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IN THE SUPREME COURT OF THE STATE OF UTAH

DORIS C. RUCKER Plaintiff-Respondent, -v- DALE E. RUCKER Defendant-Appellant.	Case No. 18991

BRIEF OF RESPONDENT

Appeal from Judgment and Decree and the adverse ruling on Appellant's Motion to set aside judgment of the Fourth Judicial District in and for Utah County

Honorable George E. Ballif, Judge

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FILED

JUN [illegible]

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE

STATE OF UTAH

DORIS C. RUCKER,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 18991
DALE E. RUCKER,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a judgment and decree and an adverse ruling on Appellant's Motion to Set Aside Judgment, in the Fourth Judicial District Court, in and for Utah County, the Honorable George E. Ballif presiding. This appeal is pursuant to Rule 72 of the Utah Rules of Civil Procedure.

DISPOSITION IN THE LOWER COURT

The court below entered a default judgment and decree of divorce in the case Rucker v. Rucker on November 18, 1981. Subsequently, the parties stipulated and agreed to set aside certain partiuclars but left intact the divorce decree. These particulars centered around child support, alimony and items of real and personal property that had been awarded to the Respondent.

This matter was resolved on December 23, 1982 where the lower court decreed that child support and real and personal property would be granted to the respondent. This decree was entered through a default judgment.

On January 5, 1983, the appellant moved the court to set aside the decree rendered on December 23, 1982. This Motion was denied on January 26, 1983.

RELIEF SOUGHT ON APPEAL

The respondent seeks to have this court affirm the lower court decision refusing to vacate a default judgment entered against the appellant, leaving intact the divorce decree and all particulars pertaining to the decree.

STATEMENT OF THE FACTS

On November 12, 1981, a divorce hearing was held in the Fourth Judicial District Court. The action was between the respondent-plaintiff and the appellant-defendant. The appellant was not present at the hearing and a default judgment was entered against him. The court awarded the respondent the decree of divorce and the terms prayed for in the complaint. (R.20, 28-30).

Subsequently, the parties, through their respective attorneys, agreed to a stipulation of certain particulars leaving intact the decree granting the divorce, custody of the couple's minor child and child support in the amount of $250.00 per month. This stipulation was initially refused by the court, but was granted on January 26, 1982 after an informal conference between the attorneys and the court. (R.31-33).

On November 12, 1982, the counsel for the appellant moved to withdraw from the case. The Motion was granted. The court advised the appellant to obtain new representation, and to allow time for this to be done, vacated the November 20, 1982 hearing date, setting it on January 5, 1983. (R.106). The departing counsel, Nick Collesides, then sent a letter to the appellant informing him of the trial date on January 5, 1983. (R.122).

After Mr. Collesides withdrew, the appellant contacted Wayne B. Watson for representation. Mr. Watson was unable to represent the appellant due to a court date on the same day as appellant's hearing. This information was passed on to the appellant by letter dated December 27, 1982, and received on or about December 29, 1982. This letter also stated that according to Mr. Watson's investigation, the January 5, 1983 trial date was still firm. (R.123).

In the meantime, it had been discovered that the January 5, 1983 trial date would conflict with the court calendar. The court had reset the trial date to December 22, 1982 and notice was sent to the counsel for the respondent and the appellant who at that time was pro se. The appellant states that notice of this change was not received (R.121) even though the notice was properly addressed. The respondent received the notice sent by the court.

While the opening statements of the court on the hearing date of December 22, 1982 show that there is a question as to the January 5, 1983 date appearing in the file, this shows no confusion--only the question of why this minute entry was in the file. When the clerk explained the reason that the January 5 trial date had been changed, the question was answered.

The December 22, 1982 hearing was not attended by the appellant. There is sworn testimony that states two witnesses saw the appellant receive the notice of the new trial date, and that the appellant's knowledge was assured through verbal confirmation in discussions with the respondent. (Tr.8-9). The court also heard testimony that the appellant was behind in alimony payments. Because of this, the respondent wished for jointly owned property which would provide rent income so reliance on alimony could be terminated.

The court entered a default judgment against the appellant, granting the respondent the relief she prayed for. This judgment was requested to be set aside by the appellant because the absence of the appellant was due to mistake, inadvertance, surprise or excusable neglect, and further, that he was prevented from appearing by the fraud, misrepresentation, or other misconduct of the respondent. (R.116). This Motion was denied by the court.

