

2009

James D. Clark, in his capacity as Personal
Representative for the Estate of Dale D. Clark v.
Mark B. Archer, an individual, Bonneville Superior
Title Company, Inc., a Utah Corporation : Reply
Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

<p>JAMES D. CLARK, in his capacity as Personal Representative for the ESTATE OF DALE D. CLARK,</p> <p style="text-align: center;">Plaintiffs and Appellees,</p> <p>vs.</p> <p>MARK B. ARCHER, an individual,</p> <p style="text-align: center;">Defendant and Appellant,</p> <p>BONNEVILLE SUPERIOR TITLE, COMPANY, INC., a Utah Corporation</p> <p style="text-align: center;">Defendant and Appellee.</p>	<p style="text-align: center;">APPELLANT'S REPLY BRIEF</p> <p style="text-align: center;"><i>20090309-SC</i></p> <p>Trial Court No. 060601640</p> <p>Appellate Case No. 20081007</p>
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Appeal

Appeal from the Second Judicial District Court
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Rebuttal Argument on Question Presented:

I. THE COURT OF APPEALS RETAINED JURISDICTION TO CONSIDER PETITIONER ARCHER'S APPEAL WHERE ARCHER FILED HIS INTERLOCUTORY APPEAL.

Clark's initial argument in his brief seems to confuse the issue currently pending before this Court. Clark argues that a lack of filing a writ of certiorari after the denial of the petition for interlocutory appeal, this Court now lacks jurisdiction to hear Archer's appeal on the case in its entirety. However, the Court specifically placed at issue only one question for this briefing:

Whether the Court of Appeals erred in holding that it lacked jurisdiction to consider Petitioner's appeal and that Petitioner had waived the opportunity to challenge the propriety of a rule 54(b) certification in connection with his appeal.

Thus, Clark's argument fully misses the point. The question is whether the Court of Appeals retained jurisdiction due to the fact that Archer timely filed a notice of appeal after the trial court erroneously certified its judgment as "final". Archer argues that, due to the Court's decision in Cedar Surgery Center, L.L.C. v. Bonelli, 2004 UT 58, 96 P.3d 911 (Utah 2004), Archer preserved his appellate right by filing his petition for interlocutory appeal. As Archer properly filed his Notice of Appeal, the Court of Appeals maintained jurisdiction to hear this appeal in its entirety.

The petition for interlocutory appeal was timely filed under the restraints of both Utah R. App. P. 4 and 5. Clark argues that Archer missed the 20-day deadline

under Rule 5. However, as the Index to the Court Record indicates, the “Notice of Entry of Final Judgment on Plaintiffs’ Second Cause of Action” was filed on March 17, 2008. The Notice of Filing of Petition for Appeal was filed on April 7, 2008. This is twenty-one days after the entry of the trial court’s order. However, the twentieth day after entry was Sunday, March 16, 2008. Pursuant to Utah R. App. P. 22, if the final day of a period of time to file a document is a Saturday, Sunday or legal holiday, the period extends to the following day that is not a Saturday, Sunday or legal holiday. Archer timely filed his notice of appeal under each of the Rules of Appellate Procedure.

The Court of Appeals’ underlying denial of Archer’s appeal is based on Lindsey v. Beneficial Reinsurance Co., 59 F.3d 942 (9th Cir. 1995). In its decision, the Court of Appeals erroneously determined claim that Defendant Archer had failed to file an appeal of the trial court’s decision. The entirety of the case law surrounding the point of law relied upon in Lindsey also rests on the premise that the party seeking appeal at the end of the case had failed to file an appeal of the order within the time frame allowed by Rule at the issuance of the trial court’s decision. In this case, however, Defendant Archer did file a timely appeal of the decision. According to this Court’s ruling in Cedar Surgical Center LLC, Defendant Archer’s Petition for Interlocutory Appeal was sufficient to preserve Archer’s appeal rights regardless of whether the 54(b) certification was proper.

