

2000

Mary Ann Lucero Dipoma v. Brian McPhie and Does 1 thorough 20, whose true names are unknown: Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

MARY ANN LUCERO
DIPOMA,

Plaintiff-Appellant,
and Respondent,

vs.

Case No. 2000466-SC
Priority No. 12

BRIAN McPHIE and DOES I
through 20, WHOSE TRUE NAMES
ARE UNKNOWN,

Defendant, Appellee,
and Petitioner.

BRIEF OF RESPONDENT

PETITION FOR REVIEW BY WRIT OF CERTIORARI OF THE OPINION
OF THE UTAH COURT OF APPEALS IN CASE NO. 990526-CA,
REVERSING SUMMARY JUDGMENT ENTERED IN THE THIRD
JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, UTAH,
THE HONORABLE JUDITH ATHERTON PRESIDING

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BRIEF OF RESPONDENT

ISSUES PRESENTED

1. Was the Utah Court of Appeals correct in finding that payment of a filing fee is not a jurisdictional requirement for determining when an action is commenced for purposes of a statute of limitation defense when Dipoma timely filed her Complaint and paid the filing fee with a personal check which was later dishonored?

2. Was the Utah Court of Appeals correct in refusing to find the actions of Dipoma with regard to payment of the check to be unreasonable as

a matter of law when there was no evidence in the record at the trial court concerning this issue and where the defendant failed to raise the issue in the trial court?

APPLICABLE STATUTES AND RULES TO THIS APPEAL

This appeal involves the interpretation of a number of statutes and civil rules which are currently in effect and, in some instances, repealed. These include statutes relating to limitation of actions, filing fee collections by government agents, and civil rules relating to commencing a civil action and appealing a civil judgment. These applicable statutes and rules are as follows:

Statutes Relating to Limitation of Actions

78-12-1 - Time for Commencement of Action Generally. Civil actions may be commenced only within the period prescribed in this chapter, after the cause of action has accrued, except in specific cases where a different limitation is prescribed by statute.

78-12-75 - An action may be brought within four years: (1) upon a contract, obligation, or liability not founded upon an instrument in writing. . .

Statutes Relating to Filing Fees

21-1-1 - For services performed in their respective offices, the officers named in this chapter shall collect in advance for the use and benefit of the state the fees hereinafter enumerated and such other fees as may be provided by law.

21-1-5(1)(a) - The fee for filing any civil complaint or petition invoking the jurisdiction of a court of record not governed by another subsection is \$120.

21-7-2(1)(a) - The state and county officers mentioned in this title may not perform any official service unless the fees prescribed for that service are paid in advance.

(b) When the fee is paid, the officer shall perform the services required.

(c) An officer is liable upon his official bond for every failure or refusal to perform an official duty when the fees are tendered.

21-7-3(2) - As provided in this chapter, any person may institute, prosecute, defend, and appeal any cause in any court in this state without prepayment of fees and costs or security, by taking an subscribing, before any officer authorized to administer an oath, an affidavit of impecuniosity demonstrating financial inability to pay fees and costs or give security.

21-7-4(1) - Upon the filing of the oath or affirmation with any Utah court by a non-prisoner, the court shall review the affidavit and make an independent determination based on the information provided whether court costs and fees should be waived entirely or in part. Notwithstanding the party's statement of inability to pay court costs, the court shall require a partial or full filing fee where the financial information provided demonstrates an ability to pay a fee.

In the instances where fees or costs are completely waived, the court shall immediately file any complaint or papers on appeal and do what is necessary or proper as promptly as if the litigant had fully paid all the regular fees. The constable or sheriff shall immediately serve any summonses, writs, processes, and subpoenas, and papers necessary or proper in the prosecution or defense of the cause, for the impecunious person as if all the necessary fees and costs had been fully paid.

21-7-4.6(1) - When an affidavit of impecuniosity has been filed and the court assesses an initial filing fee, the court shall immediately notify the litigant in writing of:

- (a) The initial filing fee required as a prerequisite to proceeding with the action;
- (b) The procedure available to challenge the initial filing fee assessment as provided in Section 21-7-4.7; and
- (c) The inmate's ongoing obligation to make monthly payments until the entire filing fee is paid.

(2) The court may not authorize service of process or otherwise proceed with the action, except as provided in Section 21-7-4.7, until the initial filing fees have been completely paid to the clerk of the court.

21-7-4.7(1) - Within ten days of receiving court notice requiring an initial filing fee under Section 21-7-4.6, the litigant may contest the fee assessment by filing a memorandum and supporting documentation with the court demonstrating inability to pay the fee.

(2) The court shall review the memorandum the supporting documents challenging the fee assessment for facial validity.

(3) The court may reduce the initial filing fee, authorize service of process, or otherwise proceed with the action without prepayment of costs and fees if the memorandum show the litigant:

- (a) Has lost his source of income;
- (b) Has unaccounted nondiscretionary expenses limiting his ability to pay;
- (c) Will suffer immediate irreparable harm if the action is unnecessarily delayed; or

(d) Will otherwise lose the cause of action by unnecessary delays associated with securing funds necessary to satisfy the assessed filing fee.

(4) Nothing in this section shall be construed to relieve the litigant from the ongoing obligation of monthly payments until the filing fee is paid in full.

Rules Relating To Commencement Of Civil Actions And Appeals.

Rule 3, Utah Rules of Civil Procedure:

A. How Commenced. A civil action is commenced (1) by filing a complaint with the court, or (2) by service of a summons together with a copy of the complaint in accordance with Rule 4. If the action is commenced by the service of a summons and a copy of the complaint, then the complaint, the summons and proof of service, must be filed within ten days of such service. If, in a case commenced under paragraph A(2) of this rule, the complaint, summons, and proof of service are not filed within ten days of service, the action commenced shall be deemed dismissed and the court shall have no further jurisdiction thereof; provided, however, that the foregoing provision shall not change the requirement of Utah Code Annotated, §12-1-8 (1986).

B. Time of Jurisdiction. The court shall have jurisdiction from the time of filing of the complaint or service of the summons and a copy of the complaint.

Rule 3, Utah Rules of Appellate Procedure:

A. Filing Appeal From Final Orders and Judgments. An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney's fees.

* * *

- (f) At the time of filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court such filing fees as are established by law, and also the fee for docketing the appeal in the appellate court. The clerk of the trial court shall not accept the notice of appeal unless the filing and docketing fees are paid.
- (g) Docketing of Appeal. Upon the filing of the notice of appeal and payment of the required fees, the clerk of the trial court shall immediately transmit one copy of the notice of appeal, showing the date of its filing, the docketing fee . . . to the clerk of the appellate court. Upon receipt of the copy of the notice of appeal and docketing fee, the clerk of the appellate court shall enter the appeal upon the docket.

Former Rule 73, Rules of Civil Procedure prior to amendment in 1985:

* * *

A party may appeal from a judgment by filing with the district court a notice of appeal, together with sufficient copies thereof for mailing to the supreme court and all other parties to the judgment, and depositing therewith the fee required for docketing the appeal in the Supreme Court. The clerk of the district court shall forthwith transmit one copy of the notice of appeal, showing the date of filing, together with the required fee, to the Supreme Court where the appeal shall be duly docketed. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is only ground for such remedies as are specified in this Rule, or when no remedy is specified, for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal.

STATEMENT OF THE CASE

Respondent takes exception to a distortion of the record contained in the "Statement of the Case" of the petitioner. (Brief of Petitioner at 2-4).

Petitioner states:

Dipoma's personal check was returned to the Clerk of the Court on December 29, 1997. (R. 16-17, 21). The Clerk of the Court notified Dipoma of the insufficient funds check shortly thereafter and told Dipoma that the Clerk could not accept additional checks from her as her first check had been returned. (R. 16-17, 21). After waiting over two more months, Dipoma attempted to pay the filing fee on March 10, 1998 by mailing another check to the Clerk of the Court (R. 21, 29-30). (Petitioner's Brief at 2).

In fact, as the Court of Appeals noted, "the record does not disclose when the Court Clerk notified Dipoma that her check had been returned."

This same effort of Petitioner to distort the record facts to paint a picture of lack of diligence on Dipoma's part was attempted in the briefs with the Court of Appeals and was specifically noted in the Reply Brief of Dipoma in that proceeding. (Reply Brief of Appellant, pp. 1-2).

Petitioner has omitted to note that during the proceeding in the trial court no effort was made by Petitioner McPhie to establish factual evidence as to the reasonableness of Dipoma's actions with regard to the payment of the filing fee. The question of reasonableness was never argued nor briefed in the lower court nor ruled upon by the trial judge. The sole basis of the

lower court's opinion was that the subsequent dishonor of Dipoma's check as a matter of law voided an otherwise timely filing of the complaint and thus was not within the applicable four-year statute of limitations.

