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Beatrice Rice, Frances W. Kennedy, Rena B. White, Gwendolyn Landenberger, and Myn Cleary v. Arthur Murray, Inc. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

BEATRICE RICE, FRANCES W. KENNEDY, RENA B. WHITE, GWENDOLYN LANDENBERGER, MYN CLEARY,

Plaintiffs-Appellants,

vs.

ARTHUR MURRAY, INC., a corporation,

Defendant-Respondent.

Cases No. 14286
14287
14288
14289
14290

BRIEF OF RESPONDENT

Appeal from Judgment of District Court

for Salt Lake County, Utah

Honorable Stewart M. Hanson, Sr., Presiding

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NATURE OF THE CASE

The plaintiffs and appellants herein filed complaints in the District Court of Salt Lake County claiming that the defendant and respondent, Arthur Murray, Inc., supervised, directed, and controlled its franchisee in Salt Lake City in a course of fraudulent representation and conduct.

DISPOSITION OF CASE IN LOWER COURT

Each complaint of the appellants asks for compensatory money damages as well as punitive damages. The appellants served the complaints, together with summonses, upon the respondent at respondent's office in Dade County, Florida.

Thereafter the respondent filed its motion to quash on the grounds that the respondent, Arthur Murray, Inc., has never done business in the State

of Utah, nor did it have offices, employees, or agents within the State of Utah at any time prior to, during, or since the events complained of by the appellants, and that, therefore, the respondent would not be subject to the jurisdiction of the courts of Utah.

On July 11, 1975, in the District Court of Salt Lake County, Stewart M. Hanson, Sr., Judge, quashed the service of summons and dismissed appellants' complaints for lack of jurisdiction.

On the 18th of July, 1975, the appellants filed a motion titled "Motion to Reopen Judgment for New Evidence to be Introduced and for New Trial"[14290 R-103-104]. The respondent then filed a motion to strike appellants' motion [14288 R-172-173] on the ground and for the reason that there is no provision for a rehearing under the Utah Rules of Civil Procedure. On September 11, 1975, after a second hearing, the District Court of Salt Lake County, Stewart M. Hanson, Sr., Judge, denied the motion for a new hearing as well as respondent's motion to strike. Thereafter on the 6th of October, 1975, the appellants filed their notices of appeal [14290 R-131].

The appellants now appeal the order of the trial court quashing the service of the summons and the dismissal of their complaints for lack of jurisdiction.

STATEMENT OF FACTS

The appellants each began taking dancing lessons during the 1960's from a franchisee of the respondent. The franchisee had studios located in Salt Lake City, Utah. During this period of time there was only one franchisee operating the dance studio at any given time, but the franchise was sold and

passed on to successor franchisees on several occasions during the period of time referred to in appellants' complaints.

Under the terms of the franchise agreement [14288 R-54-57] the franchisee was operating the dance studio wholly independent of the respondent, Arthur Murray, Inc., as an independent contractor. In the late 1960's, the appellants each became disenchanted with the dance lesson program offered by the franchisees, and it seemed to each of the appellants that they were not receiving the kind of attention to which they had been accustomed to during their earlier stages of the dance lesson program.

During this period of time the franchise was operated pursuant to a franchise contract. Arthur Murray, Inc., the respondent, by very strict requirements placed in the contract, sought to have the franchisee inform the customers of the studio that they were dealing solely with the Salt Lake franchisee and not the franchisor, Arthur Murray, Inc., the respondent herein, since the franchisor was not involved in any way with the operation of the studio [14288 R-54-57; Para. 14].

Approximately once a year Arthur Murray, Inc., the respondent, would audit the financial records of its franchisee in Salt Lake City in order to assure proper accounting and payment of the franchise obligation. The franchisor also furnished various promotional materials and advertising assistance to its franchisee and required that certain minimum standards established by Arthur Murray, Inc., be met to insure such conduct as would preserve the integrity of the Arthur Murray name. Except for these very limited requirements, the local franchisee owned and operated its own franchise studio entirely independent

and free of any control from the franchisor, Arthur Murray, Inc., the respondent.

The deposition of Paul Curry was taken on May 29, 1975, and this shed some light on the day to day operation of the franchisee's dance studio in Salt Lake City. Curry testified that there was very little contact between the franchisee and the franchisor during the time period which he managed the franchisee studio as long as the franchisee paid the fee as required by the contract referred to above.

Curry further testified that the only employees of Arthur Murray, Inc., the respondent herein, that he observed at the studio while he was the manager of the Salt Lake studio, were two auditors by the name of Volpe and Imholz. He further testified that the manual which was provided by the respondent, Arthur Murray, Inc., was merely a suggestion as to what course of action to follow. He specified that there was no requirement that the provisions of the manual be followed explicitly.

