1965

John B. Garside and Betty B. Garside v. De Loyd Hillstead : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN B. GARSIDE and
BETTY B. GARSIDE,
Plaintiffs and Respondents,

vs.

DE LOYD HILLSTEAD,
Defendant and Appellant.

Case No. 10364

RESPONDENTS' BRIEF

Appeal from the Order of the Third District Court for Salt Lake County, Honorable Marcellus K. Snow, District Judge

Ronald C. Barker
Attorney for Plaintiffs and Appellants, 2870 South State Street, Salt Lake City, Utah

KIPP AND CHARLIER
Tel Charlier, Esq.
Attorney for Defendant and Appellant
520 Boston Building
Salt Lake City, Utah

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

AUTHORITIES CITED

TABLE OF CONTENTS (Continued)

Page

TABLE OF CONTENTS (Continued)

RULES CITED

STATUTES CITED

TEXTS CITED

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STATEMENT OF THE KIND OF CASE

Appeal limited by order of this Court to sole issue of whether Court abused its descretion in denying motion to set aside judgment by default for damages from auto accident after service in accordance with Utah Non-Resident Motorist Statute.

DISPOSITION IN LOWER COURT

Defendant appeals alleging abuse of discretion in denying his motion to set aside default judgment.

RELIEF SOUGH ON APPEAL

Plaintiffs submit that the Court did not abuse its discretion in denying Defendant's motion, accordingly the order denying that motion should be affirmed.

STATEMENT OF FACTS

The statement of facts submitted by Defendant in his brief is largely unsupported by the record and therefore cannot be considered by the Court. Rule 75 (p) (2) (2) (d), URCP. The material facts as shown by the record are as follows:

On August 12, 1961, the Defendant drove his automobile into the rear of the automobile occupied by the Plaintiffs and owned by Plaintiff John B. Garside causing extensive damage to the automobile and injury to the occupants. (R.10-15). Plaintiffs underwent extensive treatment for a long period of time for their injuries which ultimately resulted in the late Dr. Snow performing surgery on Betty Garside's neck and John Garside's knee cap, and in permanent partial disability to Plaintiffs. (R. 12-14) Plaintiffs were unable to determine the extent of their injuries for a long period of time while they underwent various treatments (R. 12-14) and accordingly waited until the extent of the injuries were determined to file this action.

Jurisdiction over the Defendant was obtained in strict compliance with the Utah Non-resident motor vehicle statute (41-12-8, UCA, 1953 and related statutes) (R. 4-6D) and after hearing testimony from both Plaintiffs and from the late Dr. Burke McArthur Snow, (R. 7) an Orthopedic Surgeon who treated and performed surgery upon both Plaintiffs, Judge Marcellus K. Snow on November 10, 1964, granted judgment (R. 7-8) for a sum substantially smaller than prayed for in Plaintiffs' complaint (R. 2-3). Doctor Snow was killed in an airplane crash shortly after he testified in this matter.

Defendant claims in his brief (P. 3) that he did not receive a copy of the summons and complaint and that his first notice of the judgment was a letter sent to Defendant January 1, 1965, (although these alleged facts do not appear in the record before the court) and that he acted promptly in filing his motion to set aside the judg-

ment (Defendant's brief P. 3, 10) although the motion was not filed until February 26, 1965. (R. 18) Judge Snow denied Defendant's motion (R. 20) and Defendant appealed to this Court (R. 21). The appeal was limited to the question of alleged abuse of discretion by Judge Snow in a hearing before this court on Plaintiff's motion to dismiss the appeal. A substantial portion of Defendant's brief is devoted to a discussion of the non-resident motor vehicle statute and to other matters outside of the scope of this appeal.

