1983

Doris Starzel and State of Utah v. Johnny Jaramillo : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DORIS STARZEL and STATE OF UTAH, by and through Office of Recovery Services, State Department of Social Services, Plaintiffs-Respondents, vs. JOHNNY JARAMILLO, Defendant-Appellant.	Case No. 18374

BRIEF OF RESPONDENTS

Appeal from the Judgment of the
Seventh Judicial District Court
Carbon County, State of Utah
Honorable Boyd Bunnell, Judge

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BRIEF OF RESPONDENTS

NATURE OF THE CASE

This is an action to establish that appellant, Johnny Jaramillo, is the father of Chad Starzel, who was born out of wedlock on August 20, 1977, and to establish appellant's past and ongoing child support obligation with respect to Chad Starzel.

DISPOSITION IN LOWER COURT

Default judgment was entered against appellant on March 11, 1982. Appellant's subsequent motion to set aside the default judgment was denied by the Honorable Boyd Bunnell on April 19, 1982.

RELIEF SOUGHT ON APPEAL

Respondents seek an affirmation of the trial court's judgment.

STATEMENT OF THE FACTS

This suit was begun by respondents in December of 1980. Appellant's attorney at that time, Walter R. Ellett, served appellant's answer on the Carbon County Attorney's Office on December 22, 1980. Respondents' first set of interrogatories was served upon appellant's attorney on May 20, 1980. It appears that Mr. Ellett provided appellant a copy of the interrogatories for his answer (Tr. 57). Appellant failed to answer respondents' interrogatories within the thirty (30) day time limit imposed by Rule 33(a) of the Utah Rules of Civil Procedure. Then Deputy Carbon County Attorney, Gene Strate, wrote Walter Ellett a letter on July 13, 1981, requesting an answer to respondents' interrogatories (Tr. 61). Another letter requesting a response to respondent interrogatories was set to Mr. Ellett by Mr. Strate on August 25, 1981 (Tr. 61). A third letter was sent to Mr. Ellett on September 17, 1981, by then Deputy Carbon County Attorney, Fred Howard. Mr. Howard requested that an answer to respondents' interrogatories be supplied immediately (Tr. 61). Mr. Ellett responded to Mr. Howard by letter dated September 23, 1981, and stated that he would be meeting with appellant personally to get his answers (Tr. 61, 62). No response was submitted so Mr. Howard wrote Mr. Ellett on

October 28, 1981, and advised Mr. Ellett that he intended to file a motion for sanctions if answers were not received within three (3) weeks (Tr. 62). A motion to compel discovery was filed with the trial court on November 30, 1981. An order giving appellant ten (10) days to answer respondents' interrogatories was entered by the court (Tr. 3). When appellant failed to answer respondents' interrogatories pursuant to the court's order, a motion to strike appellant's answer was filed. Notice of that motion was served upon Mr. Ellett on January 26, 1982 (Tr. 41). Mr. Ellett advised appellant by letter which appellant received on or about February 3, 1982, that he had received a motion to strike his answer and that it was imperative that appellant contact him, since a failure to answer respondents' interrogatories could result in action by the court adverse to appellant's interests (Tr. 57). Appellant then sought to hire another attorney (Tr. 57, 58). Hearing on respondents' motion was held February 23, 1982. Neither appellant or his attorney appeared. The court struck appellant's answer and authorized respondents to enter appellant's default. Default hearing was held on March 6, 1982, at which time appellant was found to be the father of Chad Starzel. Judgment to that effect was entered against appellant on March 11, 1982. A motion to set aside judgment was filed by appellant's new attorney, Phil Hansen, on March 23, 1982. An order denying appellant's motion to set aside judgment was entered by the court on April 19, 1982.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT BECAUSE APPELLANT FAILED TO SHOW EXCUSABLE NEGLECT.

Appellant's motion to set aside default judgment was made pursuant to Rule 60(b)(1) of the Utah Rules of Civil Procedure which reads as follows:

> On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; ... The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than three months after the judgment, order, or proceeding was entered or taken....

On its face Rule 60(b) makes it clear that the moving party must show "excusable neglect" which led to the judgment and that application for relief was made in a timely fashion. This court has recognized this two-fold approach to motions under Rule 60(b) or its statutory predecessors, Mayhew v. Standard Gilsonite Co., 14 Utah 2d 52, 376 P.2d 951 (1962).

Various policies and rules of review have been articulated by this court which are to be considered in deciding whether or not a judgment should be set aside for excusable neglect. Paramount among the rules which this court has employed in the past is the rule that the decision of the trial court regarding a motion to set aside judgment under Rule 60(b) will only be

disturbed on appeal for a manifest abuse of discretion, Heath v. Mower, Utah, 597 P.2d 855 (1979).

It is true, as appellant indicates in his brief, that this court has additionally advised liberality in construing the remedy provided by Rule 60(b) to the end that cases may be decided on their merits. But as the language in Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 741 (1953), indicates the policy of liberality is to be applied at the trial court level:

> The rule that the courts will incline toward granting relief to a party who has not had the opportunity to present his case is ordinarily applied at the trial court level, and this court will not reverse the trial court... merely because the motion could have been granted.

See also Airkem Intermountain, Inc. v. Parker, 30 Utah 2d 65, 513 P.2d 429 (1973).

The task of the trial court upon appellant's motion to set aside for "mistake, inadvertence or excusable neglect", besides determining whether appellant's motion was timely, was to review the facts and circumstances of the case to see if they supported appellant's claim of excusable neglect, Heath, supra.

