

2001

# leona M. Nelson Martin v. George L. Nelson Jr. : Brief of Respondent

Utah Supreme Court

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Gayle Dean Hunt and Mikel M. Boley; Attorney for Plaintiff-Respondent.

Ryberg, McCoy and Halgren, Leon A. Halgren; Attorney for Defendant-Appellant.

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BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

IN THE SUPREME COURT  
OF THE STATE OF UTAH

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LEONA M. NELSON MARTIN,  
*Plaintiff and Respondent,*

vs.

GEORGE L. NELSON, JR.,  
*Defendant and Appellant.*

Case  
No.  
13805

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RESPONDENT'S BRIEF

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GAYLE DEAN HUNT AND  
MIKEL M. BOLEY

*Attorneys for  
Plaintiff-Respondent*

915 Continental Bank Bldg.  
Salt Lake City, Utah 84101

RYBERG, McCOY & HALGREN  
Leon A. Halgren,  
*Attorneys for Defendant-Appellant*

325 South Third East  
Salt Lake City, Utah 84111

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## RESPONDENT'S BRIEF

### STATEMENT OF THE FACTS

On August 12, 1971, Plaintiff-Respondent filed an action in the District Court of Salt Lake County to renew judgments previously granted against Defendant-Appellant for back child support. On August 27, 1971, Defendant-Appellant was personally served with summons and complaint by Mr. Gordon M. Keenoy, Deputy Sheriff of Los Angeles, County, Cali-

fornia. Defendant-Appellant does not deny in his brief nor did he deny below this personal service of process or that he was fully informed of the nature of the proceedings filed against him. However, no answer to Plaintiff-Respondent's complaint was ever filed by Defendant-Appellant. On November 9, 1973, a default judgment was taken against Defendant-Appellant, after which time Defendant-Appellant's counsel made a special appearance before the lower court seeking to vacate the judgment. The basis for this special appearance contesting the judgment was that the court was without jurisdiction. The District Court denied Appellant's motion.

## ARGUMENT

### POINT I.

DEFENDANT-APPELLANT'S RIGHTS WERE FULLY AND ADEQUATELY PROTECTED BELOW AND THE COURT HAD JURISDICTION OVER DEFENDANT-APPELLANT.

A. As between the parties to a lawsuit and their privies, the process server's return is conclusive in the absence of fraud and cannot be rebutted by extrinsic evidence.

The previous statement represents the majority position of state tribunals throughout the United States. The New Hampshire Supreme Court stated in *Clark v. Bradstreet*, 104 A.2d 739 (N.H. 1954),

[I]t has long been the law in New Hampshire that between the parties to a suit and those claiming under them the return of the sheriff of matters material to be returned is so far conclusive evidence that it cannot be contradicted for the purpose of invalidating the sheriff's proceeding or defeating any right acquired under them. *Ibid.* at 741 of A.2d.

In an action to subject certain real property conveyed to defendant's spouse to plaintiff's judgment, the highest tribunal of Virginia similarly held. The Court stated, "The sheriff's return disclosed that this motion for judgment was served upon the [Defendants] personally. . . . No fraud or collusion being involved, Defendants concede that the return imports a verity and thus cannot be assailed." *Childress v. Fidelity & Casualty Co. of New York*, 194 Va. 191 (1952). As Defendant-Appellant points out in his brief, the notarized return of Keenoy purports to satisfy all of the statutory requisites. Defendant-Appellant does not allege any fraud or collusion on the part of Keenoy or Plaintiff-Respondent.

*Hollinger v. Hollinger*, 416 Pa. 473, 206 A.2d 1 (1965), involved an automobile accident case in which the defendant claimed improper service. In its dicta the court stated the general rule concerning the conclusiveness of a process server's return. It stated, "[I]n the absence of fraud, the return of service of a sheriff, which is full and complete on its

face, is conclusive and immune from attack by extrinsic evidence.” *Ibid.* at 475.