ARGUMENT

POINT I

JUDGE SNOW'S ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE PLAINTIFFS' JUDGEMENT SHOULD BE AFFIRMED

This Court limited the issues in this appeal to the " . . . question of denial of motion to set aside default judgment." (See order of July 23, 1965). Judge Snow properly denied Defendant's motion to set aside the default judgment awarded in favor of Plaintiffs and his order should be affirmed by this Court. Arguments raised by Defendant are discussed as follows:

(a) *Questions of mistake, inadvertance, surprise or excusable neglect are not before the Court.* Rule 60(b) quoted by Defendant in his brief (P. 4-5) limits the time within which a motion to set aside a judgment on grounds specified in sub-paragraph (4) of mistake, inadvertance, surprise, excusable neglect or the other grounds specified in sub-paragraphs (1) through (4) to three months after the judgment was taken. Defendant ac-

knowledges that he had actual notice of the judgment over a month before the expiration of the three month period within which time he could have filed a motion to set aside the judgment on said grounds, (R. 3) but Defendant failed to file his motion until after the three month period had expired. Sub-paragraph (7) of that rule which is also relied upon by Defendant in his brief (P. 5) contains no time limit within which a motion to set aside a judgment may be filed. Sub-paragraph (7) of Rule 60(b) permits the Court to set aside a judgment for " . . . any other reason justifying relief from the operation of the judgment." The words "other reason" used in that subdivision following the specific enumerations contained in the other six sub-paragraphs excludes consideration of the grounds enumerated in the preceding sub-paragraphs. Accordingly, the issues of mistake, inadvertance, surprise, or excusable neglect urged by the Defendant as reason for setting aside the judgment cannot be considered by the Court. Defendant's argument in support of his motion to set aside the judgment is largely based upon subdivision (4) of Rule 60(b) and in essence contends that the judgment should be set aside unless Defendant is guilty of "inexcusable neglect." (Brief P. 4-10) However, the rule and cases clearly show that the burden is upon the Defendant to establish that he is entitled to the relief requested, and that the burden is not on the Plaintiff to show that Defendant is in fact guilty of "inexcusable neglect" even in instances where that is properly an issue before the court (and this is not an issue in our case since the motion was filed too late).

(b) *Application to set aside judgment was not made timely.* A copy of the summons and complaint were mailed to Defendant September 12, 1964, at the address furnished by him at the time of the accident, which address was the last address of Defendant known to Plaintiffs. (R. 4-5) Defendant failed to appear and answer and on October 6, 1964, after hearing sworn testimony from both Plaintiffs and from the late Dr. Snow, the Orthopedic physician who treated and performed surgery upon both Plaintiffs, Judge Snow granted judgment. (R. 7-15) The judgment was actually entered November 10, 1964. (R. 7) Defendant filed his motion to set aside Plaintiffs' judgment February 26, 1965. (R. 18)

Defendant claims that the reason for the " . . . time lapse between the granting of the judgment and Defendant's motion to have it set aside" (brief P. 10) was the alleged " . . . conduct of Plaintiffs and their counsel in delaying two months before sending Defendant a letter advising of the default judgment . . . " If we accept Defendant's gratuitous statement (unsupported by the record before the court) that Defendant received a letter about January 1, 1965, advising him of the judgment and that he immediately notified his insurance carrier (Brief P. 3), the facts are as follows:

(1) Approximately 52 *days* passed after the date of entry of judgment to the date that Defendant received notice of that judgment.

(2) Approximately 56 *days* passed after the date Defendant was notified of the judgment to the date upon which Defendant filed his motion to set aside the judgment.

(3) Defendant had approximately 40 days within which to file his motion to set aside the default judgment after he learned of the judgment and before the expiration of the three month limit specified by Rule 60(b).

The cases are uniform in requiring that the moving party show that he has used due diligence and made timely application to set aside the judgment. Mayhew v. Standard Gilsonite Company et al., 260 P.2d 741; Peterson v. Crozier, 29 U. 235, 81 P. 860. It appears, from Defendant's brief (P. 3) that Defendant's insurance carrier is the real party in interest and it is not a resident of California and cannot claim that the distance between Utah and California caused delay in filing of their motion to set aside the judgment. From the foregoing facts it is rather obvious that the Defendant and his insurance carrier did not use due diligence or make timely application after they learned of the judgment.