ARGUMENT

POINT I.

THE APPEAL OF THE APPELLANTS SHOULD BE DISMISSED SINCE IT WAS NOT TIMELY FILED.

An appeal is permitted from the District Court to the Supreme Court of the State of Utah. Pursuant to Rule 73 of the Utah Rules of Civil Procedure, the appeal is to be filed within one month from the entry of the judgment of order appealed from. The order from which the appellants appeal was entered on July 11, 1975, but the notice of appeal was not filed until October 6, 1975, which is in excess of the one-month period specified by Rule 73 of the Utah

Rules of Civil Procedure.

Rule 73 of the Utah Rules of Civil Procedure further provides that the running of the time for appeal is terminated by a timely motion made pursuant to Rule 50(b), Rule 52, or Rule 59 of the Utah Rules of Civil Procedure. These rules provide for a motion to set aside a jury verdict (Rule 50), a motion to amend findings of fact (Rule 52(b)) and a motion for a new trial (Rule 59).

Although no motion was filed pursuant to Rule 50(b), Rule 52(b) or Rule 59 of the Utah Rules of Civil Procedure, the appellants did, however, file on the 18th of July, 1975, a motion titled "Motion to Reopen Judgment and Decree for New Evidence to be Introduced and for a New Trial" [14290 R-103-104]. It is the position of the respondent that there is no provision in the Utah Rules of Civil Procedure for a rehearing and that a motion for new trial was neither proper nor should it be permitted, and that, therefore, for the purposes of appeal, the notice of appeal should have been filed within one month of the order of July 11, 1975.

This issue was raised in Hillman's Equipment, Inc. v. Central Realty, Inc., Ind. App., 235 N.E. 2d 496 (1968). In the Hillman case a motion for summary judgment was granted, and thereafter the appellants filed a motion for a new trial, which was overruled by the trial court. The appellants then appealed to the Indiana Court of Appeals. The respondent in the Hillman case did not question the manner in which the appeal was perfected. However, the Indiana Court of Appeals took the position that for purposes of filing a motion for a new trial, the hearing for summary judgment was not a trial, and, therefore, the motion was neither proper nor permitted. Upon its own motion, the court ruled

that the time period within which the notice of appeal was to be filed began to run from the date of the entry of the order of summary judgment and not from the date that the motion for a new trial was denied. The court in its opinion stated:

> Since a summary judgment is not a trial, a motion for a new trial is neither proper nor permitted. Meier, etc. v. Soc. Sec. Adm. et al. (1958), 237 Ind. 421, 146 N. E. 2d 239; Sacks v. Winkler (1967), Ind. App., 226 N.E. 2d 172. Therefore, compliance with the aforementioned Rule requires that the transcript and assignment of errors be filed within ninety (90) days from the date of the entry of the summary judgment by the trial court, and not from the date of the court's ruling on the motion for a new trial.
>
> In the case at bar appellant did not file its appeal within ninety days from the entry of summary judgment, therefore requiring that this appeal be dismissed. 235 N.E. 2d at 497.

The Utah Supreme Court has also addressed itself to the issue as to whether or not a motion to reconsider is proper under the Utah Rules of Civil Procedure. In Drury v. Lunceford, 18 Utah 2d 74, 415 P. 2d 662 (1966), the court indicated that once a trial court has made a ruling upon a motion it may not reconsider its own judgment and the order it has entered. In the Drury case the trial court sitting without a jury entered judgment and then granted a motion for a new trial. The trial court then reconsidered the motion for a new trial and then reversed itself, letting the original judgment stand and no new trial was then granted. The Utah Supreme Court held that once the trial court had ruled upon a motion, both the duty and prerogative of the court were at an end. The case was then remanded to the trial court for a new trial in accordance with the original order which granted a new trial.

In making this ruling the Utah Supreme Court stated the rationale behind the rule that a trial court cannot reconsider or rehear a motion once the order has

been entered. The Supreme Court stated as follows:

> When this has been done and the court has ruled upon the motion, if the party ruled against were permitted to go beyond the rules, make a motion for reconsideration, and persuade the judge to reverse himself, the question arises, why should not the other party who is now ruled against be permitted to make a motion for re-re-consideration, asking the court to again reverse himself? Tenacious litigants and lawyers might persist in motions, arguments and pressures and theorectically a judge could go on reversing himself periodically at the entreaties of one or the other of the parties ad infinitum. This reflection brings one to realize what an unsatisfactory situation would exist if a judge could carry in his mind indefinitely a state of uncertainty as to what the final resolution of the matter should be. 18 Utah 2d at 76.

