1983

John D. Dove, Jr. v. Howard Cude And Etta May Cude : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

[illegible] DOVE, JR.,

Plaintiff/Respondent,

No. 19294

[illegible] PTTA [illegible]
[illegible],

Defendants Appellants.

RESPONDENT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE SEVENTH
JUDICIAL DISTRICT COUPT FOR DUCHESNE COUNTY
HONORABLE RICHARD C. DAVIDSON

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TABLE OF CASES

STATUTES AND RULES

AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

[illegible], JR., :

[illegible] Respondent, :

: No. 19294

[illegible] :

[illegible], :

[illegible] Appellants. :

RESPONDENT'S BRIEF

NATURE OF THE CASE

[illegible] Plaintiff obtained a default judgment against [illegible], whose names were erroneously spelled Cudd instead [illegible] the sum of $2,131.00 on June 8, 1981. (R. 19) [illegible] Defendants have sought to set aside the judgment in [illegible] late motions, which were denied. Plaintiff was [illegible] amend all pleadings and the misspelling has been [illegible] Defendants challenge these rulings on appeal and [illegible] ruling of the trial court, which allowed plaintiff to [illegible] stipulation to set aside the judgment.

DISPOSITION IN LOWER COURT

Defendants filed a Motion to Stay All Action as to [illegible] (R. 21) because of the misnomer, to which plaintiff [illegible] filing a Motion to Amend Pleadings to correct the [illegible] (R. 24) Plaintiff's motion was granted (R. 34) and

defendants motion dismissed and all pleadings were amend
(R. 35-41). Defendants then sought to set aside the amen
default judgment, (R. [illegible]) which motion was also den
(R. [illegible]). Subsequently, counsel for plaintiff sign
stipulation agreeing to [illegible]
[illegible]
judgment. [illegible]
Stipulation. [illegible]
the Stipulation (R. [illegible]), both parties filed the issue
67-78, 80-81). On May 13, 1983 [illegible] signed a fin
entry allowing the withdrawal. (R. [illegible]). Defendant appeals
from this order on May 20, 1983 (R. 81-82).

RELIEF SOUGHT ON APPEAL

Defendant seeks to have the judgment dismissed f
lack of personal jurisdiction or to have the Amended Judgm
set aside and to have the Order allowing the Stipulati
to be withdrawn, and the case set for trial.

Plaintiff seeks to have the [illegible] of the Distric
Court allowing withdraw his Stipulation affirmed. He
to have the [illegible] of the appeal [illegible] the
court's [illegible] plaintiff to [illegible] all pleadi
dismissed as untimely and to enter an order that t
default judgment is valid in that the trial court had person
jurisdiction [illegible] of parties.

STATEMENT OF FACTS

Plaintiff's Complaint alleged property damage caused [illegible]'s negligent control of their irrigation water. [illegible] were designated as Howard Cudd and Elke [illegible] also contained this caption. Personal [illegible] was made upon defendants [illegible] R. 3) Based upon defendants failure to [illegible] by given by plaintiff on June 2, 1981, [illegible] by minute entry June 2, 1981 against [illegible] of $2,131.00. (R. 16) Findings of Fact [illegible] of Law and Judgment were signed by the [illegible]rt Judge on June 8, 1981 and filed June 11, 1981. [illegible] After execution was initiated by plaintiff (R. [illegible] defendants filed a Motion to Stay All Action as to Cude [illegible], 1981, filed July 2, 1981. (R. 21-22) Defendants [illegible] because of the misnomer in their names the court [illegible] jurisdiction. In response thereto, plaintiff [illegible] to Amend Pleadings, including the Judgment, to [illegible] names. (R. 21-27) On September 1, 1981 [illegible] filed a response to plaintiff's Motion to Amend [illegible] (R. 31-32) Counsel orally argued their positions [illegible]rt on December 1, 1981 and plaintiff's Motion to [illegible] All Pleadings was granted by minute entry. (R. 30) An [illegible] entered by the court on January 8, 1982, filed [illegible] where it was ordered that plaintiff's Motion

to Amend Pleadings including the default judgment was gr[illegible] and defendants motion was denied. (R. 34) Thereupon Summons and Complaint, Findings of Fact and Conclusions Law, and [illegible] were filed [illegible] (R. 35-39)

Aside Default Judgment (R. [illegible]) supporting the sole Answer (R. 41-44) and [illegible] Points and Authorities (R. 45-46) and Affidavit of Defendant Howard Cude (R. 51-[illegible] Defendants Motion to Set Aside Default was denied by the entry on March 16, 1982. (R. 59)

Defendants appeared personally on a motion and [illegible] in supplemental proceedings on March 16, 1982 (R. 57).