(c) *Defendant was not entitled to notice of judgment.*

Defendant complains at length (Brief P. 3) that he had no notice of the lawsuit or of the judgment until about January 1, 1965, when they allegedly received a letter from Plaintiffs' attorney at an address different from the address to which the original summons and complaint were mailed (Brief P. 3), however, there is absolutely nothing in the record before the Court to support Defendant's claim that they had no notice of the suit or judgment except the unverified bare statement of counsel contained in Defendant's motion to set aside Plaintiffs' judgment (R. 18). There is absolutely nothing in the record to support the allegation made by Defendant in his brief (P. 3) that the notice of judgment was mailed

to a different address from the address to which the summons and complaint were mailed (R. 4-5). Plaintiffs were not required by law to give Defendant any notices except the mailing of the summons and complaint. (R. 4-5). Rule 55(a)(2), URCP provides in part as follows:

> "*Notice to Party in Default.* After the entry of the default of any party, as provided in subdivision (a)(1) of this rule, *it shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these rules to be served* on a party to the action or proceeding . . . " (emphasis added)

(d) *Actual receipt of summons and complaint by Defendant is not required under Utah Non-Resident Motorist Statute.* The pertinent provisions of 41-12-8, UCA, 1953, are quoted in Defendant's brief (P. 11). The only requirements of this statute, to obtain jurisdiction over a non-resident operator of a motor vehicle who is involved in an accident in Utah, are:

(1) Service of process upon the Secretary of State.

(2) *Mail* notice of such service and a copy of the process to the non-resident motorist at his last known address within 10 days after such service. (emphasis added).

The Utah Statute is unique in that there is no requirement that the notice be sent by registered mail or that any other means be used to determine whether the non-resident motorist actually received the notice. Our statute expressly negatives the requirement of actual notice and states that " . . . such service shall be sufficient service . . . " if the two foregoing requirements are fulfilled.

The non-resident motorist statutes of most other states require that notice be sent by registered mail and many require that proof of actual receipt by the non-resident motorist be filed with the Court. Generally the Courts have held that a requirement that a notice be sent by registered mail is not a requirement that the notice actually be received by the non-resident. See annotation at 95 ALR2d 1036, etc. Certainly our statute which permits mailing by ordinary mail contains no requirement that the notice be actually received by the non-resident motorist. To rule otherwise would enable a non-resident defendant to evade service of process by simply giving a false address or by moving from the address given to law officers and injured persons without leaving a forwarding address. Conner v. Miller, 154 Ohio St. 313, 43 Ohio Ops 212, 96 NE2d 13, Williams v. Egan, (1957 Okla) 308 P.2d 273, 95 ALR2d 1036.

If the legislature had intended that actual notice to a non-resident motorist were required to obtain jurisdiction that requirement would have been included in the statute. Our case is substantially different from the possible oppressive situation contemplated in the separate concerring opinion of Justice Henroid in Teague v District Court, 4 U.2d 147, 289 P.2d 331, 53 ALR2d 1159 where it is suggested that a person might deliberately refrain from serving summons during a period while he had ample opportunity to do so, then assert an unmeritorious case when he was sure that the other party was far away and unable to protect himself. In our situation there is no evidence that the non-resident Defendant remained in the State of Utah for any period of time or

that Plaintiffs had a reasonable opportunity to serve him while he was in Utah. The reasons for delay in filing the suit are readily explained by the extensive treatment required to determine the extent of the injuries (R. 12-14) and Defendant's insurance company was available to protect its interests. Our case is precisely the type of situation contemplated by the legislature when it enacted the non-resident motorist statute and, having fully complied with the requirements of that statute, the Plaintiffs are entitled to retain and enforce their judgment.

A situation similar to non-resident motor vehicle statute has long existed in the case of service of summons upon process agent of a foreign corporation with no actual notice of the suit being conveyed to the corporation until after entry of judgment by default. The courts have been quite uniform in denying relief to the foreign corporation simply because it failed to learn of the lawsuit in sufficient time to appear and defend. 20 ALR2d 1186, 1189, Humphreys v. Idaho Gold Mines Development Co., 21 Ida 126, 120 P. 823, 40 LRA NS 817.