It is submitted that the proper procedure for the appellants to have followed after the motion to quash was granted would be for them to have filed an appeal to this court rather than to file a motion which is neither proper nor permitted. Since the motion was not proper nor permitted, it did not terminate the running of the time for appeal, and that, therefore, the appeal was not timely filed.

In a later case, Utah State Employees Credit Union v. Riding, 24 Utah 2d 211, 469 P. 2d 1 (1970), the Utah Supreme Court stated:

> We think the motion to reconsider the motion to vacate the judgment is abortive under the rules. . . . 24 Utah 2d at 214.

The Utah cases seem to be in accord with the general rule. 58 Am. Jur. 2d, New Trial, Section 22, the rule is stated as follows:

> From the very fact that the remedy bears the name "new trial," one assumes that there must have been a trial; and at this point the question arises, how much of a "trial" must there be in order to support a motion or petition for a new one? Where an action was disposed of upon a motion for summary judgment, wherein the court sustained the motion and entered judgment without a trial of issues of fact, a motion

> for new trial is not appropriate and is not permitted. Likewise, where a judgment of dismissal is entered without a trial of an issue of fact, a motion for new trial cannot be filed. Thus, where the trial court dismisses the action because it has no jurisdiction, it cannot entertain a motion for new trial. 58 Am. Jur. 2d at 206.

If the motion to reconsider is abortive, or in the alternative, if a motion for a new trial is neither proper nor permitted, the time within which an appeal must be filed was not terminated. Therefore, it is submitted that this court should do as the court in the Hillman case did; dismiss the appeal of the appellants since the appeal was not timely filed and this court would be without jurisdiction.

POINT II.

THE LOWER COURT DID NOT ERR IN QUASHING THE SERVICE OF THE SUMMONSES AND DISMISSING THE APPELLANTS' COMPLAINTS FOR LACK OF JURISDICTION SINCE THE ACTIVITIES OF THE RESPONDENT DID NOT CONSTITUTE THE MINIMUM CONTACTS TO GIVE PERSONAL JURISDICTION OVER THE RESPONDENT.

The appellants claim that the courts of Utah have jurisdiction over the respondent pursuant to 78-27-22 U.C.A. (1953) as amended. This statute is commonly referred to as the "Long Arm Statute". The statute provides as follows:

> Any person, notwithstanding section 16-10-102, whether or not a resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:
>
> (1) The transaction of any business within this state;
>
> (2) Contracting to supply services or goods in this state;

(3) The causing of any injury within this state whether tortious or by breach of warranty;

Although this statute was enacted in 1969, the theory that the courts of any of the several states of the United States may have jurisdiction over non-residents who have minimal contacts or minimum contacts with the state which asserts its jurisdiction is not new to this court.

Rule 4 of the Utah Rules of Civil Procedure provides for service of process upon foreign corporations doing business in the State of Utah. In discussing whether or not a particular state has jurisdiction over a foreign corporation, the terms of "doing business," "minimal contacts," and "minimum contact," are often used and it would appear that any distinction between these phrases is mere semantics as pointed out by this court in Hill v. Zale Corporation, 25 Utah 2d 357, 482 P. 2d 332 (1971) and Foreign Study League v. Holland-America Line, 27 Utah 2d 442, 497 P. 2d 244 (1972).

Within just a few years after the United States Supreme Court handed down its decision in International Shoe Company v. State of Washington, 326 U.S. 310, 90 L. Ed. 95 (1945), the Utah Supreme Court addressed itself to the issue as to whether or not a corporation was doing business within the State of Utah, and, therefore, pursuant to the rule announced in International Shoe subject to the jurisdiction of the courts of Utah. See Western Gas Appliances v. Servel, Inc., 123 Utah 229, 257 P. 2d 950 (1953). In the Western Gas Appliances case, the defendant Servel entered into an agreement with local dealers to promote the sales and servicing of Servel products in this state. Except for one isolated occasion, Servel, the defendant, sold no products directly to any person within

the state, but on the contrary dealt directly with its distributors.

A lawsuit arose when the defendant cancelled its franchise with the plaintiff. The plaintiff brought an action for breach of contract in the District Court of Salt Lake County. Service was obtained pursuant to Rule 4(e) of the Utah Rules of Civil Procedure which provides:

> If no officer or agent [of the corporation] can be found in the state, and the defendant does business in this state, then upon the person doing such business.

The trial court granted Servel's motion to dismiss for lack of jurisdiction, and the plaintiff appealed to the Utah Supreme Court.

In its opinion, the court reviewed the facts, although the court did point out that where issues of fact are involved and there are no findings of fact, the appellate court would not review the facts and would affirm the decision if from the evidence it would be reasonable to find facts to support the trial court's decision.