Further, as demonstrated in the opening brief, the time for appeal of an improper Rule 54(b) certification does not start until all issues have been resolved at the trial level. In re Integra Realty Resources, Inc., 262 F.3d 1089 (10th Cir. 2001); Buckley v. Fitzsimmons, 919 F.2d 1230, 1237 (7th Cir. 1990), modified on other grounds, 952 F.2d 965 (7th Cir. 1992), reversed on other grounds, 113 S. Ct. 2606 (1993). Therefore, even where Archer did not file a petition for *writ of certiorari* with regard to the Court of Appeals' denial of Archer's petition for Interlocutory Appeal, where the Rule 54(b) certification is improper, the time to file an appeal did not begin to run until all matters before the trial court were resolved.

Accordingly, Defendant Archer's appeal of the district court's Rule 54(b) certification, was not untimely.

II. ARCHER PRESERVED HIS RIGHT TO CHALLENGE THE COURT OF APPEAL'S DECISION TO DENY THE APPEAL ON JURISDICTIONAL ISSUES.

Clark argues that Archer failed to raise his argument under Cedar Surgery Center v. Bonelli, until Archer's opening brief and therefore Archer has waived his ability to raise this argument. In fact, in Archer's Petition for Writ of Certiorari Archer stated as follows:

The Court of Appeals, in its February 20, 2009 dismissal of Defendant Archer's appeal, stated that Defendant Archer had failed to timely file an appeal from the trial court's erroneously certified order. In fact, on March 31, 2008, Defendant Archer did appeal the trial court's order.

Defendant Archer sought permission to file an interlocutory appeal on the matter.

Archer did not cite to Cedar Surgery Center, LLC v. Bonelli, but the argument was presented. Further, this Court specifically directed the parties to address the issue regarding whether the Court of Appeals erred in holding that it lacked jurisdiction to hear Archer's appeal. Nothing in the two footnotes cited by Clark prohibits putting before this Court new case law to support an appellant's argument. The first case cited by Clark stated that because the party had not stated the issue in its petition for review. Estate of Berkemeir ex rel. Nielsen v. Hartford Ins. Co. of Midwest, 2004 UT 104 ¶10, 106 P.3d 700, 702 n.2 (Utah 2004). In the instant case, however, Archer did preserve the issue in his petition for certiorari.

Clark then cites to Trail Mountain Coal Co. v. Utah Div. of State Lands & Forestry, 921 P.2d 1365, 1371 n.11 (Utah 1996). In Trail Mountain, the Court took issue with an issue that was raised for the first time in the appellant's reply brief. Archer has not waited until this Reply Brief to raise this issue. Archer preserved the issue in the Petition for Certiorari and fleshed the issue out in his Opening Brief. Archer has not waived his right to now be heard by this Court on whether the interlocutory appeal constituted sufficient notice to preserve his appellate rights under the Bonelli case.

Archer properly preserved this issue on appeal through his Docketing Statement and Petition for *Writ of Certiorari*. Further, the Court has specifically asked

the parties to address the issue with whether the Court of Appeals had erred in claiming that it lacked jurisdiction to hear the appeal. This issue is fleshed out more specifically by Archer in his Opening Brief. Archer has properly raised the argument on the issue currently before this Court.

III. THE TRIAL COURT’S 54(b) CERTIFICATION OF THE RULING ON THE SECOND AND NINTH CAUSES OF ACTION WAS IMPROPER AS THE STATUTE OF LIMITATIONS HAD RUN AND THE FACTUAL ALLEGATIONS BETWEEN THE SECOND AND NINTH CAUSES OF ACTION OVERLAPPED WITH THE REMAINING CAUSES OF ACTION.

Clark raises three points in his argument that the trial court properly decided and certified the second and ninth causes of action in Clark’s amended complaint. Archer does not dispute the first issue raised by Clark, that the amended complaint involved both multiple claims and multiple parties.