(e) *Setting aside Plaintiffs' judgment would be inequitable under the circumstances.* Setting aside a judgment is an equitable matter. Equity will not intervene when the result would be inequitable to the other party. Cutler v. Haycock, 32 U. 354, 90 P. 897; Chrysler v. Chrysler, 5 U. (2d) 415, 303 P. 2d 995; Masters v. LeSeuer, 13 U.(2d) 293, 373 P.2d 573. The trial court is endowed with considerable discretion in granting or denying a motion to set aside a default judgment. Mayhew v. Standard Gilsonite Co., 14 U. (2d) 52, 376 P.2d 951. Where the trial court has ruled on a motion to vacate a

judgment the Supreme Court will reverse the trial court only where an abuse of discretion is clearly shown and where all elements were considered by the trial court. The Supreme Court will not reverse the trial court merely because the motion could have been granted. Warren v. Dixon Ranch Co., 123 U. 416, 260 P. 2d 741, 744; Aaron v. Holmes, 35 U. 49, 99 P. 450.

Some of the reasons why it would be inequitable to the Plaintiffs for the Court to set aside their judgment are as follows:

(1) Dr. Burke McArthur Snow, M.D. an Orthopedic Surgeon who treated and performed surgery upon both Plaintiffs is now dead and unavailable to testify.

(2) Defendant delayed these proceedings by sleeping on his rights after learning of the judgment while sufficient time remained for him to make timely application to set aside the judgment and has further delayed Plaintiffs by filing an untimely appeal. It has been over 4 years since Defendant caused the injuries and damages for which recovery is sought in this action and Plaintiffs have received nothing to assist them with payment of those damages. Defendant and his insurance carrier well knew that the accident had occurred, that Plaintiffs had suffered serious injuries therefrom and that Plaintiffs were unwilling to settle and were delaying filing a lawsuit until the extent of their injuries could be determined. Defendant does not come before the court with "clean hands" and accordingly is not entitled to equitable relief.

(3) Judge Snow heard the evidence from the late Dr. Snow, heard the testimony of the Plaintiffs and was "fully advised" (R. 7) when he granted judgment in

favor of Plaintiffs and against Defendant for an amount which seems extremely small in view of the extended period of treatment, the seriousness of the injuries, the surgical procedures required and yet to be required, the partial disability resulting from the injuries and the other factors well known to Judge Snow when he determined the amount of the judgment to be awarded. The accident was a rear end collision and the question of liability is clear. No good purpose could be accomplished by granting a new trial. The appellant has not included a transcript of the arguments made before Judge Snow in support of his motion to vacate the judgment, or of the testimony taken by Judge Snow at the time the judgment was granted, therefore this Court would be simply guessing if it attempted to determine the equities of Defendant's case from the record now before the Court.

(f) *No abuse of discretion by Judge Snow has been shown.* Whether a default judgment should be set aside, and the party aggrieved given opportunity to plead to merits, is a question that rests within the sound discretion of the Court; and unless it is made to appear that this discretion has been abused, rulings of trial court on matter of this kind will not be disturbed on appeal. Aaron v. Holmes, 35 U. 49, 99 P. 450, Mayhew v. Standard Gilsonite Co., 14 U. (2d) 52, 376 P. 2d 951, Warren v. Dixon Ranch Co., 123 U. 416, 260 P.2d 741, 742.

POINT II
DEFENDANT HAS FAILED TO PERFECT HIS APPEAL

Rules 72 and 73, URCP, provide that an appeal may be taken from " . . . all final judgments . . . " *within* " . . .

one month from the entry of the judgment appealed from . . . " No notice of appeal was filed after the entry of the order denying Defendant's motion to set aside the Plaintiffs' judgment in this case. Rule 73(b) requires that the notice of appeal designate the judgment or part thereof appealed from. The purported notice of appeal filed in this matter by Defendant was filed April 19, 1965, a full 7 days before the entry on April 26, 1965, of the order denying Defendant's motion. A purported appeal from a non-existent order cannot confer jurisdiction upon this Court.

The time prescribed by said rules for filing an appeal is jurisdictional Allen v. Garner, 45 U. 39, 143 P. 228, Sorenson v. Korsgaard, 83 U. 177, 27 P. 2d 439. An appeal will be dismissed when not taken within the time allowed Blyth & Fargo Co. v. Swenson, 15 U. 345, 49 P. 1027. An appeal which was not taken within prescribed period after entry of judgment is ineffectual. Henderson v. Barnes, 27 U. 348, 75 P. 759. In the case of a belated entry of a judgment, the time within which an appeal may be taken runs from the actual entry of the judgment and such entry, for the purposes of an appeal, may not be considered as nunc pro tunc entry. Lukich v. Utah Construction Co., 48 U. 452, 160 P. 270. In discussing the period included in the one month period during which an appeal can be taken from the entry of the judgment, this Court stated that such month commences at the beginning of the day of the month on which it starts and ends at the expiration of the day before the same day of the next month, and that if it commenced on the 23rd day of a month that it would end at the expiration of the 22nd day of the following month. In re Lynch's Estate, 123 U.