On April 16, 1982 a Stipulation to set aside the default judgment was signed by plaintiff's counsel and filed with the court. (R. [illegible]) No order was ever entered setting aside the default. On [illegible], 1982 plaintiff issued writ of garnishment [illegible] nts. (R. 61-65) September 21, 1982 Notice [illegible] of Stipulation [illegible] plaintiff's counsel [illegible] to which defendants objection (R. [illegible]) [illegible] of Points and Authorities was filed by plaintiff [illegible] of his Motion [illegible] Stipulation on [illegible], 1983 (R. 66-71) which was supported by the [illegible] plaintiff's counsel [illegible] not re[illegible]

...lation at issue and that there was confusion in the ... (R. 72-74) Defendants again filed a memorandum and ... March 17, 1983 arguing the Stipulation should not ... withdrawn. (R. 80-84) By minute entry of ... the Court granted plaintiff's Motion to Withdraw ... (R. 90) ... defendants filed their Notice of Appeal May 20, ...

POINT I

... DEFENDANTS' APPEAL, INSOFAR AS IT CHALLENGES THE ... THE MISNOMER, IS UNTIMELY

A judgment wherein the defendant's name is misspelled ... not void per se, but voidable at the discretion of the ... Court. (Point II) On January 8, 1982 the trial judge ... an Order, which was filed January 11, 1982, allowing ... to amend all pleadings, including his default ..., to correctly reflect defendants' names. Defendants ... to Stay All Action as to Cudes was ... (R. 34) ... were based upon the misnomer ... supported ... (R. 25-27, 31-32) No appeal was taken from ..., and defendants are now barred from raising the ...

Rather than appealing from this final Order, ... filed a Motion to Set Aside Default and the ... February 8, 1982 (R. 47-48) ... was denied by

minute entry March 16, 1982. (R. 59) The basis for motion was the same as had been previously presented to court in support of defendants' Motion to Stay All Action Cudes, and orally argued by counsel.

Defendants' [illegible] Judgment [illegible] previous ruling, as the [illegible] been decided [illegible] not provided for by the rules of civil procedure. Pro-Lunceford, [illegible] P.2d 602 (Utah 1966); Rubber Corp. [illegible] P.2d [illegible], (Case No. 17758, decided February 1, 1983, Utah.)

The caption of the motion is not controlling. The court may look [illegible] substance of the instrument to ascertain its nature. Armstrong Rubber Company v. Bastian, supra; Howard v. Howard, 11 Utah 2d 149, 356 P.2d 275 (Utah 1960).

Defendants' Motion to Set Aside Default was [illegible] more than an attempt to have the trial court reconsider its previous ruling which allowed plaintiff to correct a misnomer. As defendants did not timely appeal from [illegible] they may not now raise the issue, as they have attempted to in Points II, III, and IV of their appeal brief.

POINT II

THE TRIAL COURT CORRECTLY RULED THAT IT HAD JURISDICTION OVER [illegible]

The Summons and Complaint, Findings of Fact and ... of Law contained an error in the defendants' name ... ptions. (R. 1-19) Plaintiff sought to correct the ... with a Motion to Amend all Pleadings, including the ... was granted by the court, at the same time it ... Motion ... Pleadings as to Codes. (R. ...

... 4(h) U.R.C.P., cited below, specifically ... that an amendedment to the summons may be made "at ...":

> At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

In Meyers v. Interwest Corp., 632 P.2d 879 (Utah ... the period stated in the summons within which to answer, ... fact shorter than that allowed by law for entry of a ... The court ... plaintiff's Motion to Amend ..., citing Rule ... U.R.C.P., and dismissed defendants' ... to Dismiss for ... of jurisdiction. In discussing ... material preju... would result to substantial rights ... party the court sta...

> When the prope... defendant has received actual notice of the f... upon which the complaint is based, the pos... lity of prejudice is greatly diminished. Id. at 879, at 882.

In the instant case, defendants argue they [illegible] know [illegible]. Other than two letters, both [illegible] defendants' names were spelled correctly. The [illegible]

[illegible]

(P. 4[illegible], [illegible])

[illegible]

the [illegible]

[illegible]

misled that they were [illegible] had been filed, but rather [illegible] to take advantage of a technical error in spelling.

