2001

Sharon Winn, Natural Mother and Guardian of Perris Zan Winn v. Thomas Lee Starkey, Jerry Sue Gibb, Family Printer, and State of Utah Department of Highways : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

SHARON WINN, Natural Mother and Guardian of PERRIS ZAN WINN, Deceased,

Plaintiff and Appellant,

-vs-

THOMAS LEE STARKEY, JERRY SUE GIBB, FAMILY PRINTER, and STATE OF UTAH DEPARTMENT OF HIGHWAYS,

Defendants and Respondents.

Case No. 14239

BRIEF OF RESPONDENTS

Appeal from the Judgment of the Second Judicial District Court of Weber County, Honorable Ronald O. Hyde, Judge.

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-vs-	)	Case No. 14239
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BRIEF OF DEFENDANTS-RESPONDENTS

NATURE OF THE CASE

This is an action brought by the appellant and the natural mother of the minor decedent, Perris Zan Winn, for his claimed wrongful death alleged to have been caused when he was struck while crossing a street by two different motor vehicles, one driven by defendant-respondent Thomas Lee Starkey and the other owned by defendant-respondent Family Printer and driven by defendant-respondent Jerry Sue Gibb.

DISPOSITION IN THE LOWER COURT

Defendant, State of Utah Department of Highways, by stipulation of appellant was dismissed as a defendant in the lower court and the lower court granted to the respondents Thomas Lee Starkey, Jerry Sue Gibb and Family Printer their motion to quash the service of process made upon them by appellant.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the order of the lower court granting their motion to quash service of process made upon them.

STATEMENT OF THE FACTS

Respondents agree with the facts as set forth in the brief of plaintiff-appellant with the following exceptions and additions.

The death of Perris Zan Winn which gave rise to this action occurred on November 16, 1972. The plaintiff-appellant filed the original complaint naming defendants-respondents Thomas Lee Starkey, Jerry Sue Gibb, Family Printer, and John Does I through V on November 15, 1973.

The lower court ruled that respondents' motion to quash service of process must be granted and cited as authority Dennett v. Powers, 536 P.2d 135 (1975), and Fibreboard Paper Products Corporation v. Dietrich, 25 Utah 2d 65, 475 P.2d 1005 (1970).

ARGUMENT

POINT I

SERVICE OF PROCESS WAS NOT TIMELY MADE.

Rule 4(b) of the Utah Rules of Civil Procedure reads as follows:

> "(b) TIME OF ISSUANCE AND SERVICE. 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."

Clearly, the summons in this action did not issue within three months nor was it served within one year after the filing of the original complaint. The question for determination then is whether the amended complaint filed nearly a year later is to be treated as a new complaint for purposes of Rule 4(b). If the amended complaint does not relate back to the time of the filing of the original complaint, or if the original complaint is reactivated to the time of the filing of the amended complaint, then both the issuance and service of process were timely and in accordance with Rule 4(b). On the other hand, if an amended complaint does relate back to the date of the filing of the original complaint, then the issuance of the summons on November 19, 1974, took place over a year after the filing and the service of process on April 14, 1975, came nearly a year and a half after the filing, or five months late. That is, as of November 15, 1974, one year after the original complaint was filed, the action

should have been deemed dismissed and the service upon respondents should be treated as a nullity having no legal effect.

For the reasons and authority that follow, defendants-respondents urge this court to affirm the ruling of the lower court that according to the provisions of Rule 4(b), the original complaint in this action was deemed dismissed on November 15, 1974, and that the subsequent service of process upon respondents was a nullity without any legal effect.

The lower court relied in part upon the authority of Dennett v. Powers, cited above. In that case, the complaint was filed on September 13, 1972. On June 10, 1974, the defendants appeared specially in court and moved that the complaint be dismissed on the grounds that the summons had not been timely served pursuant to the provisions of Rule 4(b). Following a failure of the plaintiffs in the case to show proof of service of process by October 21, 1974, the lower court dismissed the action. On appeal, the plaintiffs did not even contend that the summons was timely served but rather contended that the defendants had made a general appearance which gave the court jurisdiction. In affirming the ruling of the lower court, the Supreme Court upheld both the special appearance of the defendants and the ruling that the failure of plaintiffs to comply with the provisions of Rule 4(b) with regard to the issuance and service of summons invalidated the summons and operated as a dismissal of the complaint.

In ruling that the complaint was dismissed because of a failure to

comply with the provisions of Rule 4(b), the Supreme Court in the Dennett case relied upon Fibreboard Paper Products Corporation v. Dietrich, cited above. In that case, the complaint was filed on February 21, 1969. The summons was not received, however, by the sheriff until September 22, 1969, and was not served until September 24th of the same year. The defendants, for other reasons, refused to appear in court and a default judgment was entered. Later, however, a motion was made to quash the service on the defendants and to set aside the default judgment. The lower court granted that motion. The Supreme Court affirmed that ruling by holding very simply that because Rule 4(b) requires that the summons be issued within three months of the filing of the complaint and because the summons in that case was not issued until some six months after the filing of the complaint, the summons was not timely issued.

