

1977

# Centurian Corporation v. A. L. Cripps and Walter Cripps : Brief of Appellant

Utah Supreme Court

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James R. Brown; Johnson & Baldwin; Bryce K. Bruner; Attorneys for Defendants;

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IN THE SUPREME COURT OF THE STATE OF UTAH

CENTURIAN CORPORATION, )

Plaintiff, )

vs. )

A. L. CRIPPS and )  
WALTER CRIPPS, )

Defendants. )

District Court No. 217512

Supreme Court No. 15153

PETTY MOTOR LEASE, INC., )

Plaintiff in Inter- )  
vention-Appellant, )

vs. )

CENTURIAN CORPORATION, )  
RICHARD NICKLES and )  
MARGARET K. NICKLES, )

Defendants in Inter- )  
vention-Respondents. )

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT  
FOR SALT LAKE COUNTY, STATE OF UTAH  
HONORABLE PETER F. LEARY, JUDGE

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**FILED**

JUN 30 1977

*Clerk, Supreme Court, Utah*



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IN THE SUPREME COURT OF THE STATE OF UTAH

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CENTURIAN CORPORATION, )

Plaintiff, )

vs. )

A. L. CRIPPS and )

WALTER CRIPPS, )

Defendants. )

---

PETTY MOTOR LEASE, INC., )

Plaintiff in Inter- )  
vention-Appellant, )

vs. )

CENTURIAN CORPORATION, )

RICHARD NICKLES and )

MARGARET K. NICKLES, )

Defendants in Inter- )  
vention-Respondents. )

---ooo0ooo---

BRIEF OF APPELLANT

NATURE OF CASE

Centurian Corporation brought action against A. L. Cripps and Walter A. Cripps (hereafter Cripps), claiming certain amounts due under a lease agreement. Subsequently, Petty Motor Lease, Inc., claiming to be the owner of the vehicle allegedly leased by Centurian to Cripps and based upon a lease agreement, moved to intervene in the action. The motion to intervene was granted. Trial was held July 13,

1976. The trial court, in a memorandum decision and in the judgment, held that it was without jurisdiction of the complaint of Petty Motor Lease against the defendants in intervention, Centurian Corporation, Richard Nickles and Margaret K. Nickles.

#### RELIEF SOUGHT ON APPEAL

Appellant Petty Motor Lease, Inc. prays for reversal of the trial court's judgment that the trial court was without jurisdiction of appellant's complaint against the defendants in intervention, with directions to the trial court to enter judgment consistent with the evidence introduced at the trial, and that appellant be awarded its costs on appeal.

#### STATEMENT OF FACTS

Centurian Corporation filed a complaint against Cripps on February 14, 1974, claiming amounts due under a lease agreement and possession of the leased vehicle (R.2-6).

Defendants answered (R.13-22,28-34), and the case was at issue. Petty Motor Lease, Inc., alleging ownership of the leased vehicle and other common issues with the pending action, filed a motion for intervention (R.85-92), to which its proposed complaint was attached, and served it upon counsel for parties in the action, together with a notice of hearing (R.93). The motion for intervention was

granted (see minute entry R.94, and the Court's Order entered January 26, 1976, R.95), and a copy of the order was mailed to counsel for the parties (R.95). On the 22nd day of January, 1976, counsel for Petty Motor Lease, Inc. signed the original of the complaint in intervention, mailed the complaint, together with the filing fee, to the Salt Lake County Clerk for filing, and mailed a copy of the signed complaint to James R. Brown, such mailing certified by Pauline E. Meyer on the complaint as sent to the Salt Lake County Clerk for filing (Supp.R.2-5).

The Salt Lake County Clerk filed the complaint under Civil No. 232883, rather than Civil No. 217512.

James R. Brown, attorney for Centurian Corporation, Richard Nickles and Margaret Nickles ("defendants in intervention"), filed an answer in their behalf in April, 1976 (Supp.R.6-8), in answer to the complaint of Petty Motor Lease, Inc. Said answer was served upon and received by counsel for Petty Motor Lease, Inc. The answer as sent to the Salt Lake County Clerk and as served upon counsel for appellant showed the proper case number. Subsequently, the correct number was crossed out and the new number inserted (see the answer attached to the motion to amend findings of fact and conclusions of law, R.115-17). Counsel for the defendants in intervention also filed notice of trial setting



(R.99-100) and corrected notice of trial setting (R.101-102).

