

1977

Redman Warehousing Corp. v. Clearfield City Corp. et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

REDMAN WAREHOUSING CORPORATION,)
a Texas corporation,)

Plaintiff-Appellant,)

vs.)

No. 15159

CLEARFIELD CITY CORPORATION,)
ROBERT O'BLOCK and GORDON OLCH)
d/b/a FREEPORT CENTER ASSOCI-)
ATES, and WHIRLPOOL CORPORATION,)

Defendants-Respondent.)

RESPONDENT'S BRIEF

Appeal from the Summary Judgment
of the Second District Court for Davis County
Honorable John F. Wahlquist, Judge

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TABLE OF CONTENTS

NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
STATEMENT OF FACTS	2
INTRODUCTION	3
ARGUMENT	
I. This Action is Barred by the Statute of Limitations	5
II. Plaintiff Violated Rule 4(b) by Failing to Issue a Summons to Each Defendant Within Three Months After Filing Its Complaint	9
III. Plaintiff May Not Raise for the First. Time on Appeal Freeport Center's Alleged Failure to Preserve Its Defense of Insufficiency of Process	11
IV. Plaintiff's Claim is Barred by Laches.	14
CONCLUSION	16

CASES CITED

Askwith v. Ellis,
85 Utah 103, 38 P.2d 757 (1934)

Carson v. Douglas,
12 Utah 2d 424, 367 P.2d 462 (1962)

Charlton v. Hackett,
11 Utah 2d 389, 360 P.2d 176 (1961)

Cheney v. Rucker,
14 Utah 2d 205, 381 P.2d 86 (1963)

Dolores Uranium Corp. v. Jones,
14 Utah 2d 280, 382 P.2d 883 (1963)

Draper v. J.B. & R.E. Walker, Inc.,
121 Utah 567, 244 P.2d 360 (1952)

Drummond v. Union Pac. R. Co.,
111 Utah 289, 177 P.2d 903 (1947)

Fibreboard Paper Products Corp. v. Dietrich,
25 Utah 2d 65, 475 P.2d 1005 (1970)

Fistel v. Christman,
13 F.R.D. 245 (W.D. Pa. 1952)

Flemetis v. McArthur
119 Utah 268, 226 P.2d 124 (1951)

Hamilton v. Salt Lake County Sewerage Improvement
District No. 1, 15 Utah 2d 216,
390 P.2d 235 (1964)

Huber v. Deep Creek Irr. Co.,
6 Utah 2d 15, 305 P.2d 478 (1956)

In re Ekker's Estate,
19 Utah 2d 414, 432 P.2d 45 (1967)

Jones Min. Co. v. Cardiff Min. & Mill Co.,
56 Utah 449, 191 P. 426 (1920)

Mawhinney v. Jensen,
120 Utah 142, 232 P.2d 769 (1951)

Murphy v. Citizens Bank of Clovis,
244 F.2d 511 (10th Cir. 1957)

Neilson v. Eisen,
116 Utah 343, 209 P.2d 928 (1949)

North Salt Lake v. St. Joseph Water & Irr. Co.,
118 Utah 600, 223 P.2d 577 (1950)

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Machine-generated OCR, may contain errors.

<u>Openshaw v. Openshaw,</u> 105 Utah 574, 144 P.2d 528 (1943)	15
<u>Papanikolas Bros. Ent. v. Sugarhouse</u> <u>Shopping Cr. A.,</u> 535 P.2d 1256 (Utah 1975)	14, 15
<u>Riter v. Cayias,</u> 19 Utah 2d 358, 431 P.2d 788 (1967)	12
<u>Simpson v. General Motors Corp.,</u> 24 Utah 2d 301, 470 P.2d 399 (1970)	12, 14
<u>Sorenson v. Sorenson,</u> 118 Utah 2d 101, 417 P.2d 118 (1966)	7, 8
<u>State By and Through Road Comm'n v. Larkin,</u> 27 Utah 2d 295, 495 P.2d 817 (1972)	12
<u>Thompson Ditch Co. v. Jackson,</u> 29 Utah 2d 259, 508 P.2d 528 (1973)	12
<u>Tycesen v. Magna Water Co.,</u> 13 Utah 2d 397, 375 P.2d 456 (1962)	12
<u>Wagner v. Olsen,</u> 25 Utah 2d 366, 482 P.2d 702 (1971)	12