In neither of the cases just cited and which were relied upon by the lower court was there an amended complaint in issue. These two cases, therefore, simply stand as authority that Rule 4(b) requires that a summons must be issued within three months from the filing of the complaint and served within one year of the filing of the complaint. If Rule 4(b) is not complied with in these two particulars, the complaint is deemed dismissed.

The question then becomes whether the three-month period and the one-year period are to be measured from the filing of the original complaint or whether they are to be measured from the filing of the amended complaint. The pertinent provision of the Utah Code dealing with amendments to pleadings

is Rule 15 of the Utah Rules of Civil Procedure. Rule 15(a) merely sets out the conditions under which an amendment to a pleading is allowed. Rule 15(c) reads as follows:

> "(c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Prior to the adoption of the 1953 Code, Rule 15(a) had a counterpart in the former Section 104-14-3 and 104-14-4. Rule 15(c) had no counterpart in the former law but was newly adopted in the 1953 Code. The rule verbalized in Rule 15(c) was developed in case law by the Utah Supreme Court prior to the adoption of Rule 15(c) as an interpretation of the predecessors to Rule 15(a). The question of whether an amended complaint relates back to the date of the filing of the original complaint or whether it is given the date upon which it is filed is dealt with in Peterson v. Union Pacific Railroad, 79 Utah 213, 8 P.2d 627, (1932). In that case, the original complaint was timely filed but an amended complaint which the court found to be based upon the same facts and the same cause of action was filed after the running of the statute of limitations. The question, therefore, was whether the statute of limitations was to be measured with regard to the filing of the original complaint or with regard to the filing of the amended complaint. If the amended complaint did not relate back to the original complaint, then clearly the statute of limitations had run and the action would have to be dismissed. The court

said with regard to this question:

> "Where the amendment merely expands or amplifies what is alleged in the original complaint . . . in support of the cause of action it is property allowed; and relates back to the commencement of the action."

The Peterson case makes clear that the amended complaint is to relate back to the filing of the original complaint. Considerations of fairness to the plaintiffs with regard to the statute of limitations makes this a sensible rule. After the defendant has been put on notice by the filing of the original complaint within the period allowed by the statute of limitations and summons has been timely served upon the defendants within the time allowed by Rule 4(b), the policy of the statute of limitations should not necessitate the dismissal of the original complaint simply because an amendment was made after the point at which the statute of limitations would have run.

Should the relation back of the amended complaint be any different for the policy of Rule 4(b)? Many of the same grounds for the adoption of limitation of action statutes apply in the statute requiring service of process within a given time. If the rule regarding the relation back of amended complaints is to be different for purposes of Rule 4(b), a plaintiff would be able to file a complaint, fail to timely issue or serve process thereon, and then one year later, five years later, or even twenty or fifty years later, amend the complaint and thereafter issue and serve summons upon the amended complaint. It is clear that this is the very thing that was sought to be avoided by the framers of Rule 4(b).

That is, after the original complaint is filed, the summons is then to be put in the hands of a proper person for service within three months and must be served on one of the parties within one year. If this intention can be circumvented by the simple expedient of filing an amended complaint at any time, with process then being timely issued and served on the amended complaint, and regardless of what was done to issue or serve process after the filing of the original complaint, then Rule 4(b) simply ceases to have any meaning.

This court is referred in appellant's brief to the case of Askwith v. Ellis, et al, 85 Utah 103, 38 P.2d 757 (1934), which was a case on very similar facts but heard before the adoption of the present Rule 4(b) which differs in one important way from its predecessor. The statute at the time of the Askwith case, R.S. Utah 1933, 104-5-5, read as follows:

> "If an action is commenced by the filing of a complaint with the clerk, summons must issue thereon within three months from the date of filing. If a summons is returned without being served upon any or all of the defendants, another summons may be issued and served at any time within one year after the filing of the complaint."

As can be seen, the former statute does not go on to state as does present Rule 4(b) that if service is not timely made, the action is deemed dismissed.

In Askwith, the original complaint was filed on May 1, 1922. No summons was issued or served upon this complaint. An amended complaint was then filed on November 24, 1931, and service of summons was made shortly thereafter. First, the court considered whether the action had been dismissed because of

the failure to serve summons upon the original complaint. Since Section 104-5-5 contained no express provision whereby the complaint was deemed dismissed upon failure of process to be served within one year (and as is expressly stated in present Rule 4(b)), the court held that the action was still pending at the time of the filing of the amended complaint. With regard to that question, the court said:

> "There is no provision in the statute by which an action ceases to exist; by which an action terminates, ends, is dismissed, automatically dies, or ceases to be pending, because not speedily and vigorously prosecuted, or 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 a law."