[illegible]

"Due Process [illegible] does not impose [illegible] unattainable standard of accuracy. [illegible] defendant within [illegible] is served personally [illegible] his name is misspelled, [illegible] account of the [illegible] defendant has been [illegible] in an action, a [illegible] valid although [illegible] judgment against [illegible] he is misstated."

* *

"The test in such cases appears to be whether the defendant could have been misled by the [illegible] in the name."

[illegible], [illegible], 116, p. [illegible].

[illegible] 23 Utah 2d 249, 461 P.2d 465 [illegible] setting aside a [illegible] was affirmed. The court noted that the [illegible] with such that defendant Vaugh Rhodes would [illegible] mislead as to whether or not he was the [illegible] to answer. In that case Bert Rhodes and [illegible] were both named as defendants. Summons and [illegible] served on the wife of Vaugh Rhodes, but on the [illegible] whether the sheriff had endorsed that he had served [illegible] Bert Rhodes was a non-resident of Utah, only [illegible] within the state. Default was entered against [illegible] the court the action was dismissed against Bert [illegible] court held that service was invalid, as Vaughn [illegible] not adequately notified that he was the person [illegible] to answer, and therefore the judgment was without [illegible].

[illegible] every defect in service is severe enough to [illegible] the court of jurisdiction. Failure to make proof of [illegible] within five days, as required by Rule 4(g), U.R.C.P. [illegible] not to destroy the validity of service. Redwood Land [illegible] Pinnell, 435 P.2d 1010 (Utah 1967). Stating a [illegible] in the summons before it could be

entered was not found to be grounds for dismissal of the action. Meyers v. Interwest, supra.

Clerical errors in judgments or other parts of record may be [illegible]

[illegible]

> "Under [illegible] pleadings, if the right party is before the court, without actual & willful fraud, an amendment to cure a misnomer will be allowed, . . .
>
> *
>
> The matter of the amendment is in the discretion of the court, and often such an amendment will be allowed after as well as before judgment . . ."

[illegible], Parties, §283, pp. 758-759

Defects in service are not void per se, but are voidable, in the discretion of the trial judge. As defendants did not timely appeal from the order of the trial judge allowing plaintiff to amend his pleadings they cannot challenge the ruling. Even assuming they had timely appealed the issue, an analysis of the facts of this case, lead to the conclusion that defendants could not have been misled by the misspelling, but were fully put on notice they were the parties the action was intended to effect.

POINT III

[illegible] DID NOT ABUSE ITS DISCRETION [illegible]

In Thompson v. Turner, 558 P.2d 1071 (Idaho 1977) the [illegible] court affirmed the trial court in allowing a withdrawal of a stipulation changing venue, even though the [illegible] already been transferred to a different court, and [illegible] was within the sound discretion of the trial [illegible] not to relieve a party from a stipulation.

> "Parties are bound by their stipulation, unless relieved therefrom by the court, which has the power to set aside a stipulation entered into inadvertently or for justifiable cause." First of Denver Mortgage Investors v. C.N. Zundel, 600 P.2d 521 (Utah 1979) at p. 527

In the present case, counsel for plaintiff filed a Stipulation April 26, 1982 that the default judgment could be set aside. (R. 60) However, no order was ever signed by a judge, setting aside the judgment, and counsel for plaintiff did not approve as to form the original order setting it aside. (R. 76) Correspondence between counsel for the parties April 20, 1982 (R. 71) and even on May 28, 1982 (R. 74), after the stipulation was signed, indicates counsel for plaintiff would not agree to set aside the judgment. Counsel for plaintiff submitted an affidavit stating she could not recall the exact circumstances surrounding the stipulation.

Based upon these circumstances the trial court allowed plaintiff to withdraw his Stipulation. (R. 86) This was clearly an abuse of the discretion and therefore the decision be affirmed.

CONCLUSION

For the aforementioned procedural and substantive reasons, plaintiff requests an order of this court affirming the judgment of the district court allowing plaintiff to withdraw his plea [illegible] Default [illegible] appeal challenging [illegible] the dismissal as untimely.

Respectfully submitted this 7th day of October, 1983.

[illegible]

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CERTIFICATE OF MAILING

I do hereby certify that I mailed postage prepaid, a true and correct copy of the foregoing [illegible] Inge D. Mangan, Attorney for [illegible] 47 North Second East, Roosevelt, Utah 84066, this 7th day of October, 1983.

[illegible]