The court went on to discuss the cases of Industrial Commission v. Kemmerer Coal Co., 106 Utah 476, 150 P. 2d 373 (1944), and Wabash R. Co. v. District Court of Third Judicial Dist. in and for Salt Lake County, 109 Utah 526, 167 P. 2d 973 (1946), wherein the court had held that a foreign corporation was doing business within the state and was, therefore, subject to the jurisdiction of the Utah courts.

The court then ruled, affirming the decision of the trial court, that Servel was not subject to the jurisdiction of the Utah courts and in so ruling the court stated:

> Thus before defendant's acts could properly be classified as doing business within the State, it would have to be shown that there was some degree of continuity or regularity of such acts, coupled with some manner of entering into direct business transactions with others. If such circumstances did exist, the acts of defendant herein shown might properly be considered in augmentation of other proof as to doing business.
>
> * * * * * * * * * *
>
> In this context, as noted in International Shoe Co. v. State of Washington, the term "presence" is "used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process." 257 P. 2d at 953.

Whether the activities of a corporation within a certain state are cast in terms of "presence", "minimum contacts", "minimal contacts", or "doing business," the theory is still the same; the foreign corporation must have sufficient contacts to satisfy the demands of due process before it is subject to the jurisdiction of the courts of that state. The enactment of the "Utah Long Arm Statute" is merely a codification of this rule.

The appellants have cited Caeser's World, Inc. v. Spencer Foods, Inc., 498 F. 2d 1176 (8th Cir., 1974). This case involved a contract dispute between a franchisee and a franchisor, a foreign corporation allegedly doing business in the State of Iowa. The action was brought in the United States District Court; however, the question of jurisdiction under the Iowa Long Arm Statute arose. The United States District Court held that it did have jurisdiction and this was affirmed by the Eighth Circuit Court of Appeals. In reviewing the question as to whether or not the application of the Long Arm Statute constituted a denial of due process, the Circuit Court of Appeals set forth the five factors

which it considered to be determinative of whether or not personal jurisdiction could be exercised. These guidelines were as follows:

> (1) the nature and quality of the contacts with the forum state; (2) the quantity of contacts with the forum state; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties. 498 F. 2d at 1180.

This case, although it does involve a dispute concerning a franchise agreement, is distinguishable from the facts of the case now before the court.

In Caeser's World, the dispute was between the franchisee, a resident of the State of Iowa, and the franchisor, a foreign corporation. An analogous situation would be presented in the case now before the court if the franchisees of the respondent were to bring an action against the respondent; however, this, of course, is not the case nor the facts now before the court.

As stated by the Eighth Circuit Court of Appeals in Caeser's World, there must be some relationship between the contacts referred to and the cause of action. The only contacts which are reflected in the record include the respondent's entry into a contract with the franchisee, the isolated and sporadic auditing of the financial records of the franchisee, and the sending of various pieces of literature to the State of Utah to assist the franchisee in the successful operation of the franchisee's business.

Since the enactment of the Utah Long Arm Statute, this court has ruled on several occasions on the issue of whether or not a defendant is subject to the jurisdiction of the Utah courts by virtue of doing any of the acts or engaging in any of the conduct enumerated in the "Long Arm Statute." The case of Hill v. Zale Corporation, Supra, is probably the leading Utah case in

this area of the law.

In Hill v. Zale, the Utah Supreme Court, much as the Eighth Circuit Court of Appeals did in Caeser's World, laid down certain guidelines to be used in applying such abstract terms as "doing business," "minimal contacts," "minimum contacts," and "presence." The oft-quoted guidelines as laid down in the Hill v. Zale case are as follows:

> (1) Whether there are local offices, stores, or outlets;
>
> (2) The presence of personnel, how hired, fired and paid; the degree of control and the nature of their duties;
>
> (3) The manner of holding out to the public by way of advertising, telephone listings, catalogs, etc.;
>
> (4) The presence of its property, real or personal, or interest therein, including inventories, bank accounts, etc.;
>
> (5) Whether the activities are sporadic or transitory as compared to continuous and systematic;
>
> (6) The extent to which the alleged facts of the asserted claim arose from activities within the state;
>
> (7) The relative hardship or convenience to the parties in being required to litigate the controversy in the state or elsewhere. 25 Utah 2d at 360.

In reviewing the evidence in the record and applying the guidelines of Hill v. Zale, it is submitted that the activity and conduct of the respondent does not measure up to the guidelines which were set down to insure that due process and substantial fair play are adhered to. We will now review the record applying the facts to each of the guidelines as set down in Hill v. Zale.