In 1971, the Kansas Supreme Court had before it a situation not unlike the present. There the defendant-appellant waited until after judgment to attack the veracity of the process server’s return. The court conceded that the appellant might have been able to rebut the return prior to judgment. However, the Court went on to hold, “The general rule [is] that a sheriff’s return of summons may not be impeached by oral testimony *after judgment* as to matters therein recited, which were clearly within the sheriff’s personal knowledge. . . .” *Haley v. Hershberger*, 207 Kan. 459, 485 P.2d 1321 (1971). (Emphasis added) The Defendant-Appellant does not maintain that any of the return’s alleged defects were not within the personal knowledge of Keenoy. This general rule as stated in *Haley, supra*, is especially applicable to a situation like the present where the defendant is personally served with process, is properly put on notice of the plaintiff’s claims, and merely waits for over two full years before choosing to do anything. Thus, even if this court were to adopt the more liberal view as espoused in Defendant-Appellant’s brief, a Defendant should not be allowed to wait until after the entry of judgment to contend that the lower Court was without jurisdiction. The present situation is a far cry from the cases cited in Defendant-Appellant’s brief where the chances of sub-



stantial injustice were very real if a strict adherence to the majority position were applied. This will be more fully discussed below.

B. Defendant-Appellant has failed to present sufficient evidence to rebut the truthfulness of the process server's return.

A 1965 decision of the Montana Supreme Court clearly sets forth the standard for rebuttal of returns. The Court stated that in order to rebut the truthfulness of the return requires "more than a little proof, it must be clear, unequivocal and convincing." *Sewell v. Beatrice Foods Co.*, 400 P.2d 892, 894. In the present situation the only proof of improper service comes in the form of an affidavit of the Defendant-Appellant and from a copy of the complaint, which Appellant claims to be the one left with him on August 27, 1971. On the other hand the process server's return, which was sworn to only five days after service was made, states that all of the proper information was placed upon the copy of the complaint left with the Defendant-Appellant. Due to the lapse of time, it would have been an effort in futility for Plaintiff-Respondent to attempt to have a more current affidavit prepared for officer Keenoy. The lower court was, thus, faced with choosing between two conflicting affidavits, one made five days after service and one sworn to two years later. The Pennsylvania Court in *Hollinger, supra*, although

adopting the conclusive rule, made a statement which applies regardless of the standard. It stated:

[There is] a presumption that a sheriff, acting in the course of his official duties, acts with propriety and, therefore, when the sheriff in the course of such official duties makes a statement, by way of an official return, such statement is given conclusive effect. *Hollinger, supra*, at 475.

In addition, there was one very critical factor which must have been considered by the lower court. If the facts were as Appellant has contended, then why would he wait two full years to contest the service of process? Would it not have been more prudent for Defendant-Appellant to strike at the allegedly defective service at the first possible moment? With all of these various factors to consider the lower court had ample basis for holding as it did. The Defendant-Appellant failed to carry its heavy burden of overcoming the presumption of veracity of the process server's return.

C. No Substantial Prejudice was caused to Defendant-Appellant by the Proceedings Below.

*Utah Sand & Gravel Products Corp. v. Tolbert*, 16 Utah 2d 407, 402 P.2 703 (1965), is cited in Defendant-Appellant's brief as standing for the proposition that the formalities of proper service must

be strictly followed. However, a closer look at that decision indicates otherwise. The Court started out with the following basic premise: "It is true that our new rules of civil procedure were intended to eliminate undue emphasis on technicalities and to provide liberality in procedure to the end that disputes be heard and determined on their merits." *Ibid.* at 704 of P.2d. This statement is in accord with Rule 1 of the Utah Rules of Civil Procedure which reads in part, "They [the Rules] shall be liberally construed to secure the just, speedy, and inexpensive determination of every action." The Court in *Tolbert*, *supra*, went on to state, "Liberality in their interpretation and application should be indulged where no prejudice or disadvantage to anyone results. . . ."

Defendant-Appellant was not misled as was the Defendant in *Tolbert*, *supra*. The Defendant-Appellant here was personally served with summons and complaint, had the opportunity to know of the allegations being made against him, knew the court in which the action was being prosecuted, and had over two full years to file his answer putting the matter at issue. There was no substantial prejudice or disadvantage to Defendant-Appellant. Therefore, even if the facts of service were as Defendant-Appellant alleges, he should not be allowed to attack the jurisdiction of the lower court after judgment. The only substantial prejudice that would result from such a ruling would be to Plaintiff-Respondent due

to the running of the statute of limitations against most of the judgments for child support alleged in Plaintiff-Respondent's complaint.

