

1970

# John Ira Baer v. Gail Young : Appellant's Brief

Utah Supreme Court

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# In the Supreme Court of the State of Utah

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JOHN IRA BAER,

*Plaintiff and appellant,*

- vs. -

GAIL YOUNG,

*Defendant and respondent.*

Case No.  
12055

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## APPELLANT'S BRIEF

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Remedy Sought: Reinstate Judgment that has been held  
to be void by reason of defective service of Summons.

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## APPELLANT'S BRIEF

---

### STATEMENT OF FACTS

For simplicity parties will be as identified in lower Court.

On December 21, 1964, the Plaintiff, John Ira Baer, married Kayla Baer at Pocatello, Idaho. There was born in the issue of said marriage, Gina Kay Baer, age 5 years, and Judy Lynn Baer, age 3 years. Until January 19, 1969, this little family was living happily in their house and lot at 6431 West 3620 South, Hunter, Salt Lake County, Utah.

On or about January 9, 1969, Gail Young, the milkman, decided that he would take over the Baer home and he did on January 25, 1969 move into the Baer home. In

the process, he physically and with force drove the Plaintiff, John Baer, from his own house, taking over the Plaintiff's home, his wife, and children.

The Plaintiff, John Baer, made numerous attempts to reconcile with his wife and to gain back his home and children but to avail. The Plaintiff contacted his attorney, Mark S. Miner, who wrote a letter to the defendant, Gail Young, ordering and directing him to remove himself from the Baer home and to desist in terminating the marriage between the Plaintiff and his wife, Kayla Baer. The Defendant, Gail Young, saw fit to disregard the letters and to further threaten the Plaintiff with bodily harm should he persist in attempting to save his home.

The Plaintiff in this action then obtained from the Honorable Joseph G. Jeppson, an Order, ordering and directing the Defendant to appear in the District Court of Salt Lake County, to show cause why he should not be required to desist from further living with Kayla Baer, the plaintiff's wife. This action being filed on the 10th day of April, 1969, at which time the Complaint included a Cause of Action for alienation of affection, and criminal conversation and, at which time, there was also obtained, the foregoing Order (Tr. 11). A copy of the Summons, Complaint, and Order, were then served upon the Defendant, Gail Young, by delivering a copy of said Summons, Complaint, and Order to show Cause, to the wife of the defendant, at his home at 1649 West 3rd

South, Salt Lake City, Utah. Said Summons, Complaint, and Order to Show Cause all being served on the 7th day of May, 1969, upon Claudia Paulette Young (Tr. 8).

On May 28, 1969 the Defendant appeared in the Court room of the Honorable Aldon J. Anderson, Judge, in obedience to the Order to Show Cause, at which time he appeared in the company of Kayla Baer and Kayla Baer's Attorney, at this time, in open Court, Judge Anderson ordered and directed the defendant, Gail Young to immediately remove himself from the Baer residence and he further ordered and directed him to desist in having any relations with Kayla Baer or in any way associating with her and he further ordered and directed the Defendant, Gail Young to desist in any conduct which would tend to destroy the marriage of the Plaintiff, John Baer and Kayla Baer. Judge Anderson further ordered Gail Young to remove his clothing, and his other personal items from the Baer home with the admonition that if he failed to do so, he would be incarcerated in the Salt Lake County Jail. In response to this Order, the Defendant, Gail Young, did remove himself from the Baer home. A copy of this signed order was duly served upon him, June 2, 1969.

At the hearing in May 28, 1969, Mr. Young admits that he went into Court with the Summons and Complaint, in this action, in his hand, and he further admits that he approached Mr. Miner, Attorney for the Plaintiff, and

asked him what he should do with the Summons and Complaint and that Mr. Miner told him that his time to answer was up and Mr. Miner, in Judge Anderson's Court room took the Summons, and Complaint and wrote on said Summons, and Complaint that Mr. Young had an additional fifteen (15) days in which to answer the Complaint or otherwise plead. At that time, Mr. Young was told to get an attorney and to answer the Complaint.

The Summons and Complaint were on file in the District Court of Salt Lake County, State of Utah, from the 10th day of April, 1969, up to September 3, 1969, at the hour of 2:00 p.m., when the matter was again brought before the Honorable Merrill C. Faux, Judge, and the Defendant's default was entered upon the grounds that no responsive pleading had been filed. On September 3, 1969, John Ira Baer was sworn and testified as to foregoing facts, all of which are undisputed, towit: That the Defendant, Gail Young, had physically driven the Plaintiff from his home and that the Defendant, Gail Young had taken over possession of the Plaintiff's home, Plaintiff's wife, and Plaintiff's family, in addition thereto, Gail Young had, by his conduct, completely destroyed the marriage between the Plaintiff and his wife, Kayla Baer. The Plaintiff further testified that by reason of the Defendant's willful and malicious conduct, the plaintiff suffered monetary damage in the loss of his house and lot and he suffered injury to his health and the Court, after due deliberation did, render judgement in favor of



the Plaintiff and against the Defendant, Gail Young, in the amount of \$25,000.00. (Tr. 51-52). This Judgment was duly signed and entered September 15, 1969.