SUMMARY OF THE ARGUMENTS

Before an action can be dismissed under a statute of limitations, there must be a clear showing that a litigant has not "commenced" a legal proceeding against the adverse party. In this case an actual complaint was filed with the Clerk of the Court, a case number was assigned to the litigation, and a trial judge was designated. It is undisputed that the date this action was filed satisfied the four-year statute of limitations. This appeal arose because Dipoma's personal check for the filing fee was subsequently returned by her bank and the fee was not collected by the Clerk of the Court until after the four-year statute of limitation had run.

The Court of Appeals found that the filing of the complaint and receipt of a valid case number properly "commences the action" under Rule 3 of the Rules of Civil Procedure for purposes of the statute of limitations regardless of the status of the filing fee. Because this specific rule governing the commencement of a lawsuit does not require a fee to be paid for jurisdiction to attach, any general statutes relating to the duties of government officers is

not jurisdictional for purposes of determining whether an action is within an applicable statute of limitation.

Moreover, even if it were assumed *arguendo* that a filing fee was jurisdictionally required the tender of a lawful check would satisfy this requirement since the legislature has never required a cash payment for any filing fee. The fact that a check is later dishonored is no different than allowing a person claiming to be impecunious to file a complaint even though later it is determined that no impecuniosity claim can be made. In both cases any filing fee requirement has been initially satisfied.

The alternate grounds argued by the petitioner for the first time before the Court of Appeals is not a proper issue to this appeal. The question of “reasonableness” must always be based upon a full factual record even in those cases decided as a matter of law. The issue of “reasonableness” cannot be decided on a non-existent record where no evidence was taken. The petitioner McPhie had the opportunity to develop such a record in the lower court and to raise this issue as an alternate ground in the lower court proceeding but for whatever reason chose not to do so. It was therefore proper for the Court of Appeals to reject this ground since it was not raised by Petitioner on appeal and because the lower court could not have decided this issue without a factual record of Dipoma’s actions or inaction.

The “sky is falling” argument advanced by Petitioner McPhie are totally without merit. This decision focused upon a very specific issue involving a dishonored check and a statute of limitation defense. The Court of Appeals did not hold that district court clerks would no longer be required to collect fees under the general statutory provisions of Title 21. Nor did the Court hold that a payment of a filing fee was not necessary if a litigant wishes to utilize the court system of Utah. Instead, the Court merely held that for purposes of determining when an action is “commenced” pursuant to Rule 3 of the Utah Rules of Civil Procedure, that the payment of a filing fee is not prerequisite in order for jurisdiction of the courts to attach. The decision clearly did not excuse the filing fee requirement imposed by statute.

Furthermore, the argument that court clerks will become overburdened collection agents is equally without merit. Until such time as the State of Utah requires cash payment for all state statutory fees there will always be a problem with collecting dishonored checks or rejected credit card authorizations. However, as was illustrated in this case, the clerks in the District Courts are fully prepared to deal with this problem just like every other public and private agency which transacts business with the public. Specific penalty fees are added to dishonored checks, criminal provisions

apply to fraudulent checks, and courts are free to dismiss actions at any time when payment had not been made.

Finally, the attempt by Petitioner McPhie to expand the decision of the Court of Appeals and the issue in this case to all state government agencies is completely nonsensical. This decision did not deal with the validity of fees paid to other government agencies by dishonored checks. Certainly, it is patently clear that there is no critical issue of jurisdictional commencement of the fee for a hunting license, document recording fee, or birth certificate. All of the various state agencies appropriately require payment for their services and appropriately deal with any collection problems that may subsequently arise with a minute percentage.

ARGUMENT

Respondent Dipoma fully adopts the reasoning of the majority opinion by the Court of Appeals below. A copy of this decision is contained in the Appendix to this Brief. This decision succinctly analyzes and resolves the problem presented in this particular case involving these particular litigants. Respondent Dipoma would feel comfortable relying solely upon the well-reasoned principles enunciated by the Court of Appeals were it not for the post-opinion arguments raised by Petitioner McPhie before this Court concerning alleged catastrophic consequences that were never argued below.

For this reason, therefore, respondent Dipoma will supplement the opinion of the Court of Appeals as to the precise issue of this litigation and will also address the broad predictions of mayhem now argued by McPhie before this Court.

I.

FOR PURPOSES OF DETERMINING A STATUE OF LIMITATION PERIOD AN ACTION IS “COMMENCED” BY THE FILING OF THE COMPLAINT REGARDLESS OF WHETHER A FILING FEE IS PAID OR NOT.

As is often the case, this appeal does not concern the actual automobile accident in which Plaintiff was severely injured. Instead, it focuses on the effect of a returned filing fee check which was used by the respondent Dipoma to enter the Utah court system to enforce her legal rights. It is not unusual for checks to be dishonored in Utah on any given day for a variety of reasons both within the control of the check writer and beyond the control of the check writer. This non-event of a returned check would have had no significance in this litigation had it not been for the unique fact that Dipoma did not choose to use this check until shortly before the statute of limitation was to expire. Thus, just as a razor thin presidential election has now given tremendous significance to the previously unknown terms of “hanging chad,” “pregnant chad,” and “dimpled chad” the coincidence of the statute of

limitation and the dishonored check has created a lawsuit in and of itself.

These unlikely combinations of events is what creates history and appellate decisions.

Before arguing what this case is about it is important to note what it is not about. First, this case only concerns the filing of a judicial complaint. It does not involve any other type of government agency or attempt to utilize any other government service.

Second, this is not a case in which respondent Dipoma asserted that she could commence this lawsuit without paying a filing fee. She did not go to the counter of the District Court Clerk and demand that the clerk file the action with no payment of fees. Similarly, this is not a case in which a clerk forgot to request a fee to be paid by Dipoma before the matter was stamped and assigned to a lower court judge. Rather, it is a case in which all normal requirements for filing of a complaint were complied with by Dipoma including presentation of a valid check drawn upon her personal account which was accepted by the clerk in the regular course of business.

Finally, this is not a case in which Dipoma has claimed that by some statutory or constitutional reason she should not pay the required filing fee to utilize the court systems of this state. In fact, the filing fee was paid well

before any effort was made by the petitioner McPhie to dismiss this entire action.

The sole issue raised by petitioner McPhie in the trial court was whether the sequence of events concerning the payment of the filing fee allowed him to assert an affirmative defense of the statute of limitations. That was and is the only issue now before this Court in spite of petitioner McPhie's efforts to expand the ruling by the Court of Appeals to encompass an entire rainbow of unreal issues. With this in mind, therefore, respondent Dipoma will now specifically address the actual issue of this appeal.

For purposes of analyzing a statute of limitation case the critical question becomes whether a civil action has been "commenced" within the applicable allowed time. §78-12-1, U.C.A. In the instant case, for example, a four-year period is allowed to commence an action involving a tort. §78-12-75, U.C.A. It is apparent that the term "commenced" contained in the statute of limitation sections of the Utah Code specifically refer to Rule 3 of the Utah Rules of Civil Procedure. There it is stated, "a civil action is commenced (1) by filing a complaint with the court or (2) by service of a summons together with a copy of the complaint in accordance with Rule 4." (Emphasis added). Moreover, subsection (b) states, "The court shall have

jurisdiction from the time of filing of the complaint or service of the summons and a copy of the complaint.”

Another provision of Utah law also supports Dipoma’s position. Rule 4(c)(2) states, “If the action is commenced under Rule 3(a)(2), the summons shall state that the defendant need not answer if the complaint is not filed within ten days after service” Thus, under the Utah rules the time for measuring a statute of limitation defense can occur upon the service of a summons with the filing and payment not occurring for up to ten days later.

Obviously, both Rules 3 and 4 are written with exact detail which must be followed if an action is to be correctly commenced. Failure to do so will result in lack of jurisdiction. Lock v. Peterson, 285 P.2d 1111 (Utah, 1955); Martin v. Nelson, 533 P.2d 897 (Utah 1975); Garcia v. Garcia, 712 P.2d 288 (Utah 1986); Dennett v. Powers, 536 P.2d 135 (Utah 1975); and Fibreboard Paper Products v. Ditrach, 475 P.2d 1005 (Utah 1970). Certainly, the jurisdictional requirement of a filing fee could easily have been included in Rule 3 and Rule 4 of the Rules of Civil Procedure if it was in fact required.

