

2009

Kami Washington and Josephine Ishaya v. Joseph Phalen and Jonathen Kraft : Brief of Appellee

Utah Court of Appeals

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Richard H. Thornley; Parker Thornley & Critchlow; Attorneys for Appellants.

W. Kevin Tanner; Petersen & Associates; Attorneys for Defendants.

Recommended Citation

Brief of Appellee, *Washington and Ishaya v. Phalen and Kraft*, No. 20090687 (Utah Court of Appeals, 2009).
https://digitalcommons.law.byu.edu/byu_ca3/1820

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IN THE UTAH COURT OF APPEALS

KAMI WASHINGTON and)	
JOSEPHINE ISHAYA,)	BRIEF OF APPELLEE
)	JONATHEN KRAFT
Plaintiffs and Appellants,)	
)	Appellate Case No. 20090687
JOSEPH PHALEN and)	
JONATHEN KRAFT,)	
)	
Defendants and Appellees.)	
)	

ON APPEAL FROM RULINGS AND ORDERS OF THE HONORABLE
MICHAEL D. DIREDA OF THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH

RICHARD H. THORNLEY
PARKER THORNLEY &
CRITCHOW
2610 WASHINGTON
BOULEVARD
OGDEN, UTAH 84402
ATTORNEYS FOR PLAINTIFFS
AND APPELLANTS KAMI
WASHINGTON AND JOSEPHINE
ISHAYA

W. KEVIN TANNER
PETERSEN & ASSOCIATES
230 SOUTH 500 EAST, SUITE 400
SALT LAKE CITY, UTAH 84102
ATTORNEYS FOR DEFENDANT
AND APPELLEE JONATHEN
KRAFT

FILED
UTAH APPELLATE COURTS

MAR 30 2010

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RICHARD H. THORNLEY PARKER THORNLEY & CRITCHOW 2610 WASHINGTON BOULEVARD OGDEN, UTAH 84402 ATTORNEYS FOR PLAINTIFFS AND APPELLANTS KAMI WASHINGTON AND JOSEPHINE ISHAYA	W. KEVIN TANNER PETERSEN & ASSOCIATES 230 SOUTH 500 EAST, SUITE 400 SALT LAKE CITY, UTAH 84102 ATTORNEYS FOR DEFENDANT AND APPELLEE JONATHEN KRAFT
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TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES.....	3
JURISDICTIONAL STATEMENT.....	4
ISSUES PRESENTED FOR REVIEW.....	4
STANDARD OF REVIEW.....	4
RELEVANT STATUTES AND RULES.....	5
STATEMENT OF THE CASE.....	6
STATEMENT OF FACTS.....	7
SUMMARY OF ARGUMENTS.....	8
ARGUMENT.....	9
CONCLUSION.....	14

TABLE OF AUTHORITIES

Cases

<u>Bonneville Billing v. Whatley</u> , 949 P.2d 768 (Utah App. 1997).....	5, 10, 11
<u>Carlson v. Bos</u> , 740 P.2d 1269 (Utah 1987).....	10, 11
<u>Huish v. Munro</u> , 2008 UT App 283, 191 P.3d 1242.....	4
<u>Markham v. Bradley</u> , 2007 UT App 379, 173 P.3d 865.....	5
<u>Ostler v. Buhler</u> , 1999 UT 99, 989 P.2d 1073.....	4
<u>State v. Bybee</u> , 2000 UT 43, 1 P.3d 1087.....	4
<u>Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc.</u> , 544 P.2d 876 (Utah 1975).....	11

Statutes

Utah Code Ann. § 41-12-8 (now renumbered as 41-12a-505).....	4
Utah Code Ann. § 41-12a-505 (2006).....	5, 9, 10
Utah Code Ann. § 78A-3-102(3)(j) (as amended).....	4
Utah Code Ann. § 78A-4-103(2)(j) (as amended).....	4

Rules

Rule 4 of the Utah Rules of Civil Procedure.....	6, 9, 10, 12, 13, 14
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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter pursuant to Utah Code Ann. §§ 78A-3-102(3)(j) and 78A-4-103(2)(j), and pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court correctly quashed the service of process on Defendant Jonathen Kraft attempted through Utah Code Ann. § 41-12a-505 (2006) in its ruling and order dated May 18, 2009.

2. Whether the trial court correctly denied Plaintiffs' motion to serve Defendant Jonathen Kraft after the afore-mentioned order and after the last extension of time to serve had expired as set forth in the trial court's ruling and order of July 17, 2009.

