

1978

Walter G. Simpson, and Elizabeth H. Simpson, His Wife v. Peter M. Lowe, and Martha H. Lowe, His Wife; and Marlowe Investment Company, A Utah Corporation, Et Al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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WALTER G. SIMPSON, and :
ELIZABETH H. SIMPSON, his :
wife, :

Plaintiffs- :
Respondents, :

v. :

PETER M. LOWE, and MARTHA H. :
LOWE, his wife; and MARLOWE :
INVESTMENT COMPANY, a Utah :
corporation, et al., :

Defendants- :
Appellants. :

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BRIEF OF APPELLANTS

ON PETITION FOR REHEARING OR
DISMISSING APPELLANTS

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corporation, et al., :

Case No. 15909

Defendants- :
Appellants. :

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BRIEF OF APPELLANTS

ON PETITION FOR REHEARING OF THIS COURT'S ORDER
DISMISSING APPELLANTS' APPEAL

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BRIEF OF APPELLANTS

ON PETITION FOR REHEARING OF THIS COURT'S ORDER
DISMISSING APPELLANTS' APPEAL

NATURE OF CASE

By a petition for Rehearing appellants seek reconsideration of this Court's previous order granting respondents' motion to dismiss this appeal and denying appellants' motion for an extension of time within which to file their brief.

PREVIOUS DISPOSITION

On November 7, 1978, this Court entered an order granting respondents' motion to dismiss on the basis that appellants' attorney, Don L. Bybee, had failed to file a brief on their behalf prior to the October 31, 1978, deadline that had previously been established by this Court.

STATEMENT OF FACTS

Respondents, who were plaintiffs below, were granted judgment against appellants on June 1, 1978, by the Honorable G. Hal Taylor, judge of the Third District Court in and for Salt Lake County. (R. 103-05.) Thereafter, on June 16, 1978, appellants' attorney, Don L. Bybee, filed a notice of appeal dated June 5, 1978, with the District Court. (R. 107.)

This Court notified appellants' former counsel, Mr. Bybee, that his brief was due October 15, 1978. (Affidavit of Don Bybee at ¶5.) Due to numerous other matters, which he apparently deemed more urgent, Mr. Bybee did not prepare a brief prior to that deadline. (See generally, Affidavit of Don Bybee.) On October 20, 1978, Mr. Bybee appeared before Justice Maughan and was granted an ex parte extension giving him through October 31, 1978, in which to file the brief. (Id.) Appellants were not advised by their counsel either of the expiration of the original deadline or

of the granting of the ex parte extension. (Affidavit of Peter M. Lowe at ¶3.) Likewise, appellants were not advised by their counsel of the pendency of respondents' motion to dismiss for the failure of their counsel to file a brief on their behalf by October 31 or the hearing on that motion on November 6. (Id.) It was only after this Court entered its November 7, 1978, order dismissing this appeal that appellants became aware of the true status of their appeal.

NATURE OF RELIEF REQUESTED

By their Petition for Rehearing, appellants request that this Court reconsider its previous order dismissing this appeal and modify that order so as to provide that appellants' appeal will be dismissed only if appellants fail to reimburse respondents for the costs incurred by them and to cause a brief to be filed on their behalf within a reasonable time.

ARGUMENT

I. THIS COURT'S PRIOR DECISION IN THIS CASE MAY BE RECONSIDERED UPON APPELLANTS' PETITION FOR REHEARING.

Although the dismissal of this appeal was not an adjudication upon the merits, such a dismissal nevertheless has the effect of an affirmance of the trial court's decision:

The dismissal of an appeal is in effect an affirmance of the judgment or order appealed

from, unless the dismissal is expressly made without prejudice to another appeal.

Rule 76(c), U.R.C.P. Such a dismissal is, therefore, a "decision" within the meaning of Rule 76(e), which authorizes the Petition for Rehearing procedure. Accordingly, even though this Court's dismissal of this appeal was not on the merits, that dismissal may properly be reconsidered upon appellants' petition for rehearing.