ARGUMENT

POINT I

THE TRIAL COURT MAINTAINS CONSIDERABLE DISCRETION IN DECIDING WHETHER TO GRANT OR DENY RELIEF FROM A DEFAULT JUDGMENT, AND SUCH DISCRETION REQUIRES CONSIDERATION OF THE TOTALITY OF THE CIRCUMSTANCES, ENTERTAINING BOTH LEGAL AND EQUITABLE FACTORS.

Rule 60(b) of the Utah Rules of Civil Procedure provides in pertinent part, that:

> On motion and upon such terms as are just, the court may in furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding....

This rule allows the court considerable latitude in denying or granting relief from a refusal to reopen a default judgment. By stressing that the court "may in the furtherance of justice," it is clear that the courts have the authority to resolve a conflict through the wise use of law and to temper the decision with equitable terms that are just. It is also clear that the court has complete discretion since it "may" grant relief, but it is not required to do so. To grant or deny relief is not to be based on the courts arbitrary whim, but is intended to be based on the mature reflection of the totality of the circumstances.

The most informative precedent concerning this appeal is Chrysler v. Chrysler, 303 P.2d 995, 5 Utah 2d 415 (1956). Chrysler dealt with a husband-

plaintiff who suffered a default judgment when he failed to appear at trial. When the husband moved the trial court for relief from the judgment under Rule 60(b), he was refused. On appeal, this court recognized that "it is generally regarded as an abuse of discretion for a trial court to refuse to vacate a default judgment where timely application is made...to the end that cases be decided on their merits." 303 P.2d at 996, 5 Utah 2d at 417. The court went on to say that in a usual situation the refusal would be an abuse of discretion, but the circumstances of Chrysler took it outside the parameters associated with a usual case. This court found that the husband did not have clean hands when he came before the trial court asking for relief, nor had he pursued his action in good faith. The instant case is very similar to Chrysler; there has been a refusal to vacate a default judgment under Rule 60(b) and because of this the appellant claims there has been an abuse of discretion on the part of the trial court.

The court in Chrysler cited several factors that it considered in denying relief under Rule 60(b). These factors included the failure of the husband to be present at an earlier Order to Show Cause hearing, his indifference to the divorce decree entered in Utah while he pursued a separate divorce action in Nevada, and his failure to personally appear before the court when his Motion to set aside the judgment was heard.

In the instant case, there have been repeated instances where the appellant has failed to voluntarily comply with court orders, forcing the respondent to resort to legal means to gain what would normally be expected voluntarily from from the appellant. Two instances are illustrative of the lack of good faith on the part of the appellant. The first concerns the original divorce decree issued on November 18, 1981. The appellant was not present at this important hearing nor was he represented by counsel resulting in a default judgment

against him. The second instance occurred when the respondent was forced to obtain a court order compelling the appellant to comply with a Motion for Discovery pursuant to Rule 37 of the Utah Rules of Civil Procedure.

Illustrative of the appellant's lack of clean hands is his conduct dire against the respondent and her son in September 1982. The appellant was cau turning off the gas to the respondent's house. When the gas was turned off, the pilot lights were extinguished, and when the gas was turned back on, the house filled with gas, creating a life-threatening environment. In order to avoid this hazardous situation, the respondent was forced to obtain an injunc tion which enjoined the appellant from turning off the gas, power or water.

In its decision, the Chrysler court stated, "(n)otwithstanding the policy of liberality in granting relief to persons against whom default judgments have been taken...it is not to be forgotten that Rule 60(b) under which such relief is granted states that the court may relieve a party from a final judgment in the 'furtherance of justice.' Manifestly the court should not follow the rule of indulgence toward the party in default when the effect would be to work an injustice or inequity upon the opposing party.
A prime requisite precedent to the granting of such relief is that the movant demonstrate that he comes to the court with clean hands and in good faith." 303 P.2d at 966, 5 Utah 2d at 418.