D. Defendant-Appellant waived his right to contest the alleged defects in service.

*Rees v. Scott*, 8 Utah 2d 134, 329 P.2d 877, cited in Defendant-Appellant's brief, held that the failure of a deputy sheriff to date the copy of a ten-day summons left with the defendant was fatally defective. However, a simple application of that decision is not in order. The Court there placed heavy emphasis upon the fact that use was made of a ten-day summons, which made the time factor more crucial. It should also be noted that the defendant in that case brought a motion to quash the summons prior to judgment. The alleged jurisdiction defect was questioned at the earliest possible moment in the proceedings. The authors of *American Jurisprudence* state the general rule concerning objections to formal defects of service as follows:

Formal defects and irregularities in process or the service thereof must be taken advantage of at the first opportunity, and before any further step in the cause is taken, otherwise they will be held to have been waived . . . 62 *Am. Jur.* 2d "Process" at 944 (1972).

Therefore, even if it were assumed *arguendo* that there were defects in the service of sufficient magni-

tude to destroy the lower court's jurisdiction, Defendant-Appellant waived the right to object to said defects by waiting for over two full years and after judgment was entered.

## POINT II

THE SUMMONS WAS NOT DEFECTIVE NOR IN VIOLATION OF SECTION 78-27-27, UTAH CODE ANNOTATED (1953).

Section 78-27-27 U.C.A. (1953), reads in part as follows: "No default shall be entered [against a nonresident] until the expiration of at least thirty days after service. . . ." In the instant action default was not entered for over two full years; therefore, there was no violation of the statutory requirements. The mere fact that the summons upon its face gave 20 days instead of 30 in which to answer does not destroy the jurisdiction of the lower court.

The following quotation represents the majority position:

It may be said . . . that in the majority of the cases considering the fact that the return day of process is mistakenly or defectively stated, the rule seems to be that it does not render the process void, but only voidable. 62 *Am. Jur.* 2d "Process" at 797 (1972).

Defendant-Appellant could have made a special appearance after he was personally served with sum-

mons and complaint to render the irregularity voidable; however, as with the defects discussed under Point I, he chose to do nothing. He should not be allowed at this late date to destroy the court's jurisdiction.

*Krueger v. Lynch*, 242 Iowa 772, 48 N.W.2d 266 (1951), was a case in which the original notice served upon defendant stated that defendant had only 20 days to appear, while the procedural rules called for 30 days. Defendant made a special appearance claiming that the notice was invalid, and the lower court agreed. The Supreme Court reversed, holding that the defect was a mere irregularity and did not make the service a nullity. After a fairly extensive review of cases from other jurisdictions the Court stated:

The defendant was entitled to thirty days to appear; but he was entitled to no more than that.

The fact that the notice as served upon defendant fixed 20 days, instead of 30 for his appearance, does not change the rule. *Ibid.* at 777.

In 1969, the Oregon Supreme Court had before it a case very similar to the present. In *State ex rel. Kalich v. Bryson*, 253 Or. 418, 453 P.2d 659 (1969), the defendants were personally served out of state. The summons failed to designate the time in which defendants were required to appear, although the

process was correct in all other respects. The court said that the critical issue was notice to the defendants. It held:

We do not think that the failure to give [defendants] notice of the time in which to appear or answer invaded any interest of theirs worthy of protection to such an extent that the court did not have jurisdiction . . . .  
*Ibid.* at 420.

The court stated that as long as the lower court's refusal to quash summons did not deprive the defendants of legally protected rights, there was no reason for the lower court to say that it was without jurisdiction.

As with the discussion under Point I, Defendant-Appellant has waived his right to contest the irregularity of the number of days in which to respond. If Defendant-Appellant had any real defenses to the allegations of the complaint and had wished to complain of the defective summons, he should have stepped forward prior to entry of judgment.

## CONCLUSION

Plaintiff-Respondent respectfully concludes that the lower court obtained personal jurisdiction over Defendant-Appellant and that its decision should be

given full force and effect. Defendant-Appellant failed to successfully rebut the allegations made by Officer Keenoy regarding the service of process. Even if the defects complained of by Defendant-Appellant were sufficient to deprive him of substantial justice and thus make the service defective, which they were not, Defendant-Appellant has waived his right to object to said defects by his failure to come forth earlier in the proceedings.

Therefore, the lower court's ruling should be upheld.

Respectfully submitted,

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GAYLE DEAN HUNT AND  
\_\_\_\_\_  
MIKEL M. BOLEY  
\_\_\_\_\_  
*Attorneys for Plaintiff-Respondent*

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