(1) Whether there are local offices, stores, or outlets. The appellants do not contend that the respondent maintained local offices, stores, or outlets,

and, in fact, there were no local offices, stores, or outlets in the State of Utah which were operated by the respondent, Arthur Murray, Inc.

(2) The presence of personnel, how hired, fired and paid; the degree of control and the nature of their duties. The record will reflect that although there is a dispute concerning the status of certain dance instructors, including Nina Sananiego and Vicki Venka Sevic, the deposition of Paul Curry reveals that these instructors or judges were hired on an individual basis as independent contractors by the local franchisee in Salt Lake City without any supervision or control of the respondent. Mr. Curry in his deposition testified concerning Sananiego's relationship with the local studio and the respondent. He testified concerning this relationship as follows:

Q. Now, when Nina Sananiego came up here to Salt Lake to judge a student, who would pay her expenses from Southern California?

A. The individual studio. In other words, Salt Lake City would pay her flight, room and board, and food, plus salary.

Q. Do you know if Arthur Murray, Inc., ever paid Nina Sananiego for any of her visits to Salt Lake when she came to judge students?

A. The home office never paid the expense of that individual judge.

Q. It was always the individual studio, is that right?

A. Yes.

[Curry Deposition, 49:9-49:21]

* * *

Q. How would you arrange for either Venka or Sananiego or any of these judges to come to Salt Lake?

A. Usually a lot of times, we would either write a letter to them or call them or we might see them at a Dance-O-Rama or convention because many times if we were going to have our Medal Ball, for example, let's say for the end of the year, it might be May that I happen to see them at a Dance-O-Rama and so I would check then to see if they were free at that time to make arrangements then.

Q. Would you clear this with Arthur Murray, Inc?

A. No, I didn't have to because they were a qualified person of the board.

[Curry Deposition, 50:25, 51:1-51:11]

The only employees of the respondent who entered the State of Utah were the auditors who visited sometimes as infrequently as every two years. They came to audit the financial records of the franchisee to make sure that an accurate accounting was being made pursuant to the franchise contract. Curry testified concerning these visits of the auditors as follows:

Q. What I'm asking you is if any of these Arthur Murray employees ever came to the studio in the years 1963 through 1969, and if so, what were those employees' names? I'm talking about Arthur Murray, Incorporated.

A. Imholz is the only one I remember.

Q. How about Volpe, or whatever his name is?

A. And Volpe. Those are the only two.

Q. These were both auditors?

A. Yes.

Q. Who came about once a year?

A. Yes.

Q. This would vary then, wouldn't it?

A. Yes. It varied a lot of times, but we know that it would be no longer than two years, usually about a year or we knew at any time he was going to be dropping in.

[Curry Deposition, 60:19-61:9]

The testimony of Mr. Curry substantiates the answer given to the appellants' interrogatories wherein Arthur Murray, Inc., the respondent, stated that the only employees of the respondent who visited the State of Utah were Mr. Frank J. Imholz, Samuel Gant, and Wayne Smith [14290 R-41-52]. The purpose of their visits was solely to ascertain if the franchisee, the dance studio owner, was in substantial compliance with the terms of the franchise agreement.

The appellants have referred to the Arthur Murray manual and claim that this manual was controlling upon the franchisees. The deposition of Mr. Curry would indicate to the contrary. Curry testified concerning this manual from his experience as a manager of the franchise studio during a portion of the time referred to in plaintiffs' complaint. Concerning this manual, Mr. Curry testified:

Q. Now, I take it you are required to follow this manual?

A. Well, I wouldn't say required but it was used as the purposes of good guidance for us, for many times you might have people who were inexperienced in the managerial line so it was a good guide for them.

Q. So if you didn't follow it, you would be checked or something?

A. It probably would be kind of ignorant on the individual's part because this is knowledge from experienced people who had been in business for a long time.

Q. Would it be fair to say that under the franchise you were supposed to use this manual?

A. You were advised to follow up but again there was not a strict rule put on it. It was just an aim for all studios to follow.

[Curry Deposition, 11:10-11:25]

In reviewing the manual, it will be seen that the material contained therein is merely general in nature and is nothing more than a series of suggestions to aid a franchisee in the successful operation of his studio. This manual was merely an aid to each individual studio and nothing more.

In addition, the appellants claim that there were certain promotional activities suggested by the franchisor, Arthur Murray, Inc., the respondent, but here again there was no strict requirement concerning the operation of the program. In answer to questions put to him by appellants' counsel concerning the promotional programs, Curry stated:

Q. And they told you the prices to charge; did they not on these drives?

A. No, because we had set prices. In other words we were charging at that time, if I remember right, around eighteen or nineteen dollars an hour and that was standard. There was nothing saying that we alternate the price.