Trial of the matter was held on July 13, 1976. In its memorandum decision, the trial court stated: "At the trial neither plaintiff or defendant objected to the presentation of evidence by Petty Motor in support of its complaint in intervention." At no time did the defendants in intervention question the Court's jurisdiction. The trial court found in its memorandum decision:

[O]n the 26th day of January, 1976, the Court granted the motion for intervention of Petty Motor Lease, Inc. and in its order stated "Petty Motor Lease, Inc. may file its complaint attached to its motion for intervention . . ." That subsequent to said order no complaint in intervention was filed by Petty Motor Lease, Inc. and the record does not reflect any service of process of the complaint upon plaintiff, Richard Nickles and/or Margaret K. Nickles, and no responsive pleading was filed to such complaint by Centurian or the Nickles.

Appellant moved the Court to amend its findings and conclusions as contained in its memorandum decision (R.112-17). At the hearing on appellant's motion to amend findings of fact and conclusions of law, counsel for appellant indicated the basis of its motion, including: a motion to intervene was filed; a hearing was held; the motion was granted; the original of the complaint in intervention, a copy of which was attached to the motion pursuant to Rule

24, was filed with the Court, and the filing fee was paid. The complaint in intervention was served by mail upon counsel for Centurian Corporation and an answer was subsequently filed with the proper number upon the answer. The proper case number was subsequently crossed out and a new number placed upon the answer. Counsel for Petty Motor Lease further stated to the Court:

[T]he parties were on notice that the intervenor, Petty Motor Lease, Inc., was a party to this action, an answer was filed to the complaint, and all parties were here at the time of trial, and no objection was made. And, as your Honor recalls, the trial was held on that basis.

Counsel for appellant further moved the Court that the record be corrected and the proper numbers be placed on the Court documents, which were duly filed with the Clerk of the Court, and that they be filed under the proper case number (Tr.2-3). At the hearing, in response to the foregoing, counsel for defendants in intervention stated the following:

Your Honor, I would have to concede that what Mr. Petty indicates is accurate in that relationship. (Tr.3)

The trial court's judgment (R.128-30), dated March 31, 1977, entered April 6, 1977, denied the motion to amend findings of fact and conclusions of law and held that the trial court was without jurisdiction of the complaint in intervention of Petty Motor Lease, Inc.

ARGUMENT

POINT I

THE PARTIES WERE PROPERLY BEFORE THE TRIAL COURT AND THE TRIAL COURT HAD JURISDICTION OF THE COMPLAINT IN INTERVENTION OF PETTY MOTOR LEASE, INC. AGAINST CENTURIAN CORPORATION, RICHARD NICKLES AND MARGARET K. NICKLES

The requirements of the Utah Rules of Civil Procedure were properly complied with in connection with the intervention of Petty Motor Lease, Inc., and the complaint of appellant against Centurian Corporation, Richard Nickles and Margaret K. Nickles was properly before the Court. The Court had jurisdiction over such defendants in intervention.

Pursuant to Rule 24(c) of the Utah Rules of Civil Procedure, appellant moved the Court for leave to intervene and served the motion upon the parties. The motion stated the grounds therefor and was accompanied by a pleading setting forth the claim for which intervention was sought.

The motion to intervene was granted and the original complaint, as attached to the motion to intervene, was filed with the Court and a copy thereof served upon counsel for the defendants in intervention pursuant to Rule 5, Utah Rules of Civil Procedure.

There can be no question that Centurian Corporation was before the Court, and appellant's complaint against Centurian Corporation was properly heard. Centurian Corporation was plaintiff in the primary action. Service of

the motion for intervention, the order granting the motion and the complaint in intervention upon counsel for Centurian was proper under Rule 5 of the Utah Rules of Civil Procedure. Service under those circumstances was required to be made upon counsel for the party and not upon Centurian Corporation directly. Moore's Federal Practice, ¶5.06, states the rule as follows:

When a party has appeared and is represented by an attorney, service is required to be made upon the attorney, unless the court orders service to be made upon the party himself.

If there was any defect in the intervention of appellant, such defect was waived by Centurian Corporation. With regard to waiver of defects, Moore states:

It is possible, of course, for original parties to waive any objections they otherwise might have because of the intervenor's failure to comply with proper procedure. (Footnote omitted.) Moore's Federal Practice, ¶24.12[1].