The second issued raised, however, does present a problem with Clark’s argument. The trial court based its decision on Clark’s claim that the warranty deed had not been legally “delivered” to Archer. Clark’s citation to the trial court’s order, however, fails to mention that Clark failed to bring his action until after the statute of limitations had expired on his cause of action. The trial court was unable to reach the merits of Clark’s claim for failure of delivery without resolving the fact that Clark’s claim was filed after the statute of limitations had run. The trial court stated

The second cause of action for failure of delivery remains timely and viable today as well. The timeliness of this cause of action was the issue addressed by the supplemental briefing of the parties as requested by the Court. The second cause of action for failure of delivery remains timely based on the content of Archer's Affidavit. Originally, the Court was focused on the principle or doctrine of the discovery rule in relationship to the application of the statute of limitations to the second cause of action of the amended complaint. However, the Court need not rely upon or analyze the application of the discovery rule because of the content of Archer's Affidavit.

R. 460.

The trial court relied on an affidavit filed by Archer in the trial court after Clark had commenced the action as the reaffirmation of a debt that extended the statute of limitations under Utah Code Annotated §78B-2-113(1)(b). What the trial court failed to consider is that the terms of U.C.A. §78B-2-113(1)(b)¹ only apply where the affirmation of an outstanding debt comes within the timeframe for bringing an action on that outstanding debt. State Bank v. Troy Hydro Sys., 894 P.2d 1270, 1276 (Utah App. 1995). In this case, where the affidavit came after the statute of limitations had run on the underlying cause of action, Archer's affidavit could not be used to act as a reaffirmation of any debt. Troy Hydro Sys., 894 P.2d at 1276. Therefore, regardless of whether delivery of the deed was effective, the entire matter was improperly before the trial court as the statute of limitations had expired.

¹ U.C.A. §78B-2-113(1)(b) states in relevant part: Effect of payment, acknowledgment, or promise to pay
(1) An action for recovery of a debt may be brought within the applicable statute of limitations from the date:
(b) a written acknowledgment of the debt or a promise to pay is made by the debtor,

Clark's final point, that the trial court's ruling met the requirement of "finality" necessary to allow the court to certify the issue for appeal under Rule 54(b), fails to counter the arguments raised by Archer in his Opening Brief. Specifically, Archer points to the argument and citations presented to the Court on pages 12 – 17. In that discussion, Archer demonstrates that the trial court's certification was improper. The factual issues the trial court attempted to resolve in its ruling overlapped with the factual issues of the remaining causes of action.

As demonstrated in Weiser v. Union Pac. R.R., 932 P.2d 596 (Utah 1997), Clark's second cause of action contained factual overlap with the remaining causes of action. A successful appeal by Archer on this one cause of action will allow Clark to return to the trial court in an attempt to regain possession of the land through another cause of action raised in his amended complaint. The appeal of the trial court's Rule 54(b) certified cause of action would, therefore result in a piecemeal appeal. This is precisely what this Court has sought to avoid throughout the cases that have been brought under a Rule 54(b) certification. Id. at 597. Accordingly, Clark's argument on finality fails to meet the three-prong test for certification to be proper under Rule 54(b).

III. CONCLUSION

For the reasons stated above, along with the reasons stated in his Opening Brief, Archer respectfully requests that this Court determine that the Court of Appeals did have jurisdiction to hear Archer's appeal on the issues raised at the trial court.

Respectfully submitted this 15th day of January 2009.

B. Ray Zoll, DC

A handwritten signature in black ink, appearing to read 'MB', written over a horizontal line.

Micah Bruner,

Counsel for Appellant/Defendant Archer

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant's Reply Brief was served via U.S. mail, first class, postage pre-paid to the following:

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This 15th day of January 2009

A handwritten signature in black ink, appearing to read 'S. Noel', is written over a horizontal line.