Q. Now, let me say this: Did you have these drives where you gave special rates of, say, thirty dollars for ten lessons or fifteen dollars for ten lessons-- did you have--

A. Yes, we had various inducements.

Q. Yes, inducement drives, that's what I'm speaking about.

A. Yes.

Q. They were set up by Arthur Murray?

A. Or the individual studios could also.

Q. But they were set up is what I'm talking about?

A. Well, see, they didn't operate the whole thing, they would suggest very good successful things to us and we could use whichever ones we wanted.

Q. Well, didn't you follow those?

A. Oh, yes, because they were very successful ones.

[Curry Deposition, 15:3-15:25]

As can be seen from the testimony of Mr. Curry, Arthur Murray, Inc., the respondent, only suggested successful programs. The studio in Salt Lake City set its own prices and hired its own personnel without supervision of the respondent. The only two employees of Arthur Murray, Inc., the respondent, that Mr. Curry ever recalled seeing in Salt Lake City were the auditors. The respondent's sole contact with the State of Utah was merely to visit the state sporadically to insure that payments were being made properly pursuant to the franchise agreement and to mail literature to the franchise studio suggesting successful ways to operate the studio.

Concerning the question of how much contact the respondent, Arthur Murray, Inc., had with the franchisee studio and the State of Utah, Mr. Curry summed it all up very well when he stated:

A. While I was there we had very little because we were always current on our franchise fee, and that's probably nine-tenths of it right there.

[Curry Deposition, 61:22]

The testimony of Mr. Curry which sheds some light on the day to day activities of the franchisee would indicate that the presence of the respondent's personnel was only on a sporadic basis and seems to imply that the visits were

more in the nature of "spot checks" on the franchisee's records. The dance instructors obviously were not employees of the respondent since Curry would not check with the respondent prior to making arrangements to have the dance instructors come to the studio. The individual studios paid all of the expenses and the wages of the individual instructors. Clearly this would not constitute a minimal contact as required.

(3) The manner of holding out to the public by way of advertising, telephone listings, catalogs, etc. The franchise agreement between the franchisee and the respondent [14288 R-54-57, Para. 14] provides as follows:

> (a) The franchisee will include provision in each enrollment agreement or contract entered into with a student relating to the taking of dancing lessons or the payment therefor substantially as follows: This agreement is made by student with the franchised owner of the studio in which he or she is enrolling and said franchisee is solely responsible for the performance of this contract and the dancing lessons provided for herein. As student, I understand and agree that this contract is made by me solely with the above studio, as seller and does not directly or indirectly constitute an agreement with or an obligation of Arthur Murray, Inc., or any of its employees.
>
> (b) In each extension and renewal agreement or contract entered into with a student, the franchisee in addition to the above provision will include a provision substantially as follows: This agreement may be cancelled with or without cause at any time up to and including one week after the completion of the units of dancing instruction previously contracted for by student with studio, if any, without cost or obligation except that a charge may be made for not in excess of two additional lessons furnished during each week pursuant thereto.
>
> (c) Franchisee agrees to use at all times the words "a franchised studio" whenever "Arthur Murray Studio," "Arthur Murray Dance Studio," "Arthur Murray School of Dancing," or any variation thereof is used in the franchisee's advertising or printed matter. The franchisee agrees to use in

his appointment cards, receipts, etc., wherever the name "Arthur Murray" appears, the phrase "Arthur Murray Dance Studio," _____, "franchisee," (the blank to be filled in with the franchisee's name).

(d) The franchisee will immediately have the phrase "Arthur Murray Dance Studio" _____ 'owner and franchisee" (the blank to be filled in with the franchisee's name) painted on the outer door of entrance to the franchisee's studio or studios.

In reviewing this paragraph, it is apparent that the respondent was taking the necessary steps to make sure that the franchisee would advise its customers that the customer was dealing with the franchisee and not with the respondent. This information was to be contained in all of the contracts, and in addition, this information was to be contained in all advertising or other printed matter.

(4) The presence of its property, real or personal, or interest therein, including inventories, bank accounts, etc. The appellants do not contend nor is there any evidence in the record which would suggest that the respondent is the owner of any real or personal property in the State of Utah.

(5) Whether the activities are sporadic or transitory as compared to continuous and systematic. We believe the question as to whether or not the activities of the respondent are either sporadic or continuous is best answered by Mr. Curry when he testified that he never had much contact with the representatives of the respondent as long as the franchise fees were current. He testified that no real schedule was followed and sometimes as much as two years passed between visits. Other than the visits of the auditors, the only other contact that Arthur Murray, Inc., the respondent herein, had with the State of Utah was to send to the franchisee in the State of Utah certain literature to aid

in the successful operation of the franchise studio.