In Klein v. Nu-Way Shoe Co., 136 F.2d 986 (2d Cir. 1943), the Court held that failure to file a motion to intervene was not fatal where the Court had granted leave to intervene, and the parties who later objected to the intervention were prepared to proceed at subsequent hearing without objection. See also Simms v. Andrews, 118 F.2d 803 (10th Cir. 1941).

Centurian Corporation did not object to the intervention, the Court's order allowing intervention, the form or service of the complaint, or the jurisdiction of the Court to hear the case at the time of trial. The failure to make a timely objection constitutes a waiver of any defect.

The other defendants in intervention were also before the Court and subject to its jurisdiction. The defendants in intervention filed an answer in response to the complaint of Petty Motor Lease, Inc. By filing their answer or otherwise appearing before the Court, defendants in intervention conferred jurisdiction on the Court. In Barber v. Calder, 522 P.2d 700 (Utah, 1974), this Court held the filing of an answer by defendants constituted a general appearance and "thereafter they were in Court to be dealt with the same as any other party in the case." See J.B. Colt Co. v. District Court, 72 Utah 281, 269 P. 1017 (1928), and Cooke v. Cooke, 67 Utah 371, 248 P. 83 (1926).

In addition to filing an answer on behalf of defendants in intervention, counsel for defendants in intervention filed a notice of trial setting (R.99), filed a corrected notice of trial setting (R.101), and served both upon counsel for the other parties in the action (R.100, 102). Both notices of trial setting indicated the adverse

posture of Petty Motor Lease, Inc. and defendants in intervention. This further indicates that the defendants in intervention were before the Court during the proceedings, including the trial.

At no time did defendants in intervention challenge the Court's jurisdiction, object to the trial setting, claim they were not before the Court at the time of trial, or otherwise object to having the case heard on the merits at the time of trial and determined on that basis.

Having appeared before the Court, the defendants in intervention are subject to the Court's jurisdiction. It was error for the trial court to make a finding that it lacked jurisdiction where the parties were in fact before the Court and where the question of jurisdiction was not raised by the pleadings or at trial. The Court's findings are required to conform to the pleadings, issues and proof in the matter. If findings do not so conform, the findings and judgment should be modified accordingly. Nuttall v. Holman, 110 Utah 375, 173 P.2d 1015 (1946). The finding regarding the jurisdiction of the Court over defendants in intervention was made on the initiative of the trial court. This is erroneous as indicated in In re Behm's Estate, 117 Utah 151, 213 P.2d 657 (1950), where the trial court found that the assignment of an interest in the proceeds of an

action for wrongful death was barred because champertous. This Court, on appeal, stated:

This issue was never pleaded and the evidence was insufficient to establish such a contention. Even after a discussion in court that the question might be of importance, no request was made to amend the pleadings so as to place it in issue. While we liberally construe pleadings, the findings as made should be within the framework of the petition as originally drawn, or as amended, and there should be evidence to support them.

Further, counsel for defendants in intervention admitted at the hearing on appellant's motion to amend findings of fact and conclusions of law that defendants in intervention were before the Court. Any absence or failure of jurisdiction was waived by the appearance of defendants in intervention and by the concession or admission of their counsel. See Morris v. Oregon Short Line R. Co., 106 Utah 14, 102 P. 629 (1909).

Defendants in intervention were represented by counsel who appeared at the trial, did not object to the trial of the complaint in intervention on its merits, and defendants in intervention should be bound by the proceedings before the Court. In Blake v. Blake, 17 U.2d 369, 412 P.2d 454 (1956), this Court held that an appearance by an attorney is presumptive evidence that the attorney is authorized to represent the persons for whom he appears in the

action. Having been so represented by counsel at trial, the Court in Blake held that the appellants had had their day in Court.

Counsel for the defendants in intervention admitted all parties were before the Court at the time of trial. Since the defendants in intervention answered appellant's complaint, did not object to the Court's jurisdiction, and admitted they were before the Court, the trial court should not, on its own motion, rule that it was without jurisdiction. The judgment should be reversed.