FORMER RULE OF COURT

<u>Utah R. S. §104-5-5 (1933)</u>	6
-----------------------------------	---

CURRENT RULES OF COURT

<u>Utah R. Civ. P. 4(a)</u>	10
<u>Utah R. Civ. P. 4(b)</u>	3, 4, 6, 7, 8, 9
<u>Utah R. Civ. P. 12(b)(4)</u>	11
<u>Utah R. Civ. P. 15(b)</u>	12, 13, 14
<u>Fed. R. Civ. P. 4(a)</u>	8

STATUTE

<u>Utah Code Ann. §78-12-26(2) (1953)</u>	5
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SECONDARY MATERIALS

<u>"Developments in the Law -- Statutes of</u> <u>Limitations," 63 Harv. L. Rev. 1177 (1950)</u>	6
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IN THE SUPREME COURT OF THE
STATE OF UTAH

REDMAN WAREHOUSING CORPORATION,	:	
a Texas corporation,	:	
	:	
Plaintiff-Appellants	:	Docket No. 15159
	:	
v.	:	
	:	RESPONDENT'S BRIEF
CLEARFIELD CITY CORPORATION,	:	
ROBERT O'BLOCK and GORDON OLCH,	:	
d/b/a FREEPORT CENTER ASSOCIATES,	:	
and WHIRLPOOL CORPORATION,	:	
	:	
Defendants-Respondents	:	

NATURE OF THE CASE

This is an action by Redman Warehousing Corporation against the several defendants seeking reimbursement for expenses Redman claims it incurred in protecting property stored in Redman's Warehouse. Redman claims the property was damaged by floods at the Freeport Center on July 13 and 19, 1973.

DISPOSITION IN LOWER COURT

The Second District Court for Davis County, Honorable John F. Wahlquist, granted summary judgment against plaintiff-appellant and in favor of defendant-respondent, Robert O'Block and Gordon Olch d/b/a Freeport Center Associates which is the subject of this appeal.

STATEMENT OF FACTS

Plaintiff-Appellant is a Texas corporation engaged in the warehousing business in Utah. (R. 1.) It stored property for defendant Whirlpool Corporation (R. 4, 20.) which plaintiff claims sustained water damage as a result of floods on July 11 and 19, 1973. On December 6, 1973, plaintiff filed a complaint (R. 18, reverse side.) to recover damages from Whirlpool Corporation, Clearfield and Freeport Center. Plaintiff issued summons to defendants Whirlpool and Clearfield City and caused them to be served during 1974. (R. 20 reverse side, 323, 324.) The process of litigation thereafter ensued between plaintiff, Clearfield and Whirlpool.

The statute of limitations applicable to plaintiff's claim expired on July 19, 1976. On September 27, 1976, after expiration of the statutory period, and well beyond the three-month period after the filing of the complaint in which a summons must be issued (R. 204.), plaintiff issued a summons to Freeport Center. The summons was served upon Freeport Center on September 29, 1976. (R. 205.)

On October 26, 1976 (R. 206.), Freeport Center answered plaintiff's complaint and specifically pleaded that the applicable statute of limitations barred plaintiff's claim. Freeport Center based its statute of limitations defense on the plaintiff's failure to issue a summons within three months following the filing of a complaint. Freeport Center then moved for summary

judgment and filed a supporting memorandum which argued that plaintiff's claim was barred by the statute of limitations because the plaintiff had failed to issue a summons to Freeport Center within three months and that the plaintiff could not re-file its complaint because the three-year statutory period had expired. (R. 303-308.) Plaintiff submitted an opposing memorandum and argued that Utah law did not require it to issue a summons to Freeport Center within three months after filing its complaint, and that despite its failure to issue a summons within three months, Freeport Center was nevertheless answerable under the complaint filed before the statute of limitations had run. (R. 319-325.) The parties orally elaborated on these arguments before the trial court, after which the court granted Freeport Center's motion for summary judgment and ordered that plaintiff's complaint against it be dismissed. (R. 346 et. seq.) Plaintiff appealed to this Court. (R. 338.)

INTRODUCTION

The trial court properly granted summary judgment in favor of defendant Freeport Center for the following three reasons:

- (1) The action was barred by the statute of limitations, Utah Code Ann. § 78-12-26(2)(1953);
- (2) The summons was not issued within the three-month period provided by Rule 4(b) of the Utah Rules of Civil Procedure and therefore the court lacked jurisdiction over

defendant Freeport Center; and

(3) The action was barred by laches.