On February 16, 1970, the Defendant, Gail Young, filed a Notice of Appeal to the Utah Supreme Court. On this day, the Defendant, Gail Young, not only filed his Notice of Appeal but he paid his appeal fees and the case was duly docketed in the Utah Supreme Court. On the 26th day of February, 1970, while the matter was docketed and on appeal to the Utah Supreme Court, a hearing was held before the Honorable Merrill C. Faux, and, over the Plaintiff's objection, the Court proceeded to hear the Defendant's Motion to Set Aside the Judgment and a Motion for a New Trial. (TR 20-27 inclusive).

Plaintiff objected to the Court's hearing these Motions at this time on the grounds that this case was now in the Supreme Court and any Motions pending should be argued in the Supreme Court except Motions in aid of Appeal.

In response to Plaintiff's objection, Judge Faux said:

“Not wanting to appear that I'm presumptuous, overlooking the fact that an appeal has been filed, not wanting it to appear that I am contemptuous

of the Supreme Court to save time, to hear what counsel has to say, I am going to hear the Motion.” (TR 55)

The hearing then proceeded, the Defendant presented to the Court, his position that the District Court was without jurisdiction under Rule 60-B sub-section 5, in that the Summons was served upon Claudia Paulette Young, the wife of Gail Young at a time when he was actually living with the Plaintiff’s wife, Kayla Baer.

The Defendant pointed out to the Court that the Findings of Fact, Conclusions of Law, and all of the evidence clearly showed that Gail Young was living in the home of Kayla Baer and John Baer at the time of the service and therefore, any service of Summons on his real wife, Claudia Paulette Young, was void and therefore, all proceedings herein were void as a matter of law. (TR 59)

See the Record on Page 57, where Mr. Summerhays stated:

“We would suggest, Your Honor, then that this Judgment is void under Sub-section 5 of Rule 60-B.”

The Court: “Why?”

Mr. Summerhays: "Because there was no proper service, no effective service, and this Court never gained jurisdiction."

The Court: "The certificate says that it was made upon Mrs. Gail Young, a suitable person of age and discretion, residing in the usual place of abode of the Defendant."

Mr. Summerhays: That's right, and that is where it is improper.

The Defendant was not residing there, by the Plaintiff's own allegation, he was residing somewhere else, at the home of the Plaintiff and Mrs. Kayla Baer."

The Defendant, Gail Young, was then sworn and he testified that he was, in fact, living with Kayla Baer at the time the Summons was served upon his wife. But, on cross-examination, he readily admitted that he appeared in open Court on an Order to Show Cause; that the Order to Show Cause was served upon him; that he complied with the Order to Show Cause, and removed himself from the Baer residence along with his belongings. He further acknowledged that he had the Summons and Complaint when he came into Court May 28, 1969, and that there was endorsed thereon, an additional fifteen (15) days in which to answer and that he was admonished to get a lawyer and to answer the Complaint. That irregardless of this, the Honorable Merrill C. Faux, Judge, held that the service of Summons was void. From this decision, the Plaintiff appeals.

## POINTS OF LAW

1. The Court erred in holding a hearing on February 26, 1970, at which time the matter was upon appeal to the Utah Supreme Court.

2. The Court erred in holding that the service of Summons and Complaint upon the Defendant's wife, Claudia Paulette Young, at the place of abode of the Defendant, to-wit: 1649 West 3rd South, Salt Lake City, Utah, was a void service, by reason of the fact that at the time, Gail Young was living with the Plaintiff's wife, Kayla Baer.

3. The Court erred in not finding that the appearance of the Defendant before the Honorable Aldon J. Anderson, Judge, in open Court on the Order to Show Cause, and his compliance therewith, and his bringing the Summons and Complaint in to Court with him and receiving an additional fifteen (15) days in which to answer the Complaint and his being told to obtain an attorney, was not a general appearance in this case.

## ARGUMENT

## POINT I

THE COURT ERRED IN HOLDING A HEARING  
ON FEBRUARY 26, 1970, AT WHICH TIME, THE  
MATTER WAS UPON APPEAL TO THE UTAH SU-  
PREME COURT.

This Court held in :

Peterson vs. Ohio Copper Company, 71 Utah 444; 266 Pac 1050, that, "whenever the jurisdiction of the Supreme Court is invoked as it is by filing and serving of Notice of Appeal, the Trial Court is shorn of it's jurisdiction, except as to proceedings to aid of the appeal."

Such is the law and the Court, by hearing the Motions while the matter on appeal to the Utah Supreme Court was without jurisdiction to do so.