3. Whether the trial court properly dismissed this matter in its ruling and order of July 17, 2009.

STANDARD OF REVIEW

The interpretation of a procedural rule is a question of law reviewed for correctness. See State v. Bybee, 2000 UT 43, ¶ 10, 1 P.3d 1087 (citing Ostler v. Buhler, 1999 UT 99, ¶ 5, 989 P.2d 1073). The interpretation of a statute is also a question of law reviewed for correctness. See Huish v. Munro, 2008 UT App 283, ¶ 19, 191 P.3d 1242. "When reviewing [a ruling on] a motion for involuntary

dismissal, an appellate court should defer to the trial court's findings and inferences under a clearly erroneous standard and review the trial court's conclusions of law for correctness.” Markham v. Bradley, 2007 UT App 379, ¶ 13, 173 P.3d 865. Finally, as Rule 4 encompasses jurisdictional issues, rulings of the trial court are reviewed under a correction of error standard. See Bonneville Billing v. Whatley, 949 P.2d 768, 771 (Utah App. 1997).

RELEVANT STATUTES AND RULES

41-12a-505. Effect upon nonresident of use of state highways.

(1) (a) The use and operation by a nonresident or his agent, or of a resident who has departed Utah, of a motor vehicle on Utah highways is an appointment of the Division of Corporations and Commercial Code as the true and lawful attorney for service of legal process in any action or proceeding against the person arising from the use or operation of a motor vehicle over Utah highways which use or operation results in damages or loss to person or property.

(b) The use or operation referenced in Subsection (1) is an agreement that process shall, in any action against the person in which there is such service, be of the same legal force and validity as if served upon him personally in Utah.

(2) (a) Service of process under Subsection (1) is made by serving a copy upon the Division of Corporations and Commercial Code or by filing a copy in that office with payment of a reasonable fee.

(b) The plaintiff shall, within 10 days after service of process, send notice of the process together with plaintiff's affidavit of compliance with this section to the defendant by registered mail at the defendant's last-known address.

(3) (a) The court in which the action is pending may order any continuance necessary to afford the defendant reasonable opportunity to defend the action, but not exceeding 90 days from the date of filing the action in court.

(b) The reasonable fee paid by the plaintiff to the Division of Corporations and Commercial Code is taxed as costs if the plaintiff prevails.

(c) The division shall keep a record of all process served showing the day and hour of service.

Rule 4. Process. (Relevant Portion)

(d) Method of Service. Unless waived in writing, service of the summons and complaint shall be by one of the following methods:

(d)(1) Personal service. The summons and complaint may be served in any state or judicial district of the United States by the sheriff or constable or by the deputy of either, by a United States Marshal or by the marshal's deputy, or by any other person 18 years of age or older at the time of service and not a party to the action or a party's attorney. If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof. Personal service shall be made as follows:

(d)(1)(A) Upon any individual other than one covered by subparagraphs (B), (C) or (D) below, by delivering a copy of the summons and the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing, or by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to receive service of process;

...

(d)(4) Other service.

(d)(4)(A) Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties.

STATEMENT OF THE CASE

A. Nature of the Case.

This case originates from an automobile accident that occurred August 31, 2000. (R. 110, Addendum to Plaintiffs' Brief 17).

B. Course of Proceedings

The matter had been dismissed previously for failure to serve. (R. 110, Addendum to Plaintiffs' Brief 17). The matter was re-filed and nine extensions were requested and granted before the first attempt at service, done through the Division of Corporations and Commercial Code, was made in this matter. (R. 110 – 111, Addendum to Plaintiffs' Brief 17 - 21). That service was quashed by order of the trial Court on May 18, 2009. (R. 110 – 115, Addendum to Plaintiffs' Brief 17 - 18). Plaintiffs then filed a motion to serve by alternative means, which was denied and in its denial of that motion the trial court dismissed this matter. (R. 135 – 138, Addendum to Plaintiffs' Brief 13 – 16).

STATEMENT OF FACTS

The matter of the underlying suit stems from an automobile accident which occurred on August 31, 2006. (R. 110, Addendum to Plaintiffs' Brief 17). The first filing of the suit was dismissed on April 8, 2005 for failure to serve. (R. 110, Addendum to Plaintiffs' Brief 17). The present action was filed on March 30, 2006. (R. 110, Addendum to Plaintiffs' Brief 17). Plaintiffs requested and

received nine extensions for time in which to serve, the last of which was a sixty-day extension granted on December 11, 2008. (R. 110 – 111, Addendum to Plaintiffs’ Brief 17 – 18). On January 29, 2009, Plaintiffs served this matter on the Division of Corporations and Commercial Code pursuant to Utah Code Ann. § 41-12a-505 (2006). (R. 111, Addendum to Plaintiffs’ Brief 18). Defendant, through counsel filed a motion to dismiss, or in the alternative to quash the service of process. (R. 111, Addendum to Plaintiffs’ Brief 18). The trial court found that at not time prior to service had the Plaintiffs requested permission to serve in the manner and granted the motion in the alternative and quashed the service. (R. 110 – 115, Addendum to Plaintiffs’ Brief 17 - 20).