The meaning of excusable neglect has been addressed by this court in Board of Education of the Granite School District v. Cox, 14 Utah 2d 385, 384 P.2d 806 (1963):

> It is an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification for the defendant's failure to appear and answer. However, the excuse must be reasonable to constitute excusable neglect. (emphasis added)

In addition this court has required that the moving party show he acted with due diligence and that he was prevented from appearing by circumstances over which he has no control, Peterson v. Crosier, 29 Utah 235, 81 P. 860 (1905); Helgesen v. Inyangumia, Utah, 636 P.2d 1079 (1981). Other jurisdictions have defined excusable neglect as neglect that might be expected on the part of a reasonably prudent person under the circumstances. Cleek v. Virginia Gold Mining & Milling Co., 63 Idaho 445, 122 P.2d 232 (1942

With regard to the showing appellant has made, it should be noted at the outset that appellant makes no claim, either in his motion and affidavit to set aside judgment, or in his brief, that surprise of any kind justifies opening the judgment of the trial court. Indeed, after a review of appellant's motion to set aside default judgment, his affidavit in support of his motion and his brief, the only language that can be found that appears to suggest a factual basis for appellant's motion is as follows:

> Appellant also presents a reasonable justification for setting aside the default judgment.... Appellant should not be judged by his former counsel's apparent neglect in getting answers to the interrogatories.... (Appellant's brief at 6.)

The allegation does not seem to be one of mistake or inadvertence, but rather that Mr. Ellett, appellant's first attorney,

was negligent in failing to provide respondents with answers to their interrogatories, and that counsel's negligence should not be imputed to appellant. Though appellant makes no claim that Mr. Ellett's alleged negligence was excusable, the implication is clear that appellant's failure to respond to interrogatories, and ultimately his failure to appear for trial, was excusable neglect due to his attorney's actions. Whether appellant relies on his own neglect, or the alleged neglect of Mr. Ellett, he must show that the neglect was excusable, Peterson, supra.

The trial court obviously decided that whatever neglect existed was inexcusable. The record in this case supports that finding. In addition, the record supports the proposition that if there was inexcusable neglect in this case it was very likely appellant's neglect and not that of Mr. Ellett. The second paragraph of appellant's affidavit in support of his motion to set aside states:

> That on or about the 3rd day of February, 1982, [appellant] received a letter from his counsel of record, Walter R. Ellett, informing him that Mr. Ellett was in receipt of a motion to strike his answer [in the case before the court] because the interrogatories that had previously been sent to him had not been answered. Mr. Ellett also informed him that it was imperative that he contact him, since a failure to respond to the interrogatories could result in the court entering an order that may not be to his best interest. (Tr. 57)

Appellant's affidavit clearly shows that Mr. Ellett advised appellant of the urgency of answering respondents' interrogatories at least one month before default judgment was taken. It

also leads one to believe that Mr. Ellett had previously provided appellant with respondents' interrogatories for his answer. It should be pointed out that nowhere in the record presently before the court does appellant allege that Mr. Ellett failed to provide him with respondents' interrogatories or that he attempted to answer those interrogatories, or that Mr. Ellett failed to advise him of the importance of answering those interrogatories. As has been indicated, the contrary appears.

Appellant's brief, likewise, fails to state any strong justification for appellant's neglect of this case. Appellant tries to lay the blame for his failure to respond to respondents' interrogatories at the feet of Walter Ellett. Mr. Ellett's actions are weakly characterized in appellant's brief as "apparent neglect.' And as if to retract the allegation of neglect on Mr. Ellett's part, appellant's brief then says:

> Present counsel feels it is inappropriate to emphasize the acts of prior counsel as an excuse for any delays, and would rather emphasize the pursuit with which present counsel has handled the case on appeal.... (Appellant's brief at 7.)

Respondents do not contend that appellant's motion was untimely -- respondents' position is that appellant has completely failed to show facts that amount to "excusable neglect". Appellant's actions, in light of the warning sent to him February 3, 1982, by Walter Ellett, were totally unreasonable. Instead of answering Mr. Ellett, he chose to ignore

his letter and hire new counsel. The trial court was completely justified in finding appellant's neglect inexcusable. This court's statement in Warren is applicable to the case now before the court:

> In order for this court to overturn the discretion of the lower court in refusing to vacate a valid judgment, the requirements of public policy demand more than a mere statement that a person did not have his day in court when full opportunity for a fair hearing was afforded to him or his legal representative.

Appellant was given more than ample time to answer respondents' interrogatories, and fair warning by his own attorney of the consequences of his failure to do so. Appellant obviously could have prevented default judgment at any time prior to judgment by simply responding to Walter Ellett's letter or the interrogatories Mr. Ellett sent him. He should not be heard to complain now that the trial court abused its discretion in failing to grant his motion to set aside judgment.

CONCLUSION

Respondents are entitled to retain the benefits of a great deal of time and effort that went into obtaining a judgment against appellant unless he has shown that the trial court abused its discretion in not granting his motion. The record is devoid of any showing by appellant that his neglect of this case was reasonable, or that he acted with due diligence,

or that he acted as a reasonable person would in the same circumstances. The record does show that respondent requested answers to their interrogatories at least four times and that appellant had in excess of eight months to answer but failed to do so. Appellant's failure to answer interrogatories or appear at trial was inexcusable and the judgment of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 24th day of March, 1983.

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Attorney for Respondents

By Randy A. Hudson
RANDY A. HUDSON
Chief Deputy County Attorney

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing Brief of Respondents were served this 24th day of March, 1983, on the office of Phil L. Hansen, Hansen and Hansen, 800 Boston Building, Salt Lake City, Utah 84111.

Colleen Peterson