57, 254 P. 2d 454. In Allred v. Wood, 72 U. 427, 270 P. 1089 this Court held that when a decree is entered under Code 1953, 30-3-6, it is final for the purposes of an appeal, and the six-month period prescribed by this section begins to run *from* that time. In Fausett v. General Electric Contracts Corp, 112 P. 2d 140, 100 U 259, 144 P. 2d 205, 100 U. 265 this Court in considering a motion to dismiss an alleged pre-mature appeal which was filed after denial of motion for a new trial and before a motion to re-tax costs was argued, seemed to recognize that if the appeal were in fact pre-mature that it should be dismissed, but held that since inclusion of cost did not affect the finality of a judgment that the appeal was not in fact premature.

The rule seems to be well settled that the Supreme Court is without jurisdiction to hear a pre-mature appeal. 4 Am Jur 2d 301, 302. Some of the cases which have considered this matter are as follows:

The want of jurisdiction in the Supreme Court over a pre-mature appeal is absolute, and the defect cannot be waived since consent cannot confer jurisdiction. Phillips v. Phillips, 264 P. 2d 926, 41 Cal. 2d 869, Wells v. State (Fla) 38 So. 2d 464, Re Pringle, 51 Wyo 352, 67 P.2d 204, 110 ALR 987.

Generally, an appellant court is without jurisdiction over an appeal taken before the date of entry of judgment and where notice of appeal was filed with superior court prior to filing of judgment, appeal would be dismissed as premature.

Consolidated Stage Co. v. Corp. Commission, 182 P. 2d 937, 66 Ariz. 75.

An appeal may be premature when the order appealed from, although dispositive of the issues, has not been formally entered in final form. Brown v. Adler, 282 Mich. 264, 276 NW 442, West v. Lysle, 302 Pa 147, 153 A 131.

A minute entry order dismissing Plaintiffs' complaint was not a "judgment" from which an appeal could be taken and an appeal from such an order was pre-mature. Sproul v. Cuddy, 263 P. 2d 92, 121 C. A. 2d 197.

Plaintiffs' cross-assignment contending that trial court erred in granting a nonsuit as to one of the Defendant's was not properly before the Supreme Court on appeal where no final judgment had been entered as to such Defendant. Stucki v. Ellis, 201 P. 2d 486, 114 U. 486.

CONCLUSION

The Legislature enacted the statute providing for service of process upon a non-resident motorist who was involved in an accident while driving on the Utah Highways. Plaintiffs were injured by the Defendant who was then a non-resident motorist within the meaning of that statute and Plaintiffs recovered a modest judgment against Defendant by proceding strictly in accordance with requirements of that statute and presenting the testimony of a physician who is now dead. Defendant now asks that he be excused from the consequences of his inexcusable neglect in failing to make provision for the settlement of the damages that he had caused, his inexcusable neglect in not providing Plaintiffs with his current address and his inexcusable neglect in delaying approximately 52 days after he learned that a judgment had been entered before he filed a motion to set aside

Plaintiffs' judgment under the circumstances would be to read an actual notice requirement into the non-resident motorist statute in which the legislature saw fit not to require actual notice to the non-resident. Judge Snow heard the witnesses and evidence before he entered judgment and exercised his discretion by refusing to set aside the judgment after leaving extensive argument in support of Defendant's motion. The discretion of this Court should not be substituted for the discretion vested in the trial court. Judge Snow not only did not abuse his discretion but exercised it wisely after careful consideration of all of the facts. Defendant did not see fit to include in his record a transcript of the judgment hearing or of the hearing on his motion to set aside the judgment and he now asks this Court to believe that Judge Snow abused his discretion when the facts upon which Judge Snow based his decision are not even before this Court.

RESPECTFULLY SUBMITTED,

Ronald C. Barker
Attorney for Plaintiffs
2870 South State Street
Salt Lake City, Utah