The instant case has been decided in favor of the respondent in November 1981, yet for the past two years the respondent has had to resort to legal action to obtain what is legally hers, each time tying up her time, energ and money. Surely to allow this case to continue on, especially when by doi so the party with clean hands, pursuing a good faith action, would be incon venienced, is unjust and inequitable. If this court were to analyze the

instant appeal considering only the law cited in the appellant's brief, it would be understandable if a decision were granted for the appellant. While the law cited by the appellant is good law, it is appropriate only as far as it goes, and in the instant case it does not go far enough. The analysis must go beyond pure legal means to invoke the equitable conscience of the court. Because this appellant has not shown good faith in his actions, and does not come before the court with clean hands, this court should follow the precedent established in Chrysler and affirm the lower court's decision denying relief under Rule 60(b).

In Warren v. Dixon Ranch Co., 260 P. 2d 741, 123 Utah 416 (1953), this court again upheld a lower court's refusal to vacate a default judgment through the use of Rule 60(b) of the Utah Rules of Civil Procedure. The Warren court decided that equitable issues must be considered, and if they prove sufficient they would offset the reopening of a default judgment allowing the case to be heard on the merits. Warren concerned a suit instituted to quiet title to land. Notice of the action was presented to a director and trustee of the defendant corporation. The director-trustee failed to notify the stockholders of the pending suit, and also failed to protect the interests of the corporation since it was not represented at trial and a default judgment was entered against it. The lower court refused a Rule 60(b) stockholder effort to have the default judgment reversed. The Warren court stated that "(e)quity considers factors which may be irrelevant in actions at law, such as the unfairness of a party's conduct, his delay in bringing or continuing the action, the hardship in granting or denying relief. Although an equity court no longer has complete discretion in granting or denying relief, it may exercise wide judicial discretion in weighing the factors of fairness and public convenience,

and this court on appeal will reverse the trial court only where an abuse of this discretion is clearly shown." 260 P.2d at 742, 123 Utah at 417.

The instant case presents equitable considerations for the court under each of the three categories mentioned in Warren: the unfairness of a party conduct, his delay in bringing or continuing the action and the hardship in granting or denying relief. Since the respondent has already had the ruling decided in her favor, it would be unfair for her to relitigate the decision being forced to chance losing what she has gained. As previously mentioned, the appellant's conduct does not warrant special considerations from the court. To reopen the litigation after it seemed to finally be at an end would be unfair, especially since there is sworn testimony stating that not only did the appellant receive notice of the trial date change but it was discussed on several occasions. (Tr. at 8 and 9). There have also been several instances of delay since the instant case was initiated. The most notable examples have been the default judgments that have been entered against the appellant, one of which was reopened by stipulation, one of which has resulted in this appeal. Another delay occurred when discovery was held up until the respondent obtained a court order to compel the appellant's cooperation in this fundamental matter. Throughout the two years of this litigation, other deadlines have also passed delaying the expected support that the respondent had been awarded in her divorce decree. These deadlines concerned her alimony and child payments. It seems clear that delay is part of the appellant's strategy and it should not be rewarded on this appeal. Finally, if this case is reopened it will result in a hardship to the respondent. First, she will again be frustrated in her quest to have the money needed to support herself. By delaying the termination of this litigation it lengthens the time before

the respondent can rest knowing she has enough income to sustain herself, it increases the likelihood that a much-needed operation can be taken care of before the appellant's insurance coverage ends (Tr. at 9) and it increases the expense of time, energy and money which has already been greatly expended in this two-year divorce action. Because of these hardships, this court should follow the precedent decided in Warren and not vacate the refusal of the lower court to allow Rule 60(b) relief from a final judgment.

In addition to the discretion that is made available to the trial court, there is a presumption that the decision made by that court is correct. In Warren, it was stated, "this court will not reverse the trial court where it appears...that all elements were considered, merely because the motion could have been granted. This court will not substitute its discretion for that of the trial court in a case such as this." 260 P.2d at 744, 123 Utah 423. Because the trial court has had the chance to view the evidence, question and scrutinize the witnesses and to personally view each party and how their strategy is laid out, this presumption of correctness is justified. Because the trial court in this case has seen its development during a two year period, it would be completely justified to place the proper faith in the analysis used in denying the Rule 60(b) Motion.