(6) The extent to which the alleged facts of the asserted claim arose from activities within the state. In reviewing the record and the evidence contained therein, it would appear that the activities of the respondent, Arthur Murray, Inc., were confined to sending literature into the state to assist the franchisee, entering into the franchise contract, and periodic audits of the franchisee's financial records. The appellants allege fraud on the part of the respondent; however, the claim of fraud apparently does not arise out of any of the very limited activities entered into by the respondent. The extent to which the alleged facts of the asserted claim arose from the activities within the state is one of the criteria laid down by the Eighth Circuit Court of Appeals in Caeser's World.

In Mack Financial Corporation v. Nevada Motor Rentals, Inc., 14 Utah 2d 276, 529 P. 2d 429 (1974), the Utah Supreme Court ruled that the defendant was not doing business within the State of Utah, and, therefore, not subject to the jurisdiction of the Utah courts. In that case, the defendant, a foreign corporation, entered into a sales contract to purchase vehicles from the plaintiff. The sales were made in Denver, Colorado, and a subsequent assignment of the contract was made to another foreign corporation in the State of Idaho. The Utah Supreme Court concluded that although the trucks were driven over the highways of Utah, this did not constitute doing business within the State of Utah. Apparently there was not a sufficient connection between the claim asserted by the plaintiff, namely the breach of the contract, and the fact that the trucks were used in the State of Utah. In the case now before the court it is submitted

that the claim asserted by the appellants is not sufficiently connected with those very minimal contacts which the respondent has with the State of Utah. The contacts with the State of Utah involve giving some assistance to the franchisee and making sure that the franchisee makes the payment as required by the contract. This is not connected sufficiently with the allegations of fraud.

(7) The relative hardship or convenience to the parties in being required to litigate the controversy in the state or elsewhere. It is conceded that a possible hardship might arise if the appellants are required to litigate this matter in the State of Florida; however, it would also constitute a hardship upon the respondent to litigate this claim in the State of Utah due to the fact that all of the records and all of the employees of the respondent which visited the State of Utah are residents of the State of Florida. All of the records would have to be transported, together with the personnel, from the State of Florida to testify concerning this lawsuit. It would appear that the arguments on each side of this issue are evenly balanced; however, one must realize that the appellants apparently overlooked the fact that if they were defrauded, they were defrauded by the franchisees, all of whom at one time or another were residents of the State of Utah. For reasons best known to the appellants, they have decided not to file an action against these local franchisees. Although the merits of the complaint are not before the court, it would appear that if there is a cause of action against the respondent, there would also be a cause of action against the local franchisees. Instead of filing a lawsuit against the local franchisees, the appellants have decided to bring an action against the franchisor, Arthur Murray, Inc., who is the respondent.

The respondent, Arthur Murray, Inc., is a corporation which had very limited contacts with the local franchise studio and is very distant from this forum.

In weighing the hardships on the litigants, it would be much less of a hardship for the appellants to elect to either sue the respondent in the State of Florida, or in the alternative, bring an action directly against the franchisees in the State of Utah than it would be to have a foreign corporation with its offices in the State of Florida subjected to litigation in the State of Utah when its connection with the State of Utah is of a very limited nature. It is submitted that when the criteria of Hill v. Zale are applied to the facts contained in the record, there is no question but that the facts do not measure up to those criteria which could be used to insure that when jurisdiction is asserted over a foreign person or corporation, the traditional notions of fair play, substantial justice, and due process are not offended.

POINT III.

THE RECORD AND EVIDENCE CONTAINED THEREIN SHOULD BE VIEWED IN A LIGHT MOST FAVORABLE TO THE RESPONDENT AND THE JUDGMENT OF LOWER COURT.

The appellants in their brief have summarized certain facts while overlooking those facts presented to the trial court which support the trial court's finding that the respondent was not doing business in the State of Utah, and, therefore, not subject to the jurisdiction of the courts of this State. The appellants now claim that any inference that can be drawn from the complaints and the record in general should be drawn in a manner which would favor the appellants.

The appellants refer only to those portions of the Curry deposition which

support their position that the respondent was doing business in the State of Utah. They also make use of the affidavit of Marie LaTour and certain other documents contained in the record; however, they totally ignore those portions of the record which support the trial court's findings. They make no mention of those portions of the Curry deposition which would indicate that the only representatives of the respondent who visited the State of Utah were the auditors, and that these auditors only visited on certain isolated instances to determine whether the franchisee was making a fair and accurate accounting. The appellants have seized upon certain portions of the record and now ask this court to overturn the decision of the trial court based on part of the record and ask this court to totally ignore certain other portions of the record.

