his attorney will not suffice to relieve Appellant of the default judgment under the holding of Warren (supra). This Court held therein that "although a judgment may be erroneous and inequitable equitable relief will not be granted to a party thereto on the sole ground that the negligence of the attorney, agent, trustee, or other representative of the present complainant prevented a fair trial." (Id. at 743). Therefore, reliance of Appellant on his attorney will not relieve him of the default judgment even if the acts of his attorney were negligent.

In this case, the facts bear out that Appellant failed to contact his attorney despite the fact that he knew a lawsuit was pending; he failed to appoint a new attorney when notified to do so; and he failed to answer Interrogatories after being given the chance to do so not once, but twice. Therefore, this Court should follow the rule of Airkem and hold that Appellant's conduct was not entirely excusable and that the lower Court did not abuse its discretion in refusing to relieve Appellant of the judgment under those circumstances

POINT II

THE LOWER COURT COMMITTED NO ERROR BY ALLEGEDLY ALLOWING INTO EVIDENCE A MEMORANDUM WHICH ARGUED THE RESULTS OF THE BLOOD TESTS AND CONTAINED A LETTER WRITTEN BY APPELLANT'S FORMER ATTORNEY. ERROR WAS NOT PRESERVED FOR APPEAL BY APPELLANT. SINCE THE DOCUMENT WAS SIMPLY A MEMORANDUM, THERE WAS NO REQUIREMENT THAT PRIOR SERVICE BE MADE TO APPELLANT.

Appellant fails to mention in his Brief to this Court that he quoted verbatim the contents of the letter from Dr. C. W. DeWitt in his Memorandum to the lower Court and attached a copy of the letter to his Memorandum. Furthermore, Appellant quotes affirmatively the contents of the DeWitt letter in his Brief to this Court. (at page 6). It is inconceivable that the use of this letter should be prejudicial to the Appellant when he has and is using the contents of that letter in the presentation of his case.

Assuming arguendo that the documents were incorrectly received by the lower Court, Appellant has lost the opportunity to make this argument since he failed to preserve the alleged error for appeal. The evidence complained of was offered as a proffer (as Appellant's Brief admits), and Appellant made absolutely no objection to or cross-examination of said evidence (T. 92-94). Since there was no objection, Rule 4 of the Utah Rules of Evidence provides that the judgment cannot be

overturned for an alleged erroneous admission of evidence under these circumstances. (See also 5 Am Jur 2d Appeal and Error §601.)

This Court has consistently recognized this principle and in White v. Newman, (Ut.) 348 P.2d 343 (1960) held that where there is no objection made to the admisibility of evidence, the Court will not entertain such claimed error. (See also Stragmeyer v. Leatham Brothers, Inc. (Ut.) 439 P.2d 279 (1968); Child v. Child, (Ut.) 322 P.2d 981 (1958); Pettingill v. Perkins, (Ut.) 272 P.2d 185 (1954); Porcupine Reservoir Co v. Lloyd W. Keller Corp, (Ut.) 382 P.2d 620 (1964); State v. Gilles, (Ut.) 123 p. 93 (1912).)

Had Appellant's counsel objected to any of the proffered testimony, memorandum or exhibits at the hearing, Counsel for the State would have called Mr. Parker, who was present at the hearing pursuant to a Subpoena Duces Tecum, to the stand and taken his direct testimony and introduced through him the documents in question.

It would be grossly unfair to allow Appellant to accuse the lower Court of error on appeal where Appellant's counsel stood by without raising any objection while the alleged error supposedly occurred. Therefore, since Appellant's counsel made no objection during the hearing as to any of the questioned evidence submitted by proffer, the alleged error has not been preserved for appeal and Appellant is not entitled to renew on this point pursuant to Rule 4 of the Utah Rules of

Appellant also contends that error was committed because the time requirement of Rule 6(d) of the Utah Rules of Civil Procedure was not satisfied.

It is a far stretch of the imagination to call Respondent's Memorandum a "motion" and an even farther stretch to call the supporting documents (the same ones Appellant used in his Memorandum) attached thereto "affidavits". 3 Am Jur 2d Affidavits §31 states that:

> "(An affidavit is a voluntary ex parte statement reduced to writing and sworn to or affirmed before someone legally authorized to administer an oath or affirmation."

Neither of the attached documents were under oath, so neither can be considered an affidavit. Furthermore, Respondent's Memorandum was not a motion within the meaning of U.R.C.P. Rule 6, and its provisions, therefore, do not apply. Thus, there was no requirement of pre-hearing submission of the documents and there was no error committed.

POINT III

THE DEFAULT JUDGMENT SHOULD BE AFFIRMED, INCLUDING THE FINAL JUDGMENT AMOUNT OF THE LOWER COURT.

47 Am Jur 2d Judgments §1210 states that:

> " . . . a judgment by default is conclusive, not only as to the validity of the cause of action forming the basis of the recovery, but also of the amount of the defendant's liability on the cause of action."

(See Epstein v. Chatham Park, Inc., (Del.) 193 A.2d 180; Sidensparker v. Sidensparker, 52 Me 481; Candee v. Lord, 2 NY 269.) Therefore, the judgment amount set by the lower

Court should be affirmed without remand.

Appellant submits Pitts (supra) and J.P.W. Enterprises Inc. v. Naef, (Ut.) 604 P.2d 486 (1979) as supportive of the position that this Court should remand to the lower Court for a determination of the amount of the child support that should be paid by Appellant. The cited cases can be easily distinguished from the present case on the basis of their facts. The two cases cited dealt with damage amounts that were very difficult to measure or substantiate and therefore necessitated a subsequent hearing to take evidence on the amount of damages that should be paid.

In the present case, the damages (State child support expenditures) are easily ascertained. The State has the authority to seek full reimbursement of the amount expended on behalf of the Appellant's child and this amount is easily discerned from public records. Therefore, the amount expended or to be expended on Appellant's child does not require a great deal of evidentiary intake and the amount of damage is not nebulous enough to require a remand under the holdings of Pitts and J.P.W. Enterprises.

By its nature, a default hearing requires no evidence with regard to the amount of damages where the damages requested are specific. The amount prayed for in a Complaint is routinely accepted as the correct amount. Furthermore, the Appellant failed to bring the question of the amount of child support before the lower Court. In fact, this is the first

time the issue of amount of damages has been raised as an issue by Appellant. Since this is an appeal, Appellant should not be permitted to raise an issue which has not been brought before the lower Court.

The appropriate remedy for the Appellant on this issue would be to file a Petition for Modification of the Support Order rather than to seek a remand to reopen the default judgment.

CONCLUSION

For the above stated reasons, Respondent respectfully asks this Court to affirm the judgment of the lower Court.

Respectfully submitted,

TED CANNON
Salt Lake County Attorney

JEFFERY H. THORPE
Deputy County Attorney

MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Brief of Respondents to Steven L. Hansen, attorney for the Appellant, at 4872 Poplar Street, Murray, Utah 84107 on this 10 day of November, 1982.

Secretary