Because petitioner McPhie is unable to use the judicial code or the Rules of Civil Procedure to assist him in his jurisdictional argument, he attempts to rely on Title 21 of the Utah Code relating to government fees in order to support his claim. Sections 21-1-1 and 21-7-2(1)(a) require clerks to

collect fees in advance and not to perform any services until such fees are paid. It should be noted, however, that there is no language in these categories of statutes relating to jurisdiction of a court in relation to these fees. As noted by the Supreme Court of Kansas “since payment of the docket fee affects only the clerk of the district court, and an adverse party is not affected by the time of the payment of the docket fee, it should not be regarded as jurisdictional.” Avco Financial Services v. Caldwell, 547 P.2d 756, 760 (Kan. 1976).

In Southeast Pennsylvania Transportation Authority v. DiAntonio, 618 A.2d 1182 (Pa. 1992), the clerk of the court known as a “prothonotary” accepted an answer although an insufficient amount had been tendered. The opposing party argued that even though the answer was properly date stamped and filed, the failure to pay the correct amount voided the answer and therefore allowed a default to be entered. The opposing party relied upon the same type of statutory requirement that clerks were not supposed to accept documents unless the correct fee was paid. The Commonwealth Court of Pennsylvania rejected this argument and stated:

DiAntonio contends that because SEPTA did not pay the proper filing fee, the filing was not perfected and the prothonotary was not required to docket the answer. Section 4 of the Act does provide that the prothonotary of Philadelphia County “shall not be required to receive any papers or perform any service until the proper fee is paid.”

Although the prothonotary was not required to accept the pleading until the proper fee was paid, the prothonotary accepted the answer by time stamping a copy. These actions constitute “filing”, which although not defined in the Rules of Civil Procedure, commonly refers to the delivery of papers to the prothonotary for docketing. . . . Even though the prothonotary’s office later discovered that the total fee was deficient, the prothonotary could not summarily return the answer after having accepted it.

Consequently, SEPTA’s answer was deemed filed on April 12, 1981, the day it was accepted by the prothonotary as indicated by the original time stamp, and the answer should have been timely docketed. To decide otherwise would eliminate reasonable reliance by parties on a prothonotary’s acceptance of a pleading. *Id.* at 1185.

An argument similar to Petitioner’s was made in Foley v. Foley, 147 Cal. App.2d 76 (Cal. App. 1956). A California statute required clerks to collect fees in advance. A litigant failed to pay a filing fee timely but the clerk still accepted the papers and filed them. The fees were not paid until after the statutory period had expired for filing of the original papers.

The California Appellate Court found the filing date effective even though the fee was not paid within the statutory period. The Court emphasized there was no indication that the legislature intended the filing be rendered void if the filing fee was not timely paid. The Court said:

If it had been the legislative intent that the effectiveness of certain official acts would depend on the payment of fees by the persons interested in them, a provision directed to those interested persons and in our case contained in the Code of Civil Procedure would have been expected. *Id.* at 78.

It is interesting that the research of both parties to this litigation has found only one decision from the vast courts of America dealing with the question of whether the timely filing of a complaint and filing fee by check “commences” an action for purposes of a statute of limitation defense when the check is later dishonored and subsequently paid after the statute of limitation time has expired. The Colorado Court of Appeals case of Brokerhouse International v. Bendelow is cited and quoted by the petitioner McPhie in his brief. (9-11). This case was noted by the Court of Appeals in the majority opinion. (Appendix p. 3, ¶ 21). Respondent Dipoma would submit that a review of this half-page decision relating to this issue does not clarify the question of “payment” at all but is merely a legal conclusion without any analysis. In essence, the Colorado Court of Appeals determined that the payment of a filing fee only occurs when cash is received by the clerk.

No other court in the country has relied upon this decision to support the argument now advanced by Petitioner. However, the same Colorado Court of Appeals in an apparent struggle to reconcile it with a more recent decision did refer to this case. In People v. Davenport, No. 98CA2387 (Colo. App. 03-02-2000) the prosecution filed a petition under the Colorado

Contraband Forfeiture Act seeking forfeiture of \$23,000 of seized currency which was allegedly used in the unlawful distribution of a controlled substance. (A copy of this decision is contained in the Appendix herein).

The defendant's attorney filed a response to the forfeiture petition but failed to pay a docket fee required by Colorado statute. The clerk accepted the documents for filing and presented them to the court without the filing fee.

Defendant tendered the docketing fee as soon as the error was called to his attention. The trial court acknowledged that the defendant had "filed" a response but ordered it stricken because it was unaccompanied by the necessary filing fee. The lower court then entered a default judgment in favor of the state reasoning that the defendant had failed to file a response and had failed to appear personally. The Court of Appeals made the following statement:

Filing a response and paying the docket fee are two distinct acts . . . a case cannot proceed to a final determination until the fee is paid, but it is not improper for the court to allow the party to pay the fee at a later time. *Id.* at 3.

The Colorado Court of Appeals also quoted prior authority which stated, "Unless it is necessary to enforce procedural rules to protect substantive rights, litigation should be determined on the merits, rather than on technical application of procedural rules." The Court then noted:

Defendant did violate a procedural rule by failing to pay the docket fee at the time of filing. Therefore, if the trial court felt it was necessary, a sanction could have been imposed. Imposition of sanctions is a matter for the sound exercise of the trial court's discretion. The inadvertent failure to pay a docket fee at the time of filing, without any aggravating factor, does not constitute an extreme circumstance. Therefore, we hold that striking the defendant's response and entering a default was an abuse of discretion. *Id.* at 3.

In referring to its previous decision of Brokerhouse International the Court then made the following interesting statement:

To the extent that Brokerhouse International, Ltd. v. Bendelow, 952 P.2d 860 (Colo. App. 1998) might be interpreted to reach a contrary conclusion, we find it distinguishable from this case. In Brokerhouse, the plaintiff's failure to perfect the commencement of the action impacted the defendant's right to rely on the statute of limitation. Here, the only impact on the prosecutor was to require him to litigate his petition for forfeiture, and that fact, standing alone, does not constitute harm or prejudice. *Id.* at 3.

It thus appears from this later case that the Colorado Court of Appeals attempted to narrow its Brokerhouse decision by stating that complaints not accompanied by valid checks are only considered "not filed" in cases where the statute of limitation can be asserted as a defense. In other words, a litigant who filed a proceeding with a subsequently dishonored check who was not facing a statute of limitation problem under the reasoning of the Davenport decision could still maintain the valid commencement of action date of the original filing. On the other hand, an identical litigant who filed his action on the same day but who faced a statute of limitation defense could

not assert the Davenport reasoning because to do so would preclude an affirmative defense of a defendant. Respondent Dipoma submits that this explanation is not only illogical but would be a denial of equal protection under any state or federal constitution. The validity of a filing and the compliance with state and court rules should have no relation to the defenses that a defendant may later be able to assert.

The petitioner McPhie relies upon several cases from other state jurisdictions in which a complaint was apparently accepted by the clerk without a fee being tendered but the fee was paid on a later date. In this case, the filing fee was in fact paid and accepted by the court clerk in the form of a check and the complaint was duly filed, stamped and assigned a case number. This undisputed factual scenario, therefore, is completely different from the cases relied upon by the petitioner in Boostrom, De-Gas, and Wanamaker, petitioner's Brief pp. 11-14.

Petitioner McPhie again distorts the facts in this case by claiming that Dipoma failed to "properly pay the filing fee at the time the complaint was delivered." (Petitioner's Brief at 14). Apparently, Petitioner does not consider a check to be a form of payment and essentially argues that Dipoma was somehow able to talk the clerks into filing her complaint without the offer of any funds whatsoever. This simply did not occur in the present case

and the clerks fully complied with Title 21 of the Utah Code in requesting Dipoma to make payment before the filing was accepted. There is nothing contained in the opinion of the Court of Appeals which would mislead any litigant into believing that they could attempt to file a complaint without attempting to tender payment in accordance with the statutory schedule.

Finally, the only “Pandora’s Box” with respect to this case is the demons which the petitioner has envisioned will exist under the straight-forward analysis of the Court of Appeals discussing an extremely limited problem in the specific context of a statute of limitation expiration and a dishonored check.

II.

THE COURT OF APPEALS CORRECTLY APPLIED RULES OF STATUTORY CONSTRUCTION IN ANALYZING THE VARIOUS PROVISIONS OF THE UTAH CODE AND RULES OF CIVIL PROCEDURE.

Next the petitioner claims that the Court of Appeals failed to follow normal rules of statutory construction in interpreting Rule 3 and Title 21. (Petitioner’s Brief at 16-19). Again, a close analysis of the arguments made by the petitioner does not support the assertions being made.