Finally, this court has held that "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. The movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control." Airkem Intermountain, Inc. v. Parker, 513 P.2d 429, 431, 30 Utah 2d 65, 68 (1973). Airkem concerned a defendant who suffered a default

judgment and was refused relief upon Motion of Rule 60(b). The facts that led to the judgment included the defendant's counsel who attempted to withd[illegible] from the case on the date of trial (which was disallowed) and the inability of the counsel and his client to communicate for 10 days prior to the trial [illegible] Because of this confusion no one appeared on the defendant's behalf at trial. This court ruled that the defendant should have been responsible for getting in touch with the attorney, and that the time period between when he was inform[illegible] of the approximate date of the trial and the date of trial provided plenty of opportunity and the failure to do so did not show reasonable diligence. The instant case would show due diligence in relying on the letters stating the January 5 court date if this was all that the appellant had to rely on. But as has been noted before, notice of the change was sent by the court clerk, such notice has been received according to sworn testimony and knowledge of the new trial date was confirmed through conversation. (Tr. at 8 and 9). Therefore, due diligence cannot be shown by the appellant and this court should follow the precedent set forth in Airkem and affirm the lower court's refusal to grant relief.

POINT II

CASES THAT HAVE REVERSED THE LOWER COURT DECISION TO REFUSE RULE 60(b) RELIEF ARE CASES THAT ARE CLEARLY DISTINGUISHABLE FROM THE INSTANT CASE OR THOSE PREVIOUSLY CITED.

The appellant has point out that there are several instances where this court has not allowed a trial court refusal of a Rule 60(b) Motion to stand. These cases have not required this court to analyze the equitable factors and thus are the usual cases that Rule 60(b) was designed for, not the unusual cases where the totality of the circumstances had to be considered.

In Mayhew v. Standard Gilsonite Company, 376 P.2d 951, 14 Utah 2d 52 (1962), this court stated that the "situation is patently one of the very kind for which Rule 60(b) was designed to grant relief." 376 P.2d at 953, 14 Utah 2d at 55. In Mayhew, summons were presented to a man that had resigned as an officer of the corporation and thus had no authority to accept the summons or to commit the corporation to litigation. Because of the resulting confusion, and because the defendant-corporation had not tried to avoid the litigation, this court ordered the lower court refusal under Rule 60(b) to be vacated. Mayhew presented no evidence of delay, of unclean hands or lack of good faith on the part of the corporation and thus it is a usual case mentioned in Chrysler that would require the court to grant the Rule 60(b) Motion. Because the instant case provides circumstances of delay, bad faith and unclean hands, it must be analyzed through both legal and equitable factors.

Central Finance Company v. Kynaston, 452 P.2d 316, 22 Utah 2d 284 (1969) represents a case that was remanded to determine whether proper notice was provided to the defendant's counsel persuant to Rule 11 of the Rules of Practice of the Second Judicial District. Because the defendant's counsel was not present at the pretrial hearing when the court date was set, Rule 11 establishes that notice be immediately provided to the absent counsel by the clerk. Confusion arose whether this notice was properly made and the case was remanded to determine this question. In the instant case, the court has taken note that appellant, acting pro se on the date of mailing, was provided notice of the change in court dates. Since there is sworn testimony stating that the appellant received the trial change notice, and had made plans to be present at this new date the instant case need not be remanded. The Central Finance Company court left the impression that if there was no notice provided,

the case should be reversed; but if the notice had been given then the case should remain as decided by the lower court. Because of the facts in the instant case, this would lead to the lower court's decision to be upheld.

In Interstate Excavating v. Agla Development, 611 P.2d 369 (1980), the defendant suffered the withdrawal of his attorney. Upon this attorney's withdrawal, he mailed his ex-client notice of the upcoming trial date. The plaintiff's attorney also mailed notice of the trial date to the defendant. The defendant nor a representative, appeared at trial. Upon notification that a default judgment had been entered against him, the defendant contacted a new attorney and moved, in a timely manner, for Rule 60(b) relief claiming he never received notice of the trial date. The trial court was forced to weigh the knowledge that notice was sent to the defendant and his claim that he never received the notice. The trial court refused to vacate the default judgment and the case was appealed to this court, where because of the doubt of whether notice was received justified allowing the lower court decision to be set aside.