## POINT II

THE COURT ERRED IN HOLDING THAT THE SERVICE OF SUMMONS AND COMPLAINT UPON THE DEFENDANT'S WIFE, CLAUDIA PAULETTE YOUNG, AT THE PLACE OF THE ABODE OF THE DEFENDANT, TO-WIT: 1649 WEST 3RD SOUTH, SALT LAKE CITY, WAS A VOID SERVICE, BY REASON OF THE FACT THAT AT THE TIME, GAIL YOUNG WAS LIVING WITH THE PLAINTIFF'S WIFE, KAYLA BAER.

Rule 4-E provides :

'That service of Summons may be made upon a natural person of the age of 14 or over by delivering a copy of thereof to him personally or by leav-

ing a copy at his usual place of abode, with some person of suitable age and discretion there residing."

In this case, the Summons and Complaint were served upon the Defendant's wife, Claudia Paulette Young at his home at 1649 West Third South, Salt Lake City, Utah. The Defendant was married to Paulette Young, she was his wife, and with the exception of his razor and radio and some of his personal clothing, all of his personal effects were still at his house. The law clearly states that he is to be served at his place of abode and no provision is made that he is to be served at the house of the woman with which he is living. The Defendant did, in fact, get the Summons and Complaint. Living at a place does not mean one must always be there. See:

Boothe v. Crockett 37 110 Utah 366.

In Grant v. Lawrence 37 Utah 450, 108 Pac 931, the Utah Supreme Court held:

"That a man's place of abode, prima facia, at least, is presumed to be where his family lives."

Defendant Young has never denied that he lived there with his wife, Paulette Young. He never denied that she was his wife at the time of the service of Summons. He only complained that he should have been served at the house of Kayla Baer by reason of the fact that he was

living there also. It is submitted that this is not the law in this State and that there would be chaos if a person was required to serve a person's paramour, instead of his wife.

### POINT III

THE COURT ERRED IN NOT FINDING THAT THE APPEARANCE OF THE DEFENDANT BEFORE THE HONORABLE ALDON J. ANDERSON, JUDGE IN OPEN COURT ON THE ORDER TO SHOW CAUSE, AND HIS COMPLIANCE THEREWITH, AND HIS BRINGING THE SUMMONS AND COMPLAINT IN TO COURT WITH HIM AND RECEIVING AN ADDITIONAL FIFTEEN (15) DAYS IN WHICH TO ANSWER THE COMPLAINT AND HIS BEING TOLD TO OBTAIN AN ATTORNEY, WAS NOT A GENERAL APPEARANCE IN THIS CASE.

That the Defendant made a general appearance in open Court and he was in Court by reason of the fact that he responded to the Summons, Complaint and Order to Show Cause, and by reason of the fact that on May 28, 1970, he appeared in open Court, before the Honorable Aldon J. Anderson, at which time, he was admonished by the Court to immediately remove himself from the residence of Kayla Baer and he acknowledges that in response to the Court's Order and threat of incarceration,

he did remove himself, and further, he acknowledges that at the time, he had the Summons and Complaint in his hand and there was written thereon, that he had an additional fifteen days in which to answer or otherwise plead and that he was admonished to obtain an attorney. Under the laws of the State of Utah, and the law is laid down by our Supreme Court, this was tantamount to a general appearance. See:

Sorenson vs. Sorenson, 18 Utah 2nd 102, 417 Pac 2nd 118, in which this Court held:

“The Court had jurisdiction and exercised it in principles so elementary as to require no citations of authority. She walked into Court, asked for relief, got it, and now cannot say, I had not my foot in the door but most of my torso and was out in the hall. The Court holding that an alleged, untimely service of Summons by father seeking divorce did not prevent the District Court from having jurisdiction in view of Counterclaim, whereby mother obtained part of the relief she sought under the Rules of Civil Procedure, Rule 4-B.”

See Also, 14 Am. Jur. Courts 192 (1938),

“Jurisdiction over the person may be acquired by consent, therefore, where a Court has jurisdiction of subject matter, the Defendant therein may waive lack of jurisdiction of his person.

As to what may amount to waiver of his right to object, the general rule is, if a defendant, though not served with process, takes such a step



in an action or seeks relief at the hands of the Court as is consistent only with the hypothesis that the Court has jurisdiction of the cause of his person, he thereby submits himself to the jurisdiction of the Court and is bound by it's action as fully as if he had been regularly served with process . Likewise, if he, the Defendant has been regularly served with process, any objection he may have to the irregularity must be timely made or it is waived.

### CONCLUSION

Defendant readily admits that all allegations of the Complaint are true. He has further intentionally failed to answer and, in open Court acknowledged that Findings of Fact, and Conclusions of Law are accurate. His only Complaint is the amount of the Judgment. He has no meritorious defense. It is admitted that the Defendant's conduct, not unlike that of an Alaskan seal, drove the Plaintiff from his home, destroyed his marriage and caused him to lose his home and property, his standing in the community and deprived his children of their mother. I submit that under the circumstances, the award was justified and proper and the Judgment should be affirmed.

Respectfully submitted,

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