For example, Petitioner finds fault with the decision of the Court of Appeals in using analogy to rules and cases involving appellate docketing

fees. (Petitioner's Brief at 17). It is interesting to note, however, that in the trial court and in the Court of Appeals, Petitioner argued these very same cases in his effort to show that appellate administrative fees were analogous to initial filing fees. (See "Defendant's Memorandum in Support of Motion for Summary Judgment, p. 4; Brief of Appellee, pp. 11-13).

Respondent in her Brief to the Court of Appeals below closely analyzed the cases relied upon by the petitioner and showed conclusively that the statutory history in fact supported Dipoma's position. (Brief of Appellant at 14-17; Reply Brief of Appellant at 5). The Court of Appeals essentially adopted the analysis of Dipoma in its opinion paragraphs 10-17.

It could be argued using Petitioner's logic that Appellate Rule 3 which expressly provides failure to pay the docketing fee is not jurisdictional and Appellate Rule 14(b) which provides that the court clerk may not accept a petition unless the docketing fee has been paid are extraneous language in light of Title 21-1-5(h) which establishes the filing fee for appellate jurisdiction. Under Petitioner's argument, these series of statutes 21-1-1, 21-1-5 and 21-7-1 would dismiss a litigant's appeal if the docketing fee was not properly paid on the date that the jurisdictional time for the appeal expired.

In reality, however, it is extremely unlikely that petitioner McPhie would take this absurd argument. Clearly, the plain language of the Rules of Appellate Procedure in dealing with fees and jurisdiction overcome the general language relating to the collection of fees by court clerks. Since Petitioner wishes to talk about rules of statutory construction it might be well to remember the principle that where the operation of two statutory provisions is in claimed conflict, the more specific provision will govern over that which is more general. Bittle v. Washington Terrace City, 993 P.2d 875 (Utah 1999). As further noted by this Court in Jensen v. IHC, 944 P.2d 327 (Utah 1997):

When we are faced with two statutes that purport to cover the same subject, we seek to determine the legislature's intent as to which applies. In doing this, we follow the general rules of statutory construction, which provide both that "the best evidence of legislative intent is the plain language of the statute" . . . and that "a more specific statute governs instead of a more general statute." (Citations omitted). *Id.* at 331. (Emphasis added).

Applying this principle to the instant case clearly shows that Rule 3 of the Utah Rules of Civil Procedure which specifically applies to the commencement of an action must govern any alleged dispute when compared with Title 21 relating to general obligations of government employees and state fees. The very limited question of when an action commences for the

purpose of determining a statute of limitation defense must be controlled by the rules governing the courts and not rules governing all state employees.

The Court of Appeals correctly applied the analogous statutory and case law in deciding this matter in favor of the respondent Dipoma.

III.

**UNTIL THE LEGISLATURE FORBIDS THE USE
OF PERSONAL CHECKS FOR THE PAYMENT
OF STATE FEES SUCH A PAYMENT IS VALID
AND CONSTITUTES A LEGITIMATE PAYMENT
OF A FEE AT THE TIME THE CHECK IS MADE.**

In the instant case the plaintiff clearly paid the correct filing fee to the District Court Clerk. This is, therefore, not an instance where no filing fee was tendered or where an incorrect filing fee was paid. The Utah statutes and rules do not require certified funds or cash to pay the numerous fees required in litigation. This Court can take judicial notice of the fact that the clerk will accept cash, personal checks, or credit cards to meet these statutory requirements. In addition, a person claiming impecuniosity can file an affidavit of such and still be allowed to file the documents with no form of money being tendered.

If the legislature intended the payment of the fee to be of such a significant event that it may deprive a litigant of his right to seek court redress or appellate review, the legislature clearly would have required certified funds

or cash. Even with certified cashiers' checks, however, there have been instances where they are dishonored by a bank for various reasons including theft or forgery.

Personal checks are a normal means of paying obligations ranging from grocery bills to car repairs and under the Uniform Commercial Code are an accepted form of payment for goods and services. However, personal checks may be dishonored by a bank for a number of reasons completely outside of the control of the check issuer. For example, the check may be returned for insufficient funds because the issuer relied upon a deposit from a third party which itself was later dishonored. The court can take judicial notice of this domino effect which occurs daily in personal and corporate affairs.

In addition, a check may be dishonored because of a bank mistake such as the failure to correctly print electronic numbers on the check or in a mistake as to the amount of balance shown in a person's account. In essence, therefore, the legislature never intended to take away critical judicial rights from an innocent person whose check is not honored for many reasons outside of their personal control. A check may also be dishonored because of a mathematical mistake or the failure to register a transaction by the check writer. Should these common mistakes be allowed to deny a litigant his day in court?

The judicial clerks today do not treat a dishonored check as the voiding of the document for which it was presented. In this case, for example, the clerk sent to the plaintiff a notice that the check had been dishonored and a request for certified funds. While petitioner was notified by the clerk that penalty fees were assessed for the returned check, there was no declaration that the filing of the complaint would be voided.

The allowance of the use of personal checks which are subject to dishonor is no different than the allowance of affidavits of impecuniosity which are also subject to denial. Numerous state and federal cases hold that in instances where a request for waiver of filing fees is made by a litigant but is later denied by the court, that the person is entitled a reasonable time to file the fee and to maintain the original action as if the fee had been paid. *See Jarrett v. U.S. Sprint Communication Co.*, 22 F.3d 256 (10th Cir. 1994); *McDowell v. Delaware State Police*, 88 F.3d 188 (3rd Cir. 1996); *Gilardi v. Schroeder*, 833 F.2d 1226 (7th Cir. 1987) and *Rodgers v. Bowen*, 790 F.2d 1550 (11th Cir. 1986); *Fraser v. The Colorado Board of Parole*, 931 P.2d 560 (Colo. App. 1996).

Constitutional equal protection would be violated if persons claiming to be impecunious were given advantages over those who paid filing fees but whose checks were later returned. Clearly, an impecunious applicant is

allowed to conditionally file a complaint with the clerk's complete knowledge that judicial permission may not be given for many days after and may be outrightly denied requiring actual payment. The same possibly of a conditional payment exists with a check which is later dishonored. In both instances, however, the filing fee matter should not affect the validity of the timely filing of the document.

Even assuming *arguendo* as the petitioner contends that the payment of a filing fee is a necessary prerequisite to determine when a statute of limitation time is calculated, the question remains in this case what effect does payment by check have upon this requirement. Using Petitioner's logic, for example, would delay the actual filing date of any complaint by several days since even checks that clear with no problem do not fund the state account on the date of the filing. In some instances, a check may require a week before funds are actually poured into the District Court's account. Should the filing date, therefore, be adjusted to the actual day that funds are received into the Clerk's account?

Clearly, such a delayed calculation would be absurd and not based upon any rule or statute. This same principle is equally applicable to dishonored checks. In other words, for purposes of Petitioner's argument it is immaterial whether a good check requires three days to clear or whether a

bad check requires seven days to make good the funds. In both cases neither date is the date that the complaint is filed and date stamped.

As previously noted if the legislature and the supervisory courts of this state wish to require that payment of actual funds be made concurrently with the filing of a complaint then the various rules and statutes should require cash be paid. The use of certified funds, checks, or credit cards all require a time delay in the actual receipt of funds into the Clerk's account.

IV.

**THE COURT OF APPEALS' OPINION DOES
NOT IMPOSE AN UNREASONABLE BURDEN
ON GOVERNMENT AND DOES NOT GIVE THE
GOVERNMENT PERSONNEL DISCRETION
WHERE NONE WAS INTENDED.**

Petitioner devotes a major portion of his brief to describe the conjectured consequences which the Court of Appeals decision will create within the Utah court system and, in fact, within the entire government system of Utah. (Petitioner's Brief at 20-25). These hypothetical projections are intended to substitute a logical analysis of the decision by the Court of Appeals for an emotional floodgate argument. A calm and thoughtful analysis of this litigation dispels the specters raised by Petitioner. First, the Court of Appeals in its decision in no way diluted the statutory obligation of court personnel to receive fees. Instead, the Court focused upon the very narrow

issue of jurisdiction and concluded that the Rules of Civil Procedure govern the general statutory language concerning the collection of fees. The decision did not negate any duty imposed upon court clerks or other state personnel.

Second, the facts of this case specifically involve the presentation of a valid check which was later dishonored. A “payment” was in fact made to the Clerk of the Court and was accepted. This is not a case in which Dipoma attempted to file her documents without making any effort for payment or paid an incorrect amount. In those cases in other jurisdictions where clerks did accept pleadings without payment either by mistake or design, those filings are considered filed on the date they were accepted by the clerk even though a fee must be subsequently paid. In any event, the facts of this case simply do not justify any expansion conjectured by the petitioner.