POINT II

CLERICAL ERROR DOES NOT AFFECT THE JURISDICTION  
OF THE TRIAL COURT OVER PARTIES PROPERLY BEFORE IT AND  
WHO APPEAR WITHOUT OBJECTION

Defendants in intervention have never claimed that the Court lacked jurisdiction over them, have never claimed that they were not served with the complaint in intervention, and have not challenged the Court's jurisdiction to hear all matters at the time of trial. The record shows that defendants in intervention were served with the complaint in intervention by service upon their attorney, that they appeared and answered the complaint in intervention, and they admitted they were before the Court at the time of trial. There should be no penalty or adverse effect for mere error which causes no harm. This rule was clearly



enunciated by this Court in Downey State Bank v. Major-Blakeney Corp., 545 P.2d 507 (Utah, 1976). In Downey, service was accomplished in a foreclosure action upon one of the defendants by publication. The facts and the Court's ruling are stated by the Court:

Defendant also attacks the jurisdiction of the court on the ground of alleged defects in the summons as published. Due to an error in the clerk's office, this case was originally given the number 4473. But it was found that this duplicated the number of a case just previously filed. To avoid confusion, the clerk gave this case number 4473A. But the summons as published contained the number without the "A". Defendant charges that this is in violation of Rule 79(a), U.R.C.P., which requires that "actions shall be assigned consecutive file numbers." No one will gainsay that accuracy is always to be desired. But there should be no penalty or adverse effect for mere error which causes no harm.

Insofar as giving notice to the defendants is concerned, the case number on the summons is of little value. It is true that the affidavit states that defendant's attorney made one inquiry about the case numbered 4473, and was told that it did not relate to real property. But this was after the default judgment, during the redemption period. It does not appear that the defendant was in any way misled or adversely affected by this variance in the number.

Downey is strikingly similar to the case before the Court. The filing of the complaint in intervention in an incorrect file did not prejudice in any way the rights of

the defendants in intervention before the Court. What is more, defendants in intervention have never complained or objected to the proceedings in this matter and have never relied upon the erroneous filing as a basis for the Court's lack of jurisdiction. On the contrary, the position of the defendants in intervention has been that the trial on the merits should have been dispositive of the issues and parties before the Court. Under these circumstances, similar to the Downey case, the defect did not in any manner harm the defendants in intervention, and the defect, being in form rather than substance, should not affect the proceedings held by the trial court.

The purpose of Rule 24 of the Utah Rules of Civil Procedure is to simplify litigation and avoid duplication of litigation by allowing persons with similar or related causes of action to come before the Court and join in the pending action. Moore states the rationale of the rule as follows:

Grant of intervention in many of the discretionary cases will facilitate the disposal in one action of claims involving common questions of law or fact, and thus avoid both court congestion and undue delay and expense to all parties. The discretionary right to intervene is a corollary of permissive joinder [Rule 20], the class suit based on several rights [Rule 23(b)(3)], the bill of peace with multiple parties, joint hearing or

consolidation [Rule 42(a)], all of which are predicated upon the theory that when claims or defenses have a question of law or fact common to each other, a sound administrative scheme of procedure should encourage one action or hearing rather than a multiplicity of actions or hearings. (Emphasis added; footnotes omitted.) Moore's Federal Practice, ¶24.10[1].

Appellant, in intervening in the primary action before the trial court, sought to avoid multiple litigation and simplify the matters before the Court. The purpose of the rule allowing intervention should not be thwarted by the trial court's judgment.

The judgment of the trial court should be reversed to conform to the record and proceedings before it.

#### CONCLUSION

The record clearly shows that the defendants in intervention were before the trial court, including at the time of trial. The purpose of Rule 24 of the Utah Rules of Civil Procedure should not be thwarted by mere clerical error where the parties are before the Court and appear without objection.

It is respectfully requested that this Court reverse the lower court's judgment that the trial court was without jurisdiction over the appellant's complaint against the defendant in intervention, with directions to the trial court to enter judgment consistent with the evidence introduced at the trial, and that appellant be

awarded its costs on appeal.

DATED this \_\_\_\_\_ day of June, 1977.

Respectfully submitted,

MOYLE & DRAPER

By \_\_\_\_\_  
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CERTIFICATE OF SERVICE

I hereby certify that on the \_\_\_\_\_ day of June, 1977, two true and correct copies of the foregoing Brief of Appellant were mailed, postage prepaid, to the following:

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