The Utah Supreme Court has held in Dunham-Bush, Inc. v.Bill Hartmann Plumbing & Heating, Inc., 30 Utah 2d 177, 515 P. 2d 92 (1973), that the determination of the question as to whether or not a corporation is doing business within the state is dependent upon a determination made on matters of fact. The court in its decision in that case stated as follows:

> Resolution of the question of whether a foreign corporation is doing business within a state is dependent upon the determination made on matters of fact, and the traditional rules of review as to the trial court's prerogatives, and the presumptions of verity, are applicable. 515 P. 2d at 94.

The traditional rules of review which the court referred to above include the rule that the appellate court should review evidence in the light most favorable to the party whose motion for judgment was granted. See Parrish v. Tahtaras, 7 Utah 2d 87, 318 P. 2d 642 (1957). See also Charlton v. Hackett, 11 Utah 2d 389, 360 P. 2d 176 (1961).

In the Charlton case referred to above, the trial court sitting without a jury rendered a judgment for the buyer of securities. The securities broker appealed, and in sustaining the trial court's decision, the Utah Supreme Court stated as follows:

> In considering the attack on the findings and judgment of of the trial court it is our duty to follow these cardinal rules of review: to indulge them a presumption of validity and correctness; to require the appellant to sustain the burden of showing error; to review the record in the light most favorable to them; and not to disturb them if they find substantial support in the evidence. 11 Utah 2d at 390.

It is submitted that to overturn the decision of the trial court, the appellants have the burden of showing error, and this would include a showing that the trial court's decision does not find substantial support in the evidence presented. To do this the court would have to totally ignore the testimony of Mr. Paul Curry wherein he testified concerning the nature of the arrangement with the dance instructors who are not employees or representatives of the appellant, but were hired on an individual basis by the local franchisee. In addition, the court would have to look at only one portion of the Curry deposition concerning the manual referred to and totally ignore the testimony of Mr. Curry wherein he stated that it was just a good guide for a franchisee to follow, and in his words, "suggestions" as to how a successful franchisee operation should be operated.

In reviewing the Curry deposition, it can be seen that the trial court had sufficient evidence to conclude that the only contact the respondent had with the State of Utah and its franchisee was merely to verify that the franchisee was making an accurate and fair accounting pursuant to the franchise agreement

and to assist the franchisee by forwarding certain literature to him. As Curry stated, if the franchisee was current in making his payment under the contract, the visits of the auditor were very sporadic and sometimes the visits were as much as two years apart.

In reviewing the record on appeal, it must be admitted that there may be a dispute in the evidence presented to the trial court; however, as indicated above, this court should review the record in the light most favorable to the respondent. In the case of Dansak v. Deluke, 12 Utah 2d 302, 366 P. 2d 67 (1961), the Utah Supreme Court conceded there was what it called a sharp dispute in the evidence. The appellants in that case asked the court to review the evidence received by the trial court sitting without a jury. The court extensively reviewed the evidence surrounding the transaction in dispute and then in affirming the trial court's decision, stated as follows:

> While Lucy testified as to the agreement, and inferences can be drawn from the circumstances surrounding the formation of the corporation, nevertheless the trial judge saw fit to believe the testimony of the plaintiffs and disbelieve that of Lucy. This being a case at law it follows that this appeal is upon questions of law alone. This court cannot pass upon the weight of the evidence, nor determine conflicts therein, but can only determine whether or not the findings and judgment of the trial court find substantial support in the evidence. In so examining the evidence, all reasonable presumptions are in favor of such findings and judgment, and the evidence must be considered in the light most favorable to them. 12 Utah 2d at 306.

In summary, it is the position of the respondent that the record and the evidence contained therein adequately support the decision of the trial court and that this court should not seize upon certain portions of the record and over-

turn the decision of the trial court when other portions of the record support the trial court's decision that the respondent was not doing business within the State of Utah, and, therefore, not subject to the jurisdiction of the courts of this state.

CONCLUSIONS

The respondent respectfully submits that the appeal of the appellants should be dismissed since it was not timely filed pursuant to the Utah Rules of Civil Procedure. In the event that this court rules that the motion to reconsider was sufficient to terminate the running of the time within which an appeal must be filed, then it is further submitted that the trial court did not err in ruling as it did since the record adequately supports the trial court's decision.

The judgment in favor of the defendant-respondent, Arthur Murray, Inc., should, therefore, be affirmed.

Respectfully submitted,

STRONG & HANNI

By _____
PHILIP R. FISHLER
Attorneys for Respondent

MAILING CERTIFICATE

Mailed two copies of the foregoing to William H. Henderson and Joseph C. Fratto, Attorneys for Plaintiffs-Appellants, 104 John Hancock Building, Salt Lake City, Utah 84111, this 5 day of February, 1976.

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