Of course, the legislature did in Rule 4(b) make such a law. If summons is not served within one year following the filing of the original complaint, the law now is that the action is deemed dismissed.

On the subject matter of the relation back of the amended complaint to the original complaint and the effect of the failure of service of process, the court in Askwith said:

> "The time for pleading not having expired, the cause of action being the same, and being filed before service of summons and copy served on defendants, it seems clear that the complaint of 1931 was not spurious, but was properly filed as an amended complaint. The defendants were not yet before the court. Had they appeared specially with a motion to quash service of summons because not made within the year from the time the action was commenced, such motion might have been good. It may also be that defendants could have ignored the service of summons on

the grounds that the return showed on its face that it was a nullity and coult not vest the court with jurisdiction of defendants."

The difference in the Askwith case and the case at hand is that in Askwith the defendants appeared generally and submitted themselves to the jurisdiction of the court. In the case at hand, defendants-respondents appeared specially with a motion to quash the service because not timely made. The issue in Askwith was, of course, whether the amended complaint related back to the date of the filing of the original complaint. The court found that it did, and that the original complaint was still pending. Even before the adoption of the new Rule 4(b), the court reasoned that a motion to quash service of summons would have been proper.

The added provision in Rule 4(b) with regard to dismissal of the original complaint not only strengthens the reasoning of the court from Askwith and as quoted above, but it compels the conclusion that service after the year has passed is a nullity.

Appellant in her brief refers the court to State Bank of Sevier v. American Smith and Plastic Co., 80 Utah 215, 10 P.2d 1065 (1932). That case dealt with the problem of an answer being filed a couple of days late and this court said it was not error to allow the answer to be filed a few days late. That case is plainly not applicable to the case at hand. The validity of the initial pleadings is not in issue here.

The appellant also refers to Rule 4(h), Utah Rules of Civil Procedure,

which reads:

> "(h) AMENDMENT. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued."

Rule 4(h) is not a tool for the circumvention of Rule 4(b). Its purpose is to allow an amendment where inadvertent errors have been made in filling out the forms. This is not such a case. The date on the return in this case is the true date on which it was served and clear evidence of its invalidity. Rule 4(h) is the same as Federal Rules of Civil Procedure Rule 4(h). Professor Moore points out what types of amendments the rule was meant to allow:

> "Distinction may therefore be made between process issued in flagrant disregard of federal requirements, and process which though generally issued in conformity with federal requirements, through oversight does not fully comply with these requirements. Thus in instances where Rule 4(a) and 4(b) clearly require original process to be issued and signed by the clerk and be under the seal of the court, original process issued by the plaintiff or his attorney may be void, and not curable by amendment, even if state law would sanction such process." 2 Moore's Federal Practice, 1295.51

When the summons was served it was a nullity and the subsequent proof of service consequently also was invalid and therefore not amendable. Even if it is assumed arguendo that the process was valid, the date on which it is served is not one of the items that can conveniently be changed. To do so would be a flagrant violation of the rules of civil procedure as a whole. This court in Utah Sand & Gravel Products Corporation v. Tolbert, 16 Utah 2d 407, 402 P.2d 703 (1965), in setting aside a lower court ruling allowing an amendment

to a summons changing the name of the court of jurisdiction said:

> "The law itself is a system of rules designed to safeguard rights and preserve order, and administration of justice under it must necessarily be carried on with some degree of order. This can be accomplished only by compliance with the rules established for that purpose."

Any conceivable harshness or unfairness in the enforcement of Rule 4(b) might be eliminated by 78-12-40 U.C.A. 1953, which appellant refers to in her brief. It reads:

> "EFFECT OF FAILURE OF ACTION NOT ON MERITS. If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure."

If plaintiff, after filing a complaint, fails to comply with Rule 4(b) in issuing and serving process on that complaint, then plaintiff need only voluntarily dismiss the complaint and file a new one to avoid any statute of limitations problems. Clearly, if the new complaint is filed within one year after the voluntary dismissal of an earlier timely filed complaint or within one year of a complaint "deemed dismissed" because of non-compliance with the service of process requirements of Rule 4(b), then the new complaint would be timely filed because of 78-12-40 U.C.A. 1953.

CONCLUSION

Respondents submit that plaintiff-appellant's amended complaint relates

back to the date of the filing of the original complaint; that the issuance and service of process were not made until well past the dates required by the provision of Rule 4(b) Utah Rules of Civil Procedure; that therefore the process served upon defendants-respondents was invalid and incapable of bringing them within the jurisdiction of the court and that the ruling of the District Court granting respondents' motion to quash service was proper and should be affirmed by this court.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Brief to Pete N. Vlahos, Attorney for Plaintiff-Appellant, Legal Forum Building, 2447 Kiesel Avenue, Ogden, Utah 84401, this 22 day of January, 1976.

DAVID K. WINDER