In its brief, plaintiff urges this Court to reverse judgment on these grounds:

(1) That the statute of limitations does not bar the action because once a complaint is filed within the statute period, it perpetually endures, and a summons may issue on at any time, no matter how much time has passed since filing of the complaint;

(2) That in multiple-defendant cases, Utah Rule of Civil Procedure 4(b)'s requirement that summons issue within three months requires only that a summons be issued to one defendant within that time; and

(3) That Freeport Center failed properly to plead the defense of insufficiency of process and waived its right to rely on it as a basis for summary judgment. Significantly, plaintiff's brief does not argue that the trial court erred in ruling the action barred by laches.

In this brief, Freeport Center demonstrates that plaintiff's arguments are unsupported by authority and that the trial court's judgment was correct and should be affirmed.

POINT I

THIS ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

The parties agree that Utah Code Ann. § 78-12-26(2) (1953), which requires that actions for taking, detaining or injuring personal property be commenced within three years, is the statute of limitations applicable to this case. (R. 346 et. seq.) They also agree that no summons directed to Freeport Center was issued within three months after the filing of the complaint, nor was any summons issued to or served upon Freeport Center until after the expiration of the three-year period following the accrual of plaintiff's cause of action. (R. 204, 205; Brief for Appellant at 2.) These facts being undisputed, the trial court properly dismissed the action because, inter alia, the statute of limitations barred it.

Plaintiff, however, renews before this Court its argument, unsuccessful below, that the mere filing of the complaint within the statutory period is all that is necessary to comply with the statute of limitations, no matter when a summons is issued or served. Were plaintiff correct, a potential plaintiff could comply with the statute of limitations merely by filing a complaint with the court but issue no summons to give the defendant notice of the action. Decades later, he could issue and serve a summons on the defendant and enforce his stale claim. Utah law, of course, does not permit this. Plaintiff must do more than file his complaint to satisfy the statute. He must also issue

a summons to the defendant within three months and serve it within one year. Utah R. Civ. P. 4(b). If plaintiff fails to do so his action will be "deemed dismissed." Id.

The statute's purpose, to prevent stale claims and prevent the unfairness inherent in requiring a defendant to defend against an ancient claim is fulfilled. The defendant receive notice through service of process no later than one year following the end of the period prescribed by the statute of limitations, and even earlier--within three months--if the process server does not delay. "Developments in the Law--Statute of Limitations," 63 Harv. L. Rev. 1177, 1185 (1950).

Despite the inconsistency of its argument with the clear purposes of the statute of limitations, plaintiff argues that a timely filed complaint perpetually endures and that a summons may at any time issue thereon and be served. Plaintiff cites Askwith v. Ellis, 85 Utah 103, 38 P.2d 757 (1934), as support for this position. As the trial court recognized, plaintiff is in error and Askwith, a 1934 case, has been overruled by the adoption of Utah Rule of Civil Procedure 4(b). In Askwith, the Court held that although Utah R.S. § 104-5-5 (1933), the statutory predecessor of Rule 4(b), required that a summons be issued within three months, failure to do so was not fatal because the statute made no provision for the dismissal of an action if plaintiff breached the three-month issuance or one-year service requirements. The opinion states:

There is no provision in the statute by which an action ceases to exist; by which an action terminates, ends, is dismissed . . . because no summons has been issued or served. It may well be that such a rule would be advisable, salutary and just, but it is the duty of the Legislature and not of the courts to make such the law.

Askwith v. Ellis, supra, at 38 P.2d 759 [emphasis supplied].

The drafters of the present Rule 4(b) adopted this Court's suggestion in Askwith by providing that an action would be "deemed dismissed" for violating its requirement that summons be timely issued and served:

If an action is commenced by the filing of a complaint, summons must issue thereon within three months from the date of such filing. Summons must be served within one year after the filing of the complaint, or the action will be deemed dismissed. . . .

Utah R. Civ. P. 4(b).