II. THE UNCONDITIONAL DISMISSAL OF THIS APPEAL TOO SEVERELY PENALIZES APPELLANTS FOR CONDUCT OF THEIR ATTORNEY OF WHICH THEY HAD NO KNOWLEDGE.

It is not the contention of appellants that the dismissal of this appeal was beyond the authority of this Court. Any such contention would, of course, be entirely untenable under Rule 73(a) of the Utah Rules of Civil Procedure, which provides, in part that:

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.

Rule 73(a), U.R.C.P.

It is the contention of appellants that the dismissal of this appeal--the ultimate sanction prescribed by Rule 73--is unduly severe in light of the special circumstances

of this case. As reflected by the affidavit of appellant Peter Lowe and the Statement of Facts above, the appellants entrusted the prosecution of this appeal to an attorney whom they believed to be competent and capable. They relied upon his discretion, diligence, and responsibility to perfect and prosecute this appeal in a professional manner. Such reliance should not be considered capricious or ill-advised.

The responsibility for the failure to comply with the deadlines established and the orders rendered by this Court lies entirely with the appellants' previous attorney. The preparation of a brief on their behalf was not delayed because of their personal unwillingness or inability to provide information or assistance; rather, appellants stood ready at all times to provide any assistance requested by their attorney, although such assistance was, in fact, never sought. (Affidavit of Peter Lowe at ¶4.) It is the duty and responsibility of the attorney, not his client, to assure the timely preparation of the case.

The courts of this and other jurisdictions have recognized that when an appeal is dismissed due solely to the mistakes, inadvertance, or incompetence of a party's attorney, suitable relief will be granted. In James v. Francesco, 61 N.J. 480, 295 A. 2d 633 (1972), the Supreme Court of New Jersey faced a situation which was factually

almost identical to that presently before this Court. Following a timely appeal, the appellant's attorney failed to take the remaining steps necessary to perfect the appeal and to file a brief on behalf of his client's cause. Four months later, the appellate court dismissed the pending appeal due to the lack of prosecution. Thereafter, the appellant retained new counsel, who sought to have the original appeal reinstated. In its consideration of the appellant's motion, the court emphasized that

it is clear to us that the defendant was egregiously misrepresented by his first attorney on the appeal. Suffice it to say that whereas there was a good case to be made on the appeal the attorney, although paid an appeal retainer, defaulted on his obligation to file a brief

295 A. 2d at 635. The court, recognizing the inherent unfairness of denying a party his day in court solely because his attorney had not fulfilled with dilligence his professional responsibilities, held:

In such circumstances of probable merit and serious default of representation by the first attorney a proper case for relaxation of the rules is presented in order to subserve the first objective of the rules of practice--the accomplishment of substantial justice on the merits.

295 A. 2d at 365 (emphasis added, numerous citations omitted). Likewise, this Court, in the interest of substantial justice on the merits, should exercise its discretion to impose as a

sanction for the failure of appellants' former attorney to comply with the reasonable orders of this Court, a remedy which will not deny appellants the opportunity for meaningful review.

The Wyoming Supreme Court applied this concept in Brown v. Riner, 496 P. 2d 907 (Wyoming 1972), to relieve a party whose appeal had been dismissed due to the inadvertence of his former counsel. In that case, the appeal was originally conducted on behalf of the appellant by an individual not properly authorized to practice before the Wyoming Supreme Court. That court emphasized that the appellant had, upon discovering that his former counsel had not been authorized to represent him, promptly obtained authorized counsel. Noting that, as to the party personally, "the violation of the rule in this instance appears to have been unintentional, [and] with full compliance now assured" the appeal was reinstated. 496 P. 2d at 908.

As in this case, the personal problems and professional situation of a sole practitioner lead to the dismissal of his client's appeal for failure to prosecute in Lundy v. Lakin, 202 P. 2d 369 (Cal. App. 1949). In that case, appellant entrusted his appeal to a sole practitioner, who, for a variety of reasons, was unable complete and file a brief on behalf of his client. The court emphasized that,

as in this case, the "asserted lack of dilligence . . . is wholly attributable to the one attorney who represented appellants under adverse circumstances" In holding that the appellant's appeal should be reinstated, the court noted the desirabilitiy of hearing all appeals on the merits:

It is true that the court rules requiring prompt action on the part of appellants to perfect and prosecute their appeals with diligence should be strictly complied with in every respect. It is the purpose of the law to expedite appeals in the interest of justice and to discourage dillatory proceedings. But it has been frequently said by our courts that it is also the policy of the law to hear all appeals on their merits, if it is reasonably possible to do so.