Third, the decision does not apply to any other government employees who are not court clerks and only to the specific question of when jurisdiction attaches to a complaint for purposes of a statute of limitation defense. The alleged chaos to other fields of government is again not supported by anything in this litigation.

Next, Petitioner speculates that litigants will now utilize the Dipoma case for some sinister advantage. Petitioner suggests that people will attempt to use bad checks to file complaints or will simply demand that clerks file

their complaints with no payment. However, since payment of fees has never been excused by any court, any such action would only delay the inevitable moment when payment had to be made or the matter dismissed under the discretion given to each court.

Certainly, the decision in this case does not stand for the proposition that a litigant can escape payment indefinitely but only focuses upon the very narrow question of when jurisdiction attaches if the complaint happens to be filed on the last day of the statute of limitations. Moreover, even today a litigant can claim that he is impecunious, fill out an affidavit, have his complaint filed, and later pay the filing fee after it is determined by a court that he is not impecunious. Because such abuse is possible is no answer to the ultimate question of why would a litigant do these deceptive acts merely to avoid paying the filing fee at the time the complaint is presented to the clerk.

The same argument now being made by Petitioner could have been made when former Rule 73 of the Rules of Civil Procedure requiring payment of fees for appeal as a prerequisite to jurisdiction was amended by Rule 3 of the Utah Rules of Appellate Procedure where such payment was not jurisdictional. Since 1985 a litigant hypothetically could demand that a notice of appeal be filed without the payment of a fee knowing that it was not a

jurisdictional requirement. Apparently, district court clerks have been able to deal with this problem successfully by either requiring the fee to be paid or lodging the notice of appeal without the fee subject to the later discretion of the appellate courts.

Finally, any arguments of dire predictions should be addressed to this Court in its rule-making authority or to the state legislature if payment should be a jurisdictional requirement at the time a complaint is filed. Perhaps the petitioner should also address the question of why the payment for a complaint under Rule 3(a)(1) is so critical if the Rules of Civil Procedure under Rule 3(a)(2) allow the commencement of the action by merely serving the defendant without any complaint having been filed or fee paid.

In summary, therefore, the arguments of Petitioner concerning the catastrophe now waiting the courts and government of Utah is merely a veiled attempt to protect himself from having to defend a lawsuit of liability caused by his own negligence. Petitioner's only concern is to eliminate the substantive case of Dipoma on its merits by hoping that the unfortuitous circumstance of a dishonored check will buy him his freedom from litigation. Clearly, the Court of Appeals and this Court should not allow the payment of a filing fee to be used as a weapon to destroy Dipoma's day in court.

V.

**THE ULTIMATE GROUNDS OF UNREASONABLE
DELAY BY DIPOMA HAS BEEN WAIVED BY
PETITIONER AND SHOULD NOT BE CONSIDERED
BY THIS COURT.**

In the final attempt to escape liability in this matter Petitioner argues that even if the decision of the Court of Appeals is correct and that a filing fee is not jurisdictional that nevertheless the actions of Dipoma were unreasonable as a matter of law and the case should be dismissed. (Petitioner's Brief at 16-32). The petitioner makes many factual statements as to what allegedly occurred during the District Court proceedings but does so only upon docketing dates contained in the record.

The petitioner fails to mention that the reasons for the actions or inactions of Dipoma are not contained in the trial record because Petitioner failed to assert reasonableness in the court below. Instead, the sole grounds argued by the petitioner in the trial court was that the payment as a matter of law was defective thereby allowing the statute of limitation defense to attach. No effort was made by the petitioner to take evidence below as to the facts and circumstances of the delayed payment upon which Petitioner now relies.

It goes without citation that a party who does not assert a claim waives it on appeal. The dissent in Dipoma urged that Dipoma's actions in failure to

pay the filing fee was unreasonable as a matter of law and that therefore the decision of the lower court should have been affirmed even though that ground or theory was not identified by the lower court as the basis of its ruling.

Before this appellate rule of view may be utilized, however, the ground or theory must be “apparent on the record.” Orton v. Carter, 970 P.2d 1254, 1260 (Utah 1998); State v. Finlayson, 2000 Ut. 10 (Utah 01-14-2000).

There is nothing in this record to establish the factual basis of whether Dipoma’s actions were reasonable or unreasonable. This Court has stated, “What constitutes a reasonable time ‘is a question of fact to be determined from all of the attendant circumstances.’” Russell v. Park City Corp., 506 P.2d 1274 (Utah 1973). The Court of Appeals in Mills v. Brody, 929 P.2d 360 (Utah App. 1996) specifically stated, “What constitutes a ‘reasonable time’ for payment is a question of fact”

All of the cases relied upon by the petitioner involve reviews of factual records concerning the actions or inactions of litigants in paying or not paying filing fees. Even when it is decided as a matter of law that an action is unreasonable such decision still must be based upon a factual record and not upon mere conjecture. Here, for example, there is no record as to what Dipoma was told by the clerk’s office when she received notice of her

dishonored check, what policy or rule prevented the clerk from accepting a second check from Dipoma when offered, and what occurred in Dipoma's life in the way of health or other circumstances which may have prevented her from paying the fee after her second attempt was rejected.

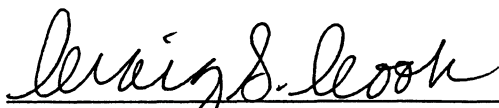
Certainly, these questions could easily have been determined by the lower court had the petitioner merely asked for an evidentiary examination of Dipoma and court personnel. Petitioner chose to put all of his eggs in the basket which was decided by the lower court as a matter of law and therefore cannot in this appeal bring up a defense which was not raised below and which has no factual basis that would allow an appellate court to make a decision.

For this reason, therefore, the question of "reasonableness" should not be an issue in this appeal.

CONCLUSION

For the above reasons, the well-reasoned decision of the Court of Appeals should be affirmed.

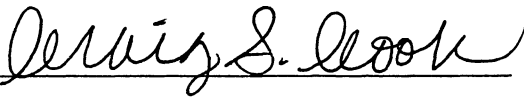
DATED this 4th day of December, 2000.



Craig S. Cook
Attorney for Plaintiff, Appellant,
Respondent

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing to
Paul N. Belnap, Attorney for Defendant, Appellee and Petitioner, 6th Floor, Boston
Building, 9 Exchange Place, Salt Lake City, Utah 84111 this 4th day of
December, 2000.



APPENDIX

INDEX TO APPENDIX

The People of the State of Colorado,
Petitioner-Appellee,

vs.

Darel Wayne Davenport, Jr.,
Respondent-Appellant

Mary Ann Lucero Dipoma,
Plaintiff and Appellant,

vs.

Brian McPhie, and Does 1 through 20,
Whose True Names are Unknown,
Defendants and Appellees

People v. Davenport. No. 98CA2387 (Colo.App. 03/02/2000)

[1] COLORADO COURT OF APPEALS

[2] No. 98CA2387

[3] 2000.CO.0042062 <<http://www.versuslaw.com>>

[4] March 2, 2000

[5] **THE PEOPLE OF THE STATE OF COLORADO,
PETITIONER-APPELLEE.
V.
DAREL WAYNE DAVENPORT, JR.,
RESPONDENT-APPELLANT.**

[6] Appeal from the District Court of Routt County Honorable Joel S. Thompson. Judge No. 98CV95

[7] Paul R. McIlmans, District Attorney, Kathryn Steelman, Deputy District Attorney, Steamboat Springs, Colorado, for Petitioner-Appellee Edward R. Harris, Denver, Colorado, for Respondent-Appellant

[8] The opinion of the court was delivered by: Judge Nieto

[9] JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS

[10] Division I

[11] Metzger and Ruland, JJ., concur

[12] In this civil forfeiture action, defendant, Darel Wayne Davenport, Jr., appeals the default judgment entered in favor of the People. We reverse and remand for further proceedings.

[13] The prosecution filed a petition under the Colorado Contraband Forfeiture Act, §§16-13-501 to 16-13-511, C.R.S. 1999, seeking forfeiture of \$23,000 of seized currency which was allegedly used in the unlawful distribution of a controlled substance.