Plaintiffs then filed a motion for alternative service on June 15, 2009. (R. 135, Addendum to Plaintiffs’ Brief 13). The trial court found that the time for effectuating service had past and recounted the extensions that had been provided to Plaintiffs. (R. 135 – 136, Addendum to Plaintiffs’ Brief 13 – 14.) The Court then dismissed this matter on its own motion for failure to timely serve a defendant in this matter. (R. 138, Addendum to Plaintiffs’ Brief 15).

SUMMARY OF ARGUMENTS

All the factual findings of the trial court should be accepted as true as they remained unchallenged by Plaintiffs. Accepting those finding as true, this Court should first find that trial court properly quashed service in this matter when

Plaintiffs tried to effect service on Defendant through the Division of Corporations and Commercial Code. If Plaintiffs did not know the location of Defendant or if they believed him to be non-resident, they are required to first meet a due diligence requirement. The trial court then properly denied their motion for alternative service as it was not filed timely and if it had jurisdiction to grant the motion, it was still not warranted based the inaction of Plaintiffs. Without timely service having been accomplished, the trial court properly dismissed the case pursuant to Rule 4 of the Utah Rules of Civil Procedure.

ARGUMENT

1. All Facts are Undisputed in this Matter.

Plaintiffs do not dispute the factual findings of the trial court in either of the trial courts' rulings and orders of May 18, 2009 or July 17, 2009. Accordingly, the issues before this Court are whether the trial court correctly interpreted Rule 4, Section 41-12a-505, and controlling case law.

2. The Trial Court Properly Quashed Service on May 18, 2009.

It is undisputed that the Plaintiffs served the Defendant pursuant to the requirements of this statute, but did so before any showing of need for alternative service or seeking leave to do so. Plaintiffs' argument in this matter is that they are not required by Rule 4 to seek the trial court's permission or to make any showing to the trial court before utilizing the service process outlined by Section

41-12a-505. The trial court, in its ruling, relied on the holding of Carlson v. Bos, 740 P.2d 1269 (Utah 1987). The Utah Supreme Court held, as noted in the trial court's ruling, that a plaintiff must show "that diligent efforts have been made to locate the defendant. Only by making a satisfactory showing of diligence can such a plaintiff satisfy" due process requirements. Id. at 1276. That case interpreted the predecessor statute to Section 41-12a-505, which was Section 41-12-8. The Utah Court of Appeals repeated this language in context of Rule 4(g) of the Utah Rules of Civil Procedure. Bonneville Billing v. Whatley, 949 P.2d 768, 773 (Utah App. 1997).

Plaintiffs do not argue the holdings of cases, but argue that they were effecting service pursuant to Rule 4(d)(1)(A) and that the agent identified in this portion of Rule includes the Division of Corporations and Commercial Code. However, the portion of Rule 4(g) that was the subject of the Bonneville Billing matter contains identical language of the current Rule 4(d)(4)(A). In Bonneville Billing, the Utah Court of Appeals quoted Rule 4(g): "Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence ..., the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication, by mail, or by some other means." Id. at 773. Here, the present language of Rule 4(d)(4)(a) set forth above is identical.

In sum, the present language of Rule 4 is unchanged. Both the Carlson and Bonneville Billing cases require that Plaintiff first make the due diligence showing to the Court before alternative service may be effected. Because Plaintiff's failed to make the requisite showing prior to utilizing the subject statute, the trial court correctly quashed service.

3. The Trial Court Properly Denied Plaintiff's Motion for Alternative Service.

Plaintiffs argue that the trial court improperly denied their motion for alternative service. Plaintiffs rely on Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876 (Utah 1975) for the proposition that this case for the proposition that it would be an abuse of discretion for the Court to have denied their motion. In that case, the Utah Supreme Court held that a trial court had a wide range of discretion for dismissing a matter for failure to prosecute. See id. at 878-79. However, the Supreme Court noted that this discretion was tempered with conditions to prevent a trial court from acting arbitrarily. See id. at 879. Plaintiffs then recite the factors set forth in this case and argue only that dismissal in this case was improper an injustice will result.

First, if the trial court properly quashed service in this matter, then the time to serve had expired before Plaintiffs' filed their motion for alternative service. The Court had explicitly informed the Plaintiff that no more extensions were forthcoming in December of 2008. (R. 23 – 24). As Plaintiffs did not request an

extension of time for service and failed to file this motion for alternative service with the time allotted by the trial court, the trial court had no jurisdiction to grant the motion. See Utah R. Civ. P. 4(b)(i) (stating, as noted by the trial court, if no party is served timely “the action shall be dismissed, without prejudice on application of any party or upon the court’s own initiative.”). The term “shall” provides no discretion to the trial court. Defendant had not been served within the requisite time period allowed the trial court and Rule and the action had to be dismissed.