202 P. 2d at 371 (emphasis added, numerous citations omitted). Accordingly, the interests of justice require that, upon reimbursing respondents for costs incurred as a result of the failures of their former attorney, these appellants be given an opportunity to present to this Court their arguments on the merits of their appeal.

In Moore v. Burdman, 84 Wash. 2d 408, 526 P. 2d 893 (1974), an appeal was dismissed due to technical insufficiencies and errors in which the appellant had not personally participated. Again emphasizing that the appellant was not personally at fault, the Washington Supreme Court held that the appeal should be reinstated, noting:

Since the deprivation order was entered, [the appellant] has diligently sought to obtain appellate review of the proceeding, but owing to occurrences beyond her control, she has been denied any review on the merits.

526 P. 2d at 896. Upon learning of the failure of their counsel to comply with the orders of this Court, appellants have likewise obtained new counsel and seek now to pursue their appeal in full compliance with the rules and orders of this Court.

Similarly, in Washington v. Evans, 338 P. 2d 754 (Washington 1959), the dismissal of an appeal was vacated on the basis that the appeal had originally been dismissed only through the inadvertance of the appellant's former counsel.

This Court, also, has recognized that the dismissal of an appeal may be vacated and the appeal reinstated when it appears that the dismissal resulted from circumstances which were beyond the personal control of the appellant. For example, in Penman v. Eimco Corporation, 114 Utah 16, 196 P. 2d 984 (1948), this Court upheld the reinstatement of an appeal to district court that had been dismissed for the appellant's failure timely to pay the required filing fee. After the dismissal, the appellant demonstrated that although tendered to the Clerk of the district court, the fees had been rejected since the papers in the case had not yet been transferred from city court. In the present case, as in

Penman, the dismissal of the appeal should be vacated since the appellants did not personally participate in the admitted failure of their former counsel to comply with this Court's appeal procedure. Moreover, as this Court recognized in Harris v. Tilley, 25 Utah 2d 260, 480 P. 2d 142 (1971), the alleged incompetence or inadvertance of a party's counsel is a matter appropriately to be considered if such can be shown to have played a significant role in the previous disposition of the case.

CONCLUSION

By their petition for rehearing, appellants do not contend that this Court exceeded its authority in dismissing their appeal. Appellants do contend, however, that the dismissal of their appeal, for the failure of their former counsel timely to file a brief on their behalf, too severely penalizes them for the conduct of their former counsel of which they had no knowledge and to which they neither contributed nor participated.

Appellants request that this Court reconsider its prior decision dismissing their appeal and exercise its discretion to modify that order of dismissal. By requiring appellants to reimburse respondents for the costs incurred by them as a result of the failure of appellants' former attorney to diligently prosecute this appeal, any prejudice to the opposing parties can be avoided.

In view of the overriding policy favoring the review of all appeals on the merits, courts of this and other jurisdictions have traditionally reinstated those appeals dismissed due to the errors, inadvertence, or incompetence of a party's counsel. By the original dismissal of this appeal, this Court has demonstrated that failure to accomplish timely compliance with its rules and orders will not be condoned; by now reinstating this appeal, this Court can avoid imposing an unduly harsh sanction upon appellants on account of improprieties in which they did not participate and of which they had no knowledge.

RESEPECTFULLY SUBMITTED this 27 day of November, 1978.

DART & STEGALL

By B. L. DART
B. L. Dart

By John D. Parken

Attorneys for Appellants

CERTIFICATE OF PERSONAL DELIVERY

I hereby certify that I personally delivered two (2) true and correct copies of the foregoing to Carman E. Kipp, 600 Commercial Club Building, Salt Lake City, Utah 84111, attorney for respondents, on this _____ day of November, 1978.