- [14] The trial court issued a citation which summoned defendant to a first appearance on a date certain in order to show cause why the prosecution's petition for forfeiture should not be granted. The citation warned defendant that a default judgment would be entered against him "if you fail to file a response to the petition ... or if you fail to appear personally or by counsel at the first appearance." A copy of the citation was served on defendant by certified mail.
- [15] The day before the first appearance date, the clerk of the trial court received from defendant's attorney a response to the forfeiture petition, a motion to continue the forfeiture proceeding until the conclusion of the criminal case, and a verified statement executed by defendant asserting that the funds at issue were lawful proceeds from a legitimate investment. The docket fee required by §13-32-101, C.R.S. 1999, did not accompany the documents. However, the clerk accepted the documents for filing and presented them to the court. The prosecutor acknowledged to the court that before the hearing she had received a copy of the documents filed by the defendant. Defendant asserts he tendered the docket fee as soon as the error was called to his attention.
- [16] Neither defendant nor his counsel appeared at the first appearance hearing on the citation to show cause. The trial court acknowledged that defendant had "filed" a response but ordered it stricken because it was unaccompanied by the necessary filing fee. The court then entered default judgment in favor of the people, reasoning that defendant had failed to file a response and had also failed to appear personally or through counsel. Defendant filed a motion to set aside the default judgment; that motion was denied. This appeal followed.
- [17] I.
- [18] Defendant argues that his failure to pay the docket fee at the time he filed his response was not a sufficient basis for striking the response, and therefore, the trial court erred by striking the response and entering default judgment against him. We agree.
- [19] Section 16-13-505(8) requires the court to find the defendant in default at the first hearing unless he either files a response or appears in person or by counsel.
- [20] If any claimant to the property subject to a forfeiture action . . . is properly served with the citation . . . and fails to appear personally or by counsel on the first appearance date or fails to file a response as required by this section, the court shall forthwith find said person in default and enter an order forfeiting said person's interest in the property and distributing the proceeds of forfeiture as provided in this part 5 (emphasis added). Section 16-13-505(8), C.R.S. 1999.
- [21] Therefore, if defendant's response was improperly stricken, it was error to enter default

judgment at the first hearing.

- [22] Filing a response and paying the docket fee are two distinct acts. *Drennen v. Johnson*, 65 Colo. 381, 176 P. 479 (1918). The case cannot proceed to a final determination until the fee is paid, but it is not improper for the court to allow the party to pay the fee at a later time. *Carls Construction, Inc. v. Gigliotti*, 40 Colo. App. 535, 577 P.2d 1107 (1978).
- [23] "Unless it is necessary to enforce procedural rules to protect substantive rights, litigation should be determined on the merits, rather than on technical application of procedural rules." *Watson v. Fenney*, 800 P.2d 1373, 1375 (Colo. App. 1990). Here defendant attempted to comply with the statute. He sent his response to the court and to the prosecutor. The prosecutor suffered no harm by the defendant's failure to timely pay the docket fee.
- [24] Entry of default judgment is the harshest of all sanctions, and it should be used only in extreme circumstances. *Nagy v. District Court*, 762 P.2d 158 (Colo. 1988). Defendant did violate a procedural rule by failing to pay the docket fee at the time of filing. Therefore, if the trial court felt it was necessary, a sanction could have been imposed. Imposition of sanctions is a matter for the sound exercise of the trial court's discretion. *Nagy v. District Court*, supra. The inadvertent failure to pay a docket fee at the time of filing, without any other aggravating factor, does not constitute an extreme circumstance. Therefore, we hold that striking the defendant's response and entering a default judgment in the circumstances here was an abuse of discretion.
- [25] To the extent that *Broker House International, Ltd. v. Bendelow*, 952 P.2d 860 (Colo. App. 1998), might be interpreted to reach a contrary conclusion, we find it distinguishable from this case. In *Broker House*, the plaintiff's failure to perfect the commencement of the action impacted the defendant's right to rely on the statute of limitations. Here, the only impact on the prosecutor was to require him to litigate his petition for forfeiture, and that fact, standing alone, does not constitute harm or prejudice.
- [26] II.
- [27] The prosecutor asserts that even if the response was timely filed, default judgment was proper because §16-13-505(8), C.R.S. 1999, requires that the defendant file a response and appear at the first hearing. Therefore, the prosecutor argues that the failure to appear at the first hearing in person or by counsel justified entry of default.
- [28] The unambiguous language of §16-13-505(8) imposes alternative, not cumulative, requirements, and in that circumstance we must apply the statute as written. See *Department of Corrections v. Nieto*, ____ P.2d ____ (Colo. No. 97SC876, February 14, 2000). Accordingly, defendant may satisfy the statute by either filing a response or appearing, and he chose the former. Therefore, the prosecutor's argument must be rejected.

[29] III.

[30] Because of our conclusions, we need not reach the question of the applicability of C.R.C.P. 55 to a forfeiture proceeding under the Colorado Contraband Forfeiture Act.

[31] Accordingly, the default judgment is reversed, and the cause is remanded for further proceedings consistent with the views expressed in this opinion.

[32] JUDGE METZGER and JUDGE RULAND concur.

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Dipoma v. McPhie. 2000 UT App 130 (Utah App. 05/04/2000)

- [1] IN THE UTAH COURT OF APPEALS
- [2] Case No. 990526-CA
- [3] 2000 UT App 130, 2000.U.T.0042086 <<http://www.versuslaw.com>>
- [4] May 4, 2000
- [5] **MARY ANN LUCERO DIPOMA,
PLAINTIFF AND APPELLANT,
V.
BRIAN MCPHIE; AND DOES 1 THROUGH 20, WHOSE TRUE NAMES ARE
UNKNOWN,
DEFENDANTS AND APPELLEES.**
- [6] Attorneys: Craig S. Cook, Salt Lake City, for Appellant Paul M. Belnap and Darren K. Nelson, Salt Lake City, for Appellees
- [7] Before Judges Greenwood, Bench. and Orme.
- [8] The opinion of the court was delivered by: Greenwood, Presiding Judge
- [9] OPINION (For Official Publication)
- [10] Third District, Salt Lake Department The Honorable Judith S. Atherton
- [11] ¶1 Appellant, Mary Ann Lucero Dipoma, appeals from the trial court's dismissal of her action for failure to properly file her complaint with the required filing fee within the applicable statute of limitation period. We conclude Dipoma's action was timely filed and, therefore, reverse.
- [12] BACKGROUND *fn1
- [13] ¶2 On November 24, 1997, Dipoma filed a pro se complaint against Brian McPhie seeking damages for injuries she sustained in a traffic accident on November 29, 1993. At the time

she filed the complaint, Dipoma submitted a personal check for payment of the filing fee. The check was returned to the clerk of the court for insufficient funds on December 29, 1997--after the applicable four-year statute of limitation had run. See Utah Code Ann. § 78-12-25 (1996). The record does not disclose when the court clerk notified Dipoma that her check had been returned. The record does reflect, however, that Dipoma attempted to pay with another personal check on March 10, 1998. The court clerk would not accept the check and informed Dipoma that she must pay "with another form." According to the record, Dipoma paid the filing fee on August 11, 1998. A summons was issued on August 13, 1998 and McPhie was served on August 26, 1998, almost nine months after the statute of limitation had run. Dipoma has not submitted anything to suggest she was unable to pay the filing fee.

- [14] ¶3 McPhie moved for summary judgment, arguing that Dipoma had not commenced her action within the applicable four-year statute of limitation because her complaint was not "filed" until August 11, 1998, when she paid the required fee. The trial court granted McPhie's motion on May 12, 1999, holding that a complaint accompanied by a check later returned for insufficient funds is not filed for purposes of satisfying a statute of limitation. Dipoma filed a timely notice of appeal on June 10, 1999.
- [15] ISSUES AND STANDARD OF REVIEW
- [16] ¶4 Dipoma claims the trial court erred in determining she had not filed her action within the applicable statute of limitation. McPhie argues that even if the trial court erred in dismissing Dipoma's action based on her failure to pay the fee prior to the lapse of the limitation period, we should affirm the trial court on the alternative ground that Dipoma did not tender the filing fee within a reasonable time. These issues present questions of law which we review for correctness. See *Gerbich v. Numbed Inc.*, 1999 UT 37, ¶10, 977 P.2d 1205; *State v. Pena*, 869 P.2d 932, 936 (Utah 1994). This court may affirm a lower court's ruling on any alternative ground "even though that ground or theory was not identified by the lower court as the basis of its ruling." *State v. Jarman*, 1999 UT App 269, ¶5 n.2, 987 P.2d 1284 (citation omitted).
- [17] ANALYSIS
- [18] Whether Filing Fees Are Jurisdictional
- [19] ¶5 McPhie argued and the trial court agreed that the Utah Code requires the payment of filing fees prior to the commencement of an action. On this basis, the trial court determined that the Legislature intended filing fees to be a jurisdictional prerequisite for commencing an action. For this case, the applicable portion of Rule 3 of the Utah Rules of Civil Procedure states: "A civil action is commenced . . . by filing a complaint with the court . . ." Utah R. Civ. P. 3(a)(1). McPhie argues that "filing" in Rule 3 incorporates sections 21-1-1, 21-1-5 and 21-7-2 of the Utah Code which set forth the court clerk's duties and required filing fees. Because these sections require that the court clerk collect filing fees in

advance of performance of services, McPhie claims that payment of filing fees is a jurisdictional requirement. On the other hand, Dipoma argues that Rule 3 neither expressly incorporates these sections nor contains any language requiring filing fees, and thus paying filing fees is not a jurisdictional requirement to commence an action.