Since Rule 4(b) was adopted, this Court has twice had occasion to consider the effect of a plaintiff's failure to issue or serve a summons within the proper time limits. In Sorenson v. Sorenson, 18 Utah 2d 101, 417 P.2d 118 (1966), the defendant had been served beyond the one year Rule 4(b) allows but defendant waited until appeal to contend that the district court had no jurisdiction over her. This Court stated:

She would be correct under the rule except she counter-claimed, sought relief, got part of that for which she asked, and now complains that with all this she should receive the benefits of the lower court's decision but not the bitter fruits thereof.

Id. at 417 P.2d 119 [emphasis supplied].

Later, in Fibreboard Paper Products Corp. v. Dietrich,

25 Utah 2d 65, 475 P.2d 1005 (1970), this Court faced a situation in which service was proper, but the summons served had not been issued within three months as Rule 4(b) requires. Following service of the untimely issued summons on the defendant, the plaintiff served a writ of garnishment on his employer in order to intercept his wages. This Court ruled that the lower court had no jurisdiction over the defendant, even though the garnishment rather than the defendant appeared to contest the court's jurisdiction over him.* Thus Fibreboard makes clear that the dismissal language in Rule 4(b) applies to untimely issuance as well as untimely service since the service in Fibreboard was timely.

In the present case, the defendant itself, Freeport Center, appeared to contest the untimely issued summons. The trial court ruled, consistent with Sorenson and Fibreboard, that since plaintiff failed to issue a summons to Freeport Center within three months, the court had no jurisdiction and therefore dismissed the action.

*This Court's decision in Fibreboard, *supra*, is in accord with decisions under the Federal Rules of Civil Procedure. The Federal Rules differ from Utah's in that the federal court clerk, a public official, rather than the plaintiff's attorney issues the summons and must issue it within a reasonable time. Fed. R. Civ. P. 4(a). Even though a public official has the duty to issue the summons, federal courts have dismissed actions although the complaint was filed within the period prescribed by the statute of limitations, the summons was not issued or served within a reasonable time. Murphy v. Citizens Bank of Clovis, 244 F.2d 511 (10th Cir. 1957) (13 months); Fistel v. Christman, 13 F.R.D. 245 (W.D. Pa. 1952) (10-1/2 months).

Had plaintiff not waited until the statute of limitations expired, the complaint could have been refiled and a new summons properly issued and served. But its delay prevented it from reinstating the action, and the trial court therefore properly held plaintiff's claim barred by the statute of limitations.

POINT II

PLAINTIFF VIOLATED RULE 4(b) BY FAILING TO ISSUE A SUMMONS TO EACH DEFENDANT WITHIN THREE MONTHS AFTER FILING ITS COMPLAINT.

Plaintiff argues in its brief is that Rule 4(b) requires a summons to issue to only one defendant within three months in a multiple-defendant action. Plaintiff contends that by issuing a summons to one of the defendants within three months, its delay of almost two years in issuing a summons to Freeport Center did not violate the Rule.

Plaintiff is attempting to twist the plain meaning of Rule 4(b). That rule provides:

If an action is commenced by the filing of a complaint, summons must issue thereon within three months from the date of such filing. The summons must be served within one year after the filing of the complaint or the action will be deemed dismissed, provided that in any action brought against two or more defendants in which personal service has been obtained upon one of them within the year, the other or others may be served or appear at any time before trial.

The Rule contains two general statements--that summons must issue within three months and that it must be served within a year. The proviso which follows, allowing all but one defen-

dant in a multiple-defendant case to be served any time before trial unmistakably reveals that without the proviso, the general statement requiring service within a year would apply to all defendants. Since the Rule omits a proviso for issuance of process in multiple defendant actions, one can only conclude that the general statement requiring issuance within three months applies to all defendants.

In addition, plaintiff fails to appreciate the purpose underlying the proviso allowing delayed service in multiple-defendant cases. The proviso contemplates that defendants may be difficult to find, and allows the court to assert jurisdiction over all defendants provided the plaintiff does all that it can to enable the court to obtain jurisdiction: files a complaint, issues a summons to each defendant, and obtains service on at least one defendant. Issuance lies completely within the plaintiff's control. All he need do is "place [a summons] in the hands of a qualified person for the purpose of service." Utah Civ. P. 4(a). A proviso relieving the plaintiff of the simple task, completely within his control, of placing a summons in the hands of a qualified person for the purpose of service would accomplish no logical function and was accordingly omitted from the Utah Rules of Civil Procedure.

