1979

# Ted R. Brown and Associates, Inc. v. Carnes Corporation and Long Deming Utah, Inc. : Reply Brief of Appellant

Utah Supreme Court


Tibbals and Staten; Attorneys for Appellant;
Moyle and Draper Reid E. Lewis; Attorneys for Respondent;
Van Cott, Bagley, Cornwall & McCarthy; Attorney for Defendant;

IN THE SUPREME COURT OF THE STATE OF UTAH

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| TED R. BROWN AND ASSOCIATES, INC., a corporation, Plaintiff and Appellant, | : | Supreme Court No. 15928 |
| vs. | : | |
| CARNES CORPORATION, Defendant and Respondent, | : | |
| and | : | |
| LONG DEMING UTAH, INC., Defendant. | : | |

# REPLY BRIEF OF APPELLANT

Appeal from Judgments of Third Judicial District Court in and for Salt Lake County, Honorable Gordon R. Hall, Judge, Quashing Service of Summons on Defendant-Respondent Carnes, and Judgment of Third Judicial District Court in and for Salt Lake County, Honorable Peter F. Leary, Judge, Quashing Service of Summons on Defendant Carnes.

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# REPLY BRIEF OF APPELLANT

## STATEMENT OF THE NATURE OF THE CASE

To this point, after five years of effort before the District Court of the Third Judicial District in Salt Lake County, and before this Court, it can still be said that the nature of this case is essentially the effort on the part of Ted R. Brown and Associates, Inc., Plaintiff and Appellant, to bring before the District Court of Salt Lake County, the Defendant Carnes Corporation for a trial on the merits of Brown's claim against Carnes. A detailed statement of the nature of the case appears in the Brief of the Appellant and is adopted herein by reference. This Reply Brief is filed under and pursuant to the provisions of Rule 75(p)(1) and (2).

## DISPOSITION IN THE COURT BELOW

The Third Judicial District Court, acting through Judge Gordon R. Hall, ruled that Carnes Corporation was not subject to the jurisdiction of the Court. Judge Peter F. Leary, before whom this matter was brought pursuant to order of the Honorable David B. Dee for an Evidentiary Hearing relating to the activities of the Defendant Carnes within the State of Utah and of its agents relative to the determination of whether or not Carnes would be subject to service of process under the Long Arm Statute in the State of Utah or whether it had an agent who might be served, refused to act on the evidence presented. His order stating he had no authority to overrule Judge Hall incorporated language in the order which would appear to invoke sanctions against the Appellant Brown. The Judge erroneously stated that "the evidence presented was peculiarly within the knowledge of the Plaintiff, obtainable by interrogation of witnesses, Young and Tregeagle, or by discovery prior to the hearing before Judge Hall on or about October 1, 1974." (Order, 30th May, 1978) Judge Leary specifically ruled that service upon the agents Richard B. McDowell and Lynn Felton, officers respectively of Long Deming, Inc. and Utah Air Sales, was not a service coming within the terms of Rule 4, URCP. The Court quashed service by entering an Order to Dismiss.

## NATURE OF THE RELIEF SOUGHT ON APPEAL

Appellant seeks to have the Order of Gordon R. Hall and the Order of Peter F. Leary, dismissing the Defendant Carnes from the case and quashing service of summons, reversed and vacated. Appellant seeks to have this Court recognize the sufficiency of service of Summons upon the Defendant Carnes and the jurisdiction of the District Court of Salt Lake County over the Defendant Carnes and to have the matter returned to the District Court for a trial upon the merits.

## ARGUMENT

### POINT I

### THE APPEAL IS NOT PREMATURE AND IS PROPER UNDER THE RULES.

By the terms of Rule 75(p)(2), it is required that "the Reply Brief, if any shall be limited to answering any new matters set forth in Respondent's Brief, and shall conform generally to the requirements of other Briefs." Since Appellant has briefed, and set forth before this Court in its

brief, the basic and underlying arguments of the Appellant in connection with this matter, it does not seek to reiterate or withdraw attention from those arguments. The position taken by the Respondent Carnes in its Brief filed before this Court March 29, 1979 in its Point I, wherein it asserts:

> "The appeal is premature since the District Court's Orders are not final and immediately appealable."

is entirely new to the five years of litigation on the jursidiction of the Court over Carnes and bears reply.