- [20] ¶6 Section 21-1-1 states: "For services performed in their respective offices, the officers named in this chapter shall collect in advance for the use and benefit of the state the fees hereinafter enumerated and such other fees as may be provided by law." Utah Code Ann. § 21-1-1 (1998). Like section 21-1-1, section 21-7-2 mandates that state and county officers collect fees in advance of rendering any service: "The state and county officers mentioned in this title may not perform any official service unless the fees prescribed for that service are paid in advance." Id. § 21-7-2(1)(a). Section 21-1-5(1)(a) sets forth the required fee for commencing an action: "The fee for filing any civil complaint or petition invoking the jurisdiction of a court of record not governed by another subsection is \$120." Id. § 21-1-5(1)(a). Finally, section 21-1-5(1)(cc) states: "all fees shall be paid at the time the clerk accepts the pleading for filing or performs the requested service." Id. § 21-1-5(1)(cc) (Supp. 1999).
- [21] ¶7 Utah courts have not addressed whether filing fees are jurisdictional at the trial court level. Other state and federal courts, however, have addressed the interplay between Rule 3 and filing provisions with differing results. For example, the Colorado Court of Appeals addressed this issue under the same factual context--improper payment of fees due to a check drawn on insufficient funds. See *Broker House Int'l. Ltd. v. Bendelow*, 952 P.2d 860, 862-63 (Colo. Ct. App. 1998). Similar to Utah, Colorado's rules of civil procedure are modeled after the federal rules, and Colorado has a statute which requires payment of fees at the time a complaint is filed. See id. The Colorado Court of Appeals concluded that under this statutory scheme, a complaint accompanied by an insufficient funds check is not filed for purposes of satisfying the applicable statute of limitation. See id. at 863.
- [22] ¶8 Like Colorado, other courts have determined that filing fees are jurisdictional and have noted the distinction between filing fees at the trial court level as opposed to the appellate level. See, e.g., *Wanamaker v. Columbian Rope Co.*, 713 F. Supp. 533, 538 (N.D.N.Y. 1989), *aff'd*, 108 F.3d 462, 465 (2nd Cir. 1997) (discussing the distinction and finding that under federal rules failure to pay fee is jurisdictional); *Keith v. Heckler*, 603 F. Supp. 150, 156-57 (E.D.Va. 1985) (same); *De- Gas, Inc. v. Midland Resources*, 470 So. 2d 1218, 1222 (Ala. 1985) (same under Alabama rules of procedure); *Boostrom v. Bach*, 622 N.E.2d 175, 176-77 (Ind. 1993) (same under Indiana rules of procedure). While courts have held that docketing fees are not jurisdictional at the appellate level, ^{*fn2} *Wanamaker*, *Keith*, *De-Gas*, and *Boostrom* have distinguished filing fees at the trial court level from fees on appeal based on the procedural differences in commencing an action as opposed to appealing a judgment or order. Significantly, one court stated:
- [23] Authorizing the commencement of the district court action without the required fee would breed countless administrative and procedural woes, and give to the Clerk's Office an element of discretion where none was intended. The Clerk's Office could be converted into a part-time credit institution, spending significant energy collecting fees as well as

extending credit. Keith, 603 F. Supp. at 157.

[24] Furthermore, one court commented that requiring filing fees at the trial court level discourages parties from filing frivolous complaints. See De-Gas, 470 So. 2d at 1220.

[25] ¶9 Nevertheless, the majority of courts considering this issue have concluded that prepayment of filing fees is not jurisdictional at the trial court level. For example, a Kansas federal district court examined the issue under the federal rules of civil procedure in conjunction with local rules for the District of Kansas, and determined that while 28 U.S.C. § 1914(a) uses the word "shall," it does not state when the fee is required. See Burnett v. Perry Mfg., Inc., 151 F.R.D. 398, 402 (D. Kan. 1993). The court stated, "[w]hen read with 28 U.S.C. § 1914(c), in which Congress allows each district court to require by rule advance payment of fees, it seems clear that Congress did not intend by 28 U.S.C. § 1914(a) to require parties to pre-pay the fee." Id. Because the Kansas district had no local rule requiring the prepayment of fees, the court concluded that prepayment was not a jurisdictional requirement. See id. In arriving at this conclusion, the court noted that "[a]lthough there is a split among federal courts, the greater weight of authority indicates that the filing fee requirement is not jurisdictional." Id. at 401 (citations omitted); cf. Jarrett v. US Sprint Communications Co., 22 F.3d 256, 258-59 (10th Cir. 1994) (discussing split between circuits and finding "district court authority supporting either argument").

[26] ¶10 Utah appellate courts have not addressed whether filing fees are jurisdictional in order to commence an action, but our courts have examined whether fees are jurisdictional on appeal. See, e.g., State v. Johnson, 700 P.2d 1125, 1129 n.1 (Utah 1985); Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d 952, 955, 958 (Utah 1984); In re Estate of Ratliff, 19 Utah 2d 346, 431 P.2d 571, 573 (Utah 1967); Jacobsen v. Jeffries, 86 Utah 587, 47 P.2d 892, 893 (Utah 1935) (per curiam); Bunch v. Englehorn, 906 P.2d 918, 919 (Utah Ct. App. 1995); Hausknecht v. Industrial Comm'n, 882 P.2d 683, 685 (Utah Ct. App. 1994), cert. granted, 892 P.2d 13 (Utah 1995), dismissed by, 938 P.2d 248 (Utah 1996). While not controlling on this precise issue, these cases are instructive in their reasoning. Importantly, Utah courts have consistently looked to the plain language of the statutes and rules when construing them. See Hausknecht, 882 P.2d at 685 (declining to read additional language into rule).

[27] ¶11 Prior to 1985, Rule 73 of the Utah Rules of Civil Procedure governed filing appeals. Rule 73 stated, in relevant part:

[28] "A party may appeal from a judgment by filing with the district court a notice of appeal, together with sufficient copies thereof for mailing to the Supreme Court and all other parties to the judgment. [2] and depositing therewith the fee required for docketing the appeal in the Supreme Court." Prowswood, 676 P.2d at 954-55 (quoting Utah R. Civ. P. 73) (alteration in original). After setting forth these two requirements, Rule 73 stated: "Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not effect the validity of the appeal" Id. at 958 (quoting Utah R. Civ. P. 73(a)) (omission in original).

- [29] ¶12 In Prowswood, our supreme court determined that this language expressly made the notice of appeal and docketing fee requirements jurisdictional and the further steps non-jurisdictional. *Id.* The Prowswood court distinguished Rule 73 from Rule 3 of the Federal Rules of Appellate Procedure. Federal Rule 3 sets forth only the requirement that appellant must file a notice of appeal, and then states: "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. . . ." *Id.* (quoting Fed. R. App. P. 3(a)). The court concluded that, unlike Rule 73, which required both notice and the docketing fee, Federal Rule 3 required only the timely filing of the notice of appeal. See *id.*
- [30] ¶13 Utah Supreme Court opinions preceding Prowswood also construed Rule 73 to require payment of the docketing fee as a prerequisite to commencing an appeal. The court held: "Leaving a paper with a filing officer, a fee for the filing of which is by statute required to be paid in advance, is not a filing." Ratliff, 431 P.2d at 573 (quoting Jacobsen, 47 P.2d at 893). Because Rule 73 contained express language requiring payment of the docketing fee, the court interpreted Rule 73 as consistent with the statute that required court clerks to collect fees in advance. See *id.*
- [31] ¶14 Shortly after the Prowswood decision, the Utah Supreme Court adopted the Utah Rules of Appellate Procedure which became effective on January 1, 1985. Examining Rule 3 of the Utah Rules of Appellate Procedure which replaced Rule 73, the supreme court held: "Under Rule 3, the timely payment of fees on an appeal from the district court to this Court is no longer jurisdictional." *fn3 State v. Johnson, 700 P.2d 1125, 1129 n.1 (Utah 1985). Appellate Rule 3, which is modeled after the federal rule distinguished in Prowswood, contains no reference to payment of fees at the time of filing as a jurisdictional requirement. See Hausknect, 882 P.2d at 685 n.3.
- [32] ¶15 Finally, in Hausknect, this court addressed the question of whether payment of docketing fees is a jurisdictional requirement for an appeal from an administrative order under Rule 14 of the Utah Rules of Appellate Procedure. Rule 14(b) states:
- [33] "At the time of filing any petition for review, the party obtaining the review shall pay to the clerk of the appellate court such filing fees as are established by law, and also the fee for docketing the appeal. The clerk shall not accept a petition for review unless the filing and docketing fees are paid." *Id.* at 684 (quoting Utah R. App. P. 14(b)).
- [34] The appellant in Hausknect argued that, like Rule 3, Rule 14 does not mandate the payment of fees in advance as a jurisdictional requirement. See *id.* After noting that Rule 3 expressly states that failure to pay fees does not affect the validity of an appeal, we noted that Rule 14 contains different language than Rule 3 and mandates that fees are "a prerequisite to acceptance of a petition for review by the clerk of the appellate court." *Id.* at 685. Specifically, we stated: "Language limiting the jurisdictional effect of failure to comply is

notably absent from Rule 14, and we decline to read it into the rule." Id.