POINT III

PLAINTIFF MAY NOT RAISE FOR THE FIRST TIME ON APPEAL FREEPORT CENTER'S ALLEGED FAILURE TO PRESERVE ITS DEFENSE OF INSUFFICIENCY OF PROCESS.

Plaintiff for the first time contends that Freeport Center failed to raise the issue of insufficiency of process in its answer or by a motion pursuant to Rule 12(b)(4) and has therefore waived it. On the contrary, Freeport Center did challenge the sufficiency of process in its answer by specifically pleading the statute of limitations when the only basis for the statute of limitations defense was the insufficiency of an untimely issued summons. (R. 206.) Freeport Center successfully argued that the untimely issued summons did not give the court jurisdiction over it, and that the statute of limitations had expired, preventing plaintiff from refileing the complaint. Plaintiff admits as much in its brief to this Court: "The basis of defendant's Statute of Limitations defense is the purported insufficiency of the process served on them on September 29, 1976." Brief for Appellant at 8.

Moreover, whether Freeport Center should technically have plead the defense of insufficiency of process rather than statute of limitations is now irrelevant before this Court. Plaintiff made no objection before the trial court and, indeed, argued the merits of the defense orally and in its memorandum. (R. 319-322, 346 et. seq.) As this Court has held many times, it

is a fundamental tenet of our judicial system that an issue not be raised for the first time on appeal. Thompson Ditch v. Jackson, 29 Utah 2d 259, 508 P.2d 528 (1973); State By and Through Road Comm'n v. Larkin, 27 Utah 2d 295, 495 P.2d 817 (1973); Wagner v. Olsen, 25 Utah 2d 366, 482 P.2d 702 (1971); Simpson v. General Motors Corp., 24 Utah 2d 301, 470 P.2d 399 (1970); In re Ekker's Estate, 19 Utah 2d 414, 432 P.2d 45 (1967); Riter v. Riter, 19 Utah 2d 358, 431 P.2d 788 (1967); Hamilton v. Salt Lake County Sewerage Improvement District No.1, 15 Utah 2d 216, 390 P.2d 216 (1964); Dolores Uranium Corp. v. Jones, 14 Utah 2d 280, 382 P.2d 883 (1963); Tygesen v. Magna Water Co., 13 Utah 2d 397, 375 P.2d 456 (1962); Carson v. Douglas, 12 Utah 2d 424, 367 P.2d 462 (1962); Huber v. Deep Creek Irr. Co., 6 Utah 2d 15, 305 P.2d 15 (1956); Flemetis v. McArthur, 119 Utah 268, 226 P.2d 124 (1951); North Salt Lake v. St. Joseph Water & Irr. Co., 118 Utah 600, 209 P.2d 577 (1950); Neilson v. Eisen, 116 Utah 343, 209 P.2d 928 (1949); Drummond v. Union Pac. R. Co., 111 Utah 289, 177 P.2d 903 (1947).

Another rationale compels the same conclusion. Rule 15(b) of the Utah Rules of Civil Procedure was adopted to prevent a party from relying on pleading defects as a basis for excluding issues actually tried by the court:

When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evi-

dence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend does not affect the result of the trial of these issues.

Utah R. Civ. P. 15(b) [emphasis supplied]. This Court, consistent with the position taken by the federal courts, has construed Rule 15(b) to prevent a party from assigning as error on appeal the failure of the pleadings to raise issues which were subsequently tried by express or implied consent before the lower court. This Court has quoted from Moore's Federal Practice:

At the trial Rule 15 enables the case to be litigated on the merits. It does this in two ways: (a) in effect pleadings are automatically amended to conform to proof on issues tried by express or implied consent. . . . The sporting element in litigation is eliminated. . . . This is true because Rule 15(b) provides: 'Such amendment of the pleading as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend does not affect the result of the trial of these issues.'

3 Moore's Federal Practice, § 15.02 at 805 (2d ed. 1948), quoted in Draper v. J. B. & R. E. Walker, Inc., 121 Utah 567, 244 P.2d 360 (1952).

Later, in Cheney v. Rucker, 14 Utah 2d 205, 381 P.2d 86 (1963), this Court held that where an affirmative defense was not properly plead but the merit of the affirmative defense was tried before the lower court, Rule 15(b) required that it be presumed that the defense had been properly plead. This Court noted that the rule allowed the pleadings to be amended to conform to the proof actually received in the trial, and further

provided, "failure so to amend does not affect the result of trial of these issues." Id.; Utah R. Civ. P. 15(b).