The essence of the argument set forth by Carnes in its Brief that the appeal is premature, is that since there are two Defendants, namely Carnes Corporation and Long Deming Utah, Inc., that under Rule 54(b) of the Utah Rules of Civil Procedure, the decision denying the jursidiction over Carnes is not a final decision. Rule 54(b) states:

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express

> direction for the entry of judgment. In absence of such determination and direction, any order or other form of decision, however, designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

This ingenious argument by Carnes based upon the rule quoted, would seek to impose upon the Appellant in this case, Ted. R. Brown and Associates, Inc., which is trying to establish the jurisdiction over Carnes, the duty, which Carnes claims exists before the judgment becomes final, of applying to the Court for an express determination that there is no just reason for a delay in the entry of judgment, and secondly that the Court expressly directs the entry of judgment. Manifestly, in this case if such a duty exists, it is a duty of Carnes, which seeks to treat the judgment as final and wishes to escape the jurisdiction of the Third Judicial District Court.

A careful reading of the full text of the citations referred to by Carnes in its Respondent's Brief taken from Moore's Federal Practice 54.27[6], 2nd Edition 1978, leaves

no doubt but that the Federal District Court can, if it so chooses, go forward with the trial of the cause with the party who has had a partial determination of status or of the status of the claims against them still participating in the trial and reserving until the ultimate determination of the entire cause on its merits for appellate review the issue of jurisdiction. This method of procedure where appropriate, would save multiple appeals. Here, however, Carnes has treated the determination of the District Court quashing service of summons as a final judgment and has itself twice proceeded with appellate procedures without having previously ever raised the issue which it now raises under Rule 54(b). The objection now raised for the first time in this appeal is neither timely nor applicable to the legal and factual situation in this case.

The fact is, that if jurisdiction of the District Court is not established over Carnes, there simply is no lawsuit. Clearly, since the only party benefited by entry of judgment quashing service of Summons is Carnes, if Rule 54(b) has any application to the situation, which appellant believes it does not have, then Carnes should have asked the Court to enter the judgment as a final judgment and find that

no cause for delay exists. Certainly, this is not the function of the Appellant, Ted R. Brown and Associates, Inc., in this case. Respondent cannot by its own failure to comply with Rule 54(b), insulate itself from timely appeal.

Appellant further submits that an analysis of the actual position of the litigants in this matter discloses that the Complaint of Ted R. Brown is not based solely on a joint claim against the two defendants to the action. The First Claim and Second Claim of the Complaint are claims solely against Carnes and are based upon breach of contract. The second claim also contains an additional factor, namely an admission by Carnes that it was in fact indebted to the Plaintiff under the contract forming the basis for the first claim between the parties. Only the third claim sets forth any claim against both defendants Carnes and Long Deming. It alleges that a wrongful cancellation of the contract was accomplished by Carnes and Long Deming acting in concert. Carnes is an essential party to the litigation in all claims in the Complaint. Undoubtedly, Carnes could have elected to have treated the order of the District Court quashing service of Summons against it, as only a partial determination, answered the Plaintiff's Complaint, proceeded to trial on the

merits of the cause, and reserved the ultimate jurisdictional question for determination on appeal at the conclusion of the trial of the action on the merits. Carnes has refused to recognize the jurisdiction of the Court and elected to treat the order quashing service or dismissal as to Carnes as a final determination. Carnes has twice before brought appeals before this Court treating the actions of the District Court as final and determinative of the rights of the parties with respect to Carnes. In its brief on this appeal, it argues that the matter of jurisdiction has been finally determined and is res judicata. We direct the Court's attention to the fact that if Carnes is permitted to prevail based upon the argument contained in Point I, of respondent's brief, to the effect that the appeal now prosecuted by the Appellant Brown was premature, it makes a mockery of the entire Court procedure and leaves the Appellant Brown with no meaningful remedy which Brown can pursue.

We note that Rule 72(b), U.C.A., gives to a party the right to an Interlocutory Appeal when a party has appeared specially and objected to jurisdiction and the objections have been overruled. No reference is there made to whether or not there are multiple parties involved in the action.

Secondly, the better view and the prevailing view today is that "An order sustaining a motion to quash or to set aside process or service thereof is appealable." This result has been justified on the ground that,

> "...such an order is in effect a final decision since further prosecution of the action is prevented thereby, or that the order comes within the purview of a statute authorizing an appeal from any order affecting a substantial right in a civil action or proceeding where that order, in effect, determines the action or proceeding and prevents a final judgment." 4 Am Jur 2d Appeal and Error, Section 81, p.598.