- [35] ¶16 Unlike Rule 14, Rule 3 contains no specific reference to filing fees as a jurisdictional necessity nor does it incorporate sections 21-1-1, 21-1-5 or 21-7-2 of the Utah Code as jurisdictional requirements. The plain language of Rule 3 merely requires that a plaintiff "file" a complaint with the court clerk. Reference to filing fees as a jurisdictional prerequisite to commencing an action is "notably absent" from Rule 3, and "we decline to read it into the rule." Id. Sections 21-1-1, 21-1-5, and 21-7-2 are merely directive to court clerks. If, as occurred in this case, a plaintiff submits a complaint with a personal check and the clerk accepts the complaint prior to the lapse of the applicable statute of limitation, the complaint is filed for purposes of Rule 3, regardless of whether the check is later returned for insufficient funds. As a practical matter, sections 21-1-1, 21-1-5 and 21-7-2 dictate that filing fees be paid at the time the complaint is filed in order to be accepted by the court clerk, but this is not a jurisdictional requirement.
- [36] ¶17 Accordingly, in the absence of plain language making filing fees jurisdictional, we decline to read such a requirement into the statute. In the case of a check returned for insufficient funds, such a reading could potentially lead to a harsh, unintended result. A check can be returned for insufficient funds for a multitude of reasons--some of which are beyond the payor's ability to control. While no evidence was submitted in this case to suggest such a problem, a potential plaintiff should not have his or her case dismissed due to bank error or some other problem beyond their control. The argument that courts should not act as collection agencies is likewise unpersuasive and cannot be used to trump the plain meaning of the rule. Our courts assess fees for a myriad of different reasons, and, as explained at oral argument, typically assess a fee for bounced checks. Collecting on a bounced check would neither add a significant burden to a clerk's typical duties, nor would it turn the court into a credit agency. Because Rule 3 of Utah Rules of Civil Procedure only requires a plaintiff to file a complaint in order to commence an action, the trial court erred in dismissing Dipoma's action for failure to tender the required fee prior to the lapse of the applicable statute of limitation.
- [37] Whether Dipoma Paid Within Reasonable Time
- [38] ¶18 McPhie argues that even if filing fees are not jurisdictional, we should affirm the trial court's dismissal because Dipoma's payment of her filing fee nine months after it was due was unreasonable. McPhie raises this argument for the first time in his brief to this court. Generally, "[t]o preserve a substantive issue for appeal, a party must first raise the issue before the trial court." *Hart v. Salt Lake County Comm'n.* 945 P.2d 125, 129 (Utah Ct. App. 1997), cert. denied, 953 P.2d 449 (Utah 1997); see *Certified Sur. Group, Ltd. v. UT Inc.*, 960 P.2d 904, 906 n.3 (Utah 1998). It is true, as the dissent suggests, that we may latch on to a new ground if, on that basis, it is possible to affirm the trial court. The new ground does not offer such an opportunity here. The record does not include any indication that the court gave Dipoma a deadline for submitting her fee, making it difficult to see how her eventual payment, which was accepted by the clerk without incident, was not made within a reasonable time under the circumstances. *fn4 Furthermore, we see no reason why the court could not issue a notice or order directing a plaintiff to submit the required fee by a

certain date or face dismissal of the action.

[39] CONCLUSION

[40] ¶19 We determine that the plain language of Rule 3 of the Utah Rules of Civil Procedure contains no requirement that filing fees be paid prior to commencing an action to vest a trial court with jurisdiction and avoid running of a statute of limitation. Accordingly, we reverse the trial court's dismissal of Dipoma's action.

[41] Pamela T. Greenwood, Presiding Judge

[42] ¶20 I CONCUR:

[43] Gregory K. Orme, Judge

[44] BENCH. Judge (concurring and dissenting):

[45] ¶21 I agree with the portion of the main opinion holding that payment of the filing fee is not jurisdictional. I disagree, however, with the main opinion's determination that we cannot reach the alternative basis for affirmance presented by appellee because it was not raised below. This position is contrary to Utah case law, which provides:

[46] "The appellate court will affirm the judgment, order, or decree appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court." *Limb v. Federated Milk Producers Ass'n*, 23 Utah 2d 222, 461 P.2d 290, 293 n.2 (1969) (emphasis added) (quoting 5 C.J.S. Appeal & Error § 1464(1)). Thus, under controlling Utah law, an alternative ground for affirmance need not be raised in or considered by the trial court. Accordingly, we must address the alternative ground for affirmance that appellee has presented on appeal.

[47] ¶22 Appellant attempted to pay the filing fee by personal check when she filed her complaint on November 24, 1997. The check was returned to the court clerk for insufficient funds on December 29, 1997. It is unclear from the record exactly when appellant received notice that her check had bounced. It may have been as early as December, but it was certainly no later than March 10, 1998. This later date was when appellant attempted to pay the filing fee with a second check, but the court clerk insisted on another form of payment because the first check had bounced. In any event, appellant allowed an additional five months to elapse before she finally paid the filing fee on August 11, 1998. In my opinion,

waiting more than five months to pay the filing fee after being informed that a check has bounced is unreasonable. as a matter of law.

- [48] ¶23 I would therefore affirm the dismissal of the complaint on the alternative ground that, after receiving notice that the original payment was returned for insufficient funds, a litigant must pay the mandatory filing fee within a reasonable time. See, e.g., *Truitt v. County of Wayne*, 148 F.3d 644, 648-49 (6th Cir. 1998) (waiting 120 days to pay filing fee after receiving notice of denial of in forma pauperis application unreasonable); *Williams-Guice v. Board of Educ.*, 45 F.3d 161, 165 (7th Cir. 1995) (103 day delay unreasonable); *Jarrett v. US Sprint Communications Co.*, 22 F.3d 256, 259 (10th Cir. 1994) (five month delay unreasonable). Appellant clearly did not pay the filing fee in this case within a reasonable time.

- [49] Russell W. Bench. Judge

Opinion Footnotes

- [50] *fn1 . The facts pertinent to the issues on appeal are undisputed.
- [51] *fn2 . See, e.g., *Parissi v. Telechron, Inc.*, 349 U.S. 46, 47, 75 S. Ct. 577, 577 (1955) (per curiam) (holding that appellate fees are not jurisdictional); *Finch v. Finch*, 468 So. 2d 151, 154 (Ala. 1985) (same); *Brady v. Eastern Indiana Prod. Credit Ass'n*, 396 N.E.2d 335, 335 (Ind. 1978) (same).
- [52] *fn3 . Utah R. App. P. 3(a) provides: An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal. . .
- [53] *fn4 . The cases relied on by the dissent do not stand for the general proposition that if a clerk accepts a complaint and files it, and later learns that a check for the filing fee bounced and so advises plaintiff that plaintiff has only a reasonable time within which to bring in alternate payment. Nor do they recognize delays in payment which, as a matter of law, are of unreasonable duration based on length alone. Rather, these federal cases all turn on the interplay of provisions of federal law and practice, including Title VII's ninety-day period within which to sue after getting an EEOC right-to-sue letter and the practice of receiving and retaining a complaint in the clerk's office but not officially filing it until payment is received or in forma pauperis status secured. In each of these cases, the initial payment was

made, and the complaint officially filed, only after the elapse of ninety-days, as calculated to include periods in which the deadline was tolled pending plaintiff's notification that in forma pauperis status had been denied.

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