Second, assuming that the trial court could hear the motion for alternative service and had the discretion to make the determination, Plaintiffs’ argument fails as the trial court did not abuse its discretion if this Court looks to the Westinghouse standards. First, unlike Westinghouse, the unusual factors, if any, weigh against the Plaintiffs. Plaintiffs filed the present action only after a previous dismissal for failure to prosecute. The present matter was filed on March 30, 2006. Plaintiffs requested and were granted, nine extensions, the last of which would have expired on February 10, 2009. These extensions extend well beyond the 120 days explicitly provided for by Rule 4. In fact, reviewing these dates, Plaintiffs had almost 3 years to serve any defendant in this matter.

Of course this fact weighs against Plaintiffs’ first factor to be considered. Plaintiffs’ only attempt at service came at the end of the almost three years in

which they had time to act. That is inaction and Defendant, in contrast, had no conduct with which to compare. The same is true of the second factor. Plaintiffs had their initial time in the first filing to serve and almost three years in which to attempt service on their second filing. They had every opportunity to serve or to timely seek alternative service. As to the difficulty factor, the trial court noted in its Ruling and Order of May 2009, that Plaintiffs lost track of Defendants. (R. 111, Addendum to Plaintiffs' Brief 18). That finding is unchallenged. In some, the difficulty faced by Plaintiffs in now locating the Defendant is one they brought upon themselves. Finally, the motion should be denied as the motion would have allowed service some three and half years after the filing of the second action and nine and half years after the subject accident.¹ Obviously, any defendant would be prejudiced if he were forced to defend an action which is based on facts that occurred nine years before. Therefore, if this Court determines that the trial court had discretion to rule on the motion, it should find that the trial court acted within that discretion when it denied the motion.

4. The Trial Court Properly Dismissed this Matter.

As set forth in Part 3 above, the trial court properly quashed service and denied the motion for alternative service. As stated, Rule 4 mandates dismissal if

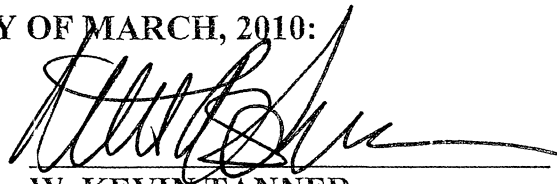
¹ As noted in the trial court's ruling of May 2009, Defendant did raise the due process issues involved in the trial courts' numerous extensions in this matter. As the dismissal was not based on those grounds, it is not examined here.

a party fails to timely serve a defendant in the case. It shall do so upon a motion of a party or on its own initiative once service is not timely effected.²

CONCLUSION

For the foregoing reasons, all the ruling of the trial court should be affirmed.

DATED THIS 29TH DAY OF MARCH, 2010:

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

**W. KEVIN TANNER
ATTORNEYS FOR DEFENDANT AND
APPELLEE JONATHEN KRAFT**

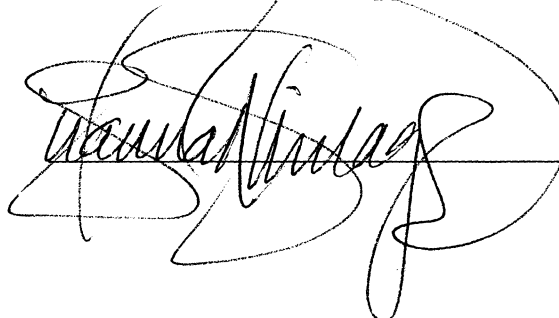
² Defendant Jonathen Kraft acknowledges that Rule 4 is a dismissal without prejudice unless otherwise ordered by the Court. It is correct that if the matter were refiled and served, Defendant would seek dismissal on due process grounds relating to the extensions given in this case. However, that issue is not before this Court as the motion to dismiss was a sua sponte motion by the trial court. Plaintiffs have taken the position that the dismissal was with prejudice.

CERTIFICATE OF SERVICE

Two copies of the this Brief and a disc containing a PDF copy of same
were delivered via U.S. Mail on March 30, 2010, to Counsel for
Plaintiffs/Appellants at the following address:

RICHARD H. THORNLEY
PARKER THORNLEY & CRITCHOW
2610 WASHINGTON BOULEVARD
OGDEN, UTAH 84402

Eight copies, including an original of this Brief, as well as a disc containing
a PDF copy of same, were hand-delivered to the Utah Court of Appeals by hand.

A handwritten signature in black ink, appearing to read "Amanda H. King", is written over a large, faint, hand-drawn oval. The signature is fluid and cursive.