The instant case is similar to Interstate Excavating because the trial court has taken note that notice of the change in the trial date was properly mailed to the appellant, but he claims that he never received the notice. But there is one crucial difference between the cases: whether witnesses testified that the defendant (appellant) received the notice. In Interstate Excavating, there is no testimony stating that the notice was received but in the instant case, there is testimony stating that two witnesses saw the notice received. Again, there were no circumstances, as there are in the present case, that would require the equitable conscience of this court to be invoked.

The case of Helgeson v. Inyangumia, 636 P.2d 1079 (1981) states the problems that have arisen from the lack of professional courtesy on the part of counsel for the plaintiff. The plaintiff had suffered injuries in two separate accidents, and his counsel began negotiating with an insurance adjuster in order to settle the claims out of court. The plaintiff's attorney stated he would negotiate until the response date set for the complaint. The deadline passed without response from the adjuster and the attorney submitted the case to trial without notice to the adjuster resulting in a default judgment. The insurance company moved for Rule 60(b) relief but was denied. On appeal, this court held that the refusal was an abuse of discretion because "(t)he attorney was well aware that the adjuster and his company contested the amount sought by the plaintiff. With that knowledge, he must have expected that where he filed the lawsuits, the insurance comapny would defend them." 636 P.2d at 1081. And when the plaintiff's attorney entered the case for default without contacting the adjuster, especially when the adjuster was waiting on information from the attorney, this court felt this provided grounds for reopening the case and therefore an abuse of discretion by the lower court. In the instant case, there has been no reliance by the appellant on respondent's promises that has led to the default judgment. In fact, the promises that have been made concerning the trial have been made by the appellant (Tr. at 9).

It is also evident that equitable circumstances arose in Helgesen when the case was submitted for default judgment without notice. This court took the totality of the circumstances in account and found against the party that had committed the inequitable act, allowing the case to be reopened to provide justice to the injured defendant. In the instant case, this court should also take the total situation into account and resolve its decision against the

party that has committed inequitable acts, the appellant, and allow the lower decision to be affirmed.

This court determined the question of whether Rule 60(b) should allow an appeal on a judgment after five years, or in the alternative whether a new action could be initiated in Mendenhall v. Kingston, 610 P.2d 1287 (1980). This court first addressed itself to dictum praising the virtues of Rule 60(b) before deciding that the appeal was not timely and that the initiation of the new action would be barred by res judicata. This court did not address itself to any pertinent matters that would be of further help in the decision to the instant appeal.

In State in Interest of Summers Children v. Wulffenstein, 560 P.2d 331 (1977), this court decided that an incarcerated father, who had not provided additional information in three previous hearings, could not claim an abuse of discretion when he was not allowed a new hearing to present his "wishes" and "hopes" for his children rather than concrete information on his parental plans. This court summarized its findings by stating "(s)ince appellant's absence was a circumstance of his own volition, the...determination was not an abuse of discretion." 560 P.2d at 335. If this court finds that this appellant was absent as a circumstance of his volition, it should also find that the lower court decision was not an abuse of discretion.

The instant case presents equitable considerations that requires analysis that goes beyond the superficial question of whether the lower court refusal to grant relief under Rule 60(b) can be reversed, to whether such relief should be granted in this particular situation. Because this appellant has not pursued his defense in good faith, nor come before the court with clean hands, it is respectfully submitted that the lower court decision be affirmed.

This affirmation will provide justice to both parties, will terminate the litigation for once and for all. If the case were remanded, the same decision would probably be reached because the appellant is not, and does not plan to pay alimony. An affirmation of the lower court refusal will alleviate further waste of time, energy and money.

CONCLUSION

Since the lower court is empowered with considerable discretion, and has obviously weighed the legal and equitable factors involved in this case, the decision reached upon the Rule 60(b) Motion is just and fair and should not be reversed. For this reason, the respondent respectfully requests that this court affirm the judgment below.

Respectfully Submitted,

Richard L. Maxfield
Attorney for Respondent

MAILING CERTIFICATE

Mailed 2 copies of the foregoing Brief of Respondent to W. Andrew McCullough, Attorney for Appellant, 930 South State Street, Suite 10, Orem, Utah 84057, this _____ day of June, 1983.

____

APPENDIX

Rule 72 of the Utah Rules of Civil Procedure provides in pertinent part:

> (a) From Final (Orders and) Judgments. An appeal may be taken to the Supreme Court from all final orders and judgments, in accordance with these rules....