Plaintiff, having argued the merits of Freeport Center's defense of insufficiency of process without objection before the lower court, cannot now for the first time raise the issue before this Court.

POINT IV

PLAINTIFF'S CLAIM IS BARRED BY LACHES.

The trial court also granted Freeport Center's motion for summary judgment because of laches. (R. 327-328, 346 et. seq.) Plaintiff-appellant, in its brief, totally ignored this ground for granting the motion. As this Court has stated:

The rule is well-settled that a judgment is endowed with a presumption of validity; that the party attacking it has the burden of affirmatively showing that it is in error; and that the evidence and all inferences that fairly and reasonably may be drawn therefrom must be viewed in the light most favorable to it.

Cheney v. Rucker, 14 Utah 2d 205, 381 P.2d 86, 89 (1963); See also Simpson v. General Motors Corp., 24 Utah 2d 301, 470 P.2d 399 (1970); Charlton v. Hackett, 11 Utah 2d 389, 360 P.2d 176 (1961). Having ignored the ground of laches, plaintiff has not met his burden to prove the judgment in error, and it therefore must stand.

Moreover, this Court has long recognized the defense of laches. Papanikolas Bros. Ent. v. Sugarhouse Shopping Ctr., 535 P.2d 1256 (Utah, 1975); Mawhinney v. Jensen, 120 Utah 146

232 P.2d 769 (1951); Openshaw v. Openshaw, 105 Utah 574, 144 P.2d 528 (1943); Jones Min. Co. v. Cardiff Min. & Mill. Co., 56 Utah 449, 191 P.426 (1920).

In Papanikolas, this Court recited the elements of the defense:

- (1) The lack of diligence on the part of plaintiff;
- (2) An injury to defendant owing to such lack of diligence.

Papanikolas, supra, at 535 P.2d 1260. The record contains ample evidence to support the trial court's determination that plaintiff was guilty of laches. The numerous letters which passed between the parties reveal that plaintiff was aware from the very beginning of the pertinent facts which it claims make Freeport Center liable to it. (R. 230-252.) Just over one year after the flood, plaintiff filed its complaint, naming Freeport Center as a defendant. But it waited for two years, for no reason apparent from the record, until after the statute of limitations had run, before issuing a summons to or serving Freeport Center.

In addition to unreasonable delay on plaintiff's part, the record shows prejudice to Freeport Center resulting from the delay. Because of the late date on which Freeport was finally served Freeport may be barred by the applicable statutes of limitations from asserting its cross-claim against Clearfield for indemnity in the event that Freeport should be found liable. (R.

209.) Defendant Whirlpool's third-party complaint for indemnity against Clearfield was dismissed for this very reason (330-331.); Freeport Center's cross-claim could suffer the same fate.

In view of plaintiff's abdication of its burden to show error on the part of the trial court and the evidence in the record sufficient to support the decision, the trial court's judgment that plaintiff's claim is barred by laches must be sustained.

CONCLUSION

Plaintiff has failed to meet its burden of showing the trial court's judgment erroneous.

First, plaintiff failed to issue a summons to Freeport Center within the time required by the Utah Rules of Civil Procedure, and has not shown that the trial court erred in dismissing the action on that ground.

Second, plaintiff's argument that once a complaint is filed a summons may be issued thereon and served at any time, even in violation of the Utah Rules of Civil Procedure and after the statute of limitations has expired, rests on overruled authority and unsound principle.

Third, plaintiff's brief does not even contend that the court erred in dismissing the action on the ground of laches.

Finally, plaintiff's procedural point that Freeport


Center did not timely raise its defense of insufficiency of process is factually incorrect and, in any event, has been waived by plaintiff's failure to raise the matter before the trial court.

IT IS THEREFORE RESPECTFULLY SUBMITTED that the Second District Court for Davis County committed no error, and that its judgment against plaintiff Redman Warehousing Corporation in favor of Robert O'Block and Gordon Olch d/b/a Freeport Center Associates be affirmed.

Respectfully submitted,

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The under signed hereby certifies that he delivered
a copy of the foregoing Respondent's Brief to Mr. Robert W.
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Office Place, Salt Lake City, Utah, Attorneys for Appellant,
this 21st day of August, 1977.