This view has been specifically adhered to in the State of Oklahoma. We refer to the case of Harder v. Woodside, 165 P.2d 841, which ruled that "An order quashing the summons and setting aside the service made upon the defendant is an appealable final order."

The fact that the Respondent treats the order as final and is positive of its posture in the case is well illustrated by its previous appeals to this Court and in its Point II in the present Brief.

## POINT II

THE RESPONDENT'S BRIEF IN ITS POINT II DOES NOT PROPERLY CHARACTERIZE OR RECOGNIZE THE ACTION TAKEN BY JUDGE LEARY. JUDGE LEARY DID NOT DETERMINE THAT JUDGE HALL'S RULING WAS CORRECT. HE MERELY REFUSED TO ACT.

The novel aspect of the Respondent's Brief in connection with its Point II which requires reply by this Appellant is the interpretation placed upon the action taken by Judge Leary. Judge Leary made no finding or determination that Judge Hall had correctly decided the issue of jurisdiction. Judge Leary without ever having requested or suggested to counsel that the Appellant Brown should justify its actions in not having conducted prior discovery, and without having sought to be informed on this matter or having ascertained the actual availability to Plaintiff-Appellant Brown of the information, declared:

> "substantially all of the evidence presented before this court was peculiarly within the knowledge of the plaintiff, was obtainable by interrogation of the witnesses Young and Tregeagle, or by discovery prior to the hearing before Judge Hall on or about October 1, 1974..." (R355).

This statement of Judge Leary is entirely without support in the record. It is a conclusionary finding prepared by counsel for Carnes, submitted to Judge Leary and which Judge Leary signed, but it is totally unsupported in

the record. We again respectfully submit to this Court that Judge Leary was not, by the order of Judge David B. Dee, under which order he acted in this case, authorized or empowered to invoke sanctions against any party for what he individually may or may not have considered to be a diligent pursuit of discovery in the matter. Clearly, in all events, before he could invoke such sanctions, the Appellant Brown was entitled to notice and to be heard in regard thereto. No such opportunity was afforded to Brown. Carnes made no effort to present any such accusation to Judge Leary or to invoke before that Court procedures looking towards a review of whether or not the Appellant Brown was subject to sanctions by reason of failure to earlier present the evidence in the lower court. An examination of the findings by Judge Leary and the order based on said findings, makes it clear that Judge Leary did not pass upon the question of "Long Arm Jurisdiction" over Carnes. He ignored the mandate of the order of Judge Dee under which the hearing was held, that he should determine the factual issues of whether or not Carnes had conducted activities in the State of Utah which would subject it to Long Arm Jurisdiction. The Respondent's assumption that Judge Leary concurred with Judge Hall, is not founded upon the action of the Court. Since counsel for

Carnes prepared the findings and the order signed by Judge Leary, it would have been simple enough to have included a finding to support that contention if, in fact, Judge Leary was so persuaded. The Judge did not so find and there is no such language incorporated in either findings or the order reasonably susceptible of such interpretation.

We respectfully represent to this Court that the attempt by Respondent to distort the action taken by Judge Leary by characterizing it as a determination that Judge Hall's order was correct, cannot be supported from the record.

## CONCLUSION

Appellant Brown reiterates its Brief in support of the Appeal and the conclusions there expressed. Counsel for Carnes is persistent in attempting to avoid the jurisdiction of the District Court and a trial of the action upon the merits. We respectfully submit that the facts clearly show that Carnes enjoyed all the fruits and benefits of doing business within the State of Utah. Ted R. Brown and Associates, Inc., a Utah corporation and taxpayer should not be deprived of its right to enforce the contractual obliga-

tion against Carnes that Carnes' activities within the State of Utah created. We request that this Court rule that the District Court has jurisdiction over Carnes and that the case be remanded to that Court for trial upon the merits.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I hand delivered copies of the foregoing REPLY BRIEF OF APPELLANT to O. Wood Moyle III, Reid E. Lewis and Robert D. Merrill this _____ day of April, 1979.

_____

Received two copies of the foregoing Brief this ____ da of April, 1979.

MOYLE & DRAPER

_____

O. WOOD MOYLE III

_____

REID E. LEWIS

Received two copies of the foregoing Brief this ____ da of April, 1979.

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ROBERT D. MERRILL