

1998

Zions First National Bank v. Richard F. McKeen : Reply Brief

Utah Court of Appeals

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Denver C. Snuffer; Nelson, Snuffer and Dahle; Attorney for Appellant.

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BRIEF

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DOCKET NO. 981733CA ~~IN THE~~ UTAH COURT OF APPEALS

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ZIONS FIRST NATIONAL BANK, :

Plaintiff :

vs. :

RICHARD F. McKEEN, et al., : Court of Appeals No. 981733-CA

Defendant. : Priority Number 15

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APPELLANT'S REPLY BRIEF

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FILED

Utah Court of Appeals

JUL 15 1999

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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ZIONS FIRST NATIONAL BANK, :

Plaintiff :

vs. :

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APPELLANT'S REPLY BRIEF

Appellant, Richard A. Christenson, submits this Reply Brief in the appeal before this court.

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TABLE OF AUTHORITIES

TREATISES:

46 Am Jur 2d, Judgments 1

ARGUMENTS

I. The judgment entered in this case does not have sufficient support in the record to entitle it to a presumption of validity.

The record of the case below contains no evidence that Mr. Christenson was served process. The record demonstrates conclusively that those who were present in the case received written notice of proceedings. For example, the discovery conducted contains certificates verifying those to whom copies were mailed. They omit Mr. Christenson, because he was not a party. Similarly the Motion for Summary Judgment contains a certificate evidencing the mailing of the document to the parties, but excludes Mr. Christenson. The Notice of Hearing on Plaintiff's Motion for Partial Summary Judgment and Mailing Certificate excludes Mr. Christenson from the notice. He was not given notice of anything. He was not a party.

The presumption argued by Michel's in their Brief would apply to a file containing the kind of notice normally expected in a trial court proceeding. There is not a single document in the file which was sent to Mr. Christenson. This omission to mention that he received any of the court filings is of such consequence that this alone defeats the presumption. There is no basis to presume that this case was conducted "in conformity with settled usage." (46 Am.Jur.2d, Section 34 *Judgments*.)

The argument of Michels to the contrary is not supported by the record of the case below.

II. The record of the case below provides sufficient proof of the absence of Mr. Christenson from these proceedings.

There is no return of service in this case showing service of process on Mr. Christenson. He does not recall ever being served. The record, as set forth in the argument above, belies his presence in this case. If he were a noticed party, why does the record fail to show any evidence of his presence in the case.

Michels point only to the misspelled name in the original complaint (a name which is omitted from later pleadings when “et. al.” is used) as evidence of Mr. Christenson’s presence. This does not support a finding of jurisdiction.

Michels’ argument concedes that Mr. Christenson was not provided copies of materials served on other parties. This they attempt to excuse as “filing habits of Zion’s Bank’s counsel.” (Michel Brief p. 17.) However, the failure to give notice, provide copies of documents, and include Mr. Christenson in the conduct of the case denies him notice and an opportunity to be heard. This is a denial of the fundamentals of due process which jurisdiction is intended to provide.

The arguments of Michels are unpersuasive.

III. Richard A. Christenson did not have notice of the earlier proceeding.

Mr. Christenson did not recall ever hearing about this earlier case until asserted by Michels in 1997. This case was not a proceeding in which he had any familiarity. He did not personally handle this kind of matter for Franklin Financial or Capitol Thrift and Loan. It was handled by others employed there and by the attorney. The case came and went without his notice. There is no basis for asserting that Mr. Christenson failed to act earlier. He learned of the matter in 1997 and acted promptly thereafter.

IV. The Motion to Vacate was brought within a reasonable time.

The first time Mr. Christenson learned of the earlier case and its purported effect upon his individual rights was in 1997. He acted promptly. Further, this argument is completely unavailing because of the original order of Judge Frederick granting relief was entered in July 1998. (Record at p. 148.) Judge Frederick set aside the earlier judgment, and as of July 1998 it was vacated. Then Michels asked that the judgment be

reinstated. The judgment was reinstated in September 1998. This appeal was then timely. Any issue related to timing is removed by the 1998 orders of Judge Frederick.

V. The prejudice to Mr. Christenson outweighs any claimed injury to Michels.

Michels bid only \$25,000.00 for this approximate one-hundred forty (140) acre parcel of ground. Mr. Christenson has an approximate \$1.8 million lien. The “prejudice” to Michels from the loss of their modest investment pales in comparison to the loss which may be visited to Mr. Christenson.

VI. The misspelling of the name is further evidence of neglect of Mr. Christenson in the earlier proceedings.

Michels want it both ways. They want to read the word “Defendants” with exactitude to mean all of the persons whose names appear on the original complaint. But then they want to read the name “Christensen” loosely to include another person whose name is spelled different. They are not consistent. Their argument comes out of both sides of their mouth. To be consistent, if the word “Defendants” is to be read with

exactitude, then the name “Christensen” should also be read with exactitude. That, of course, defeats Michels’ claims.

This Court should, in any event clarify the significance of the name in this case. The lower court’s decision is ambiguous because of a failure to address the name misspelling issue. The decision of the court below may have meant that no change in the decision is necessary because Mr. Christenson was not included, a Mr. Christensen was instead. The citation to *Corpus Juris Secundum* in Michels’ brief is also not controlling. The mistake should be corrected by the lower court, not on appeal. The lower court refused to correct the misspelling. Further, the *C.J.S.* test of whether there will be prejudice to Mr. Christenson, who was not provided due process in the handling of the case, cannot be met. Since there is prejudice, the name change cannot be perfunctorily made on appeal. Perhaps that is why the lower court declined Michels’ request to do so.

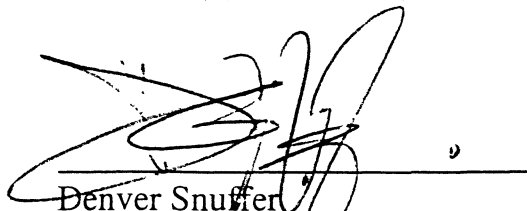
Another argument is suggested by the neglect to spell Mr. Christenson’s name correctly. Clearly this failure points to an earlier neglect of Mr. Christenson during the progress of the case in the 1980’s. If Mr. Christenson had been included as a party during the earlier phase of this case, his name’s spelling would have been discovered and corrected. This failure is further evidence of the procedural neglect to properly include Mr. Christenson in the earlier proceeding.

CONCLUSION

Neither Mr. "Christensen" nor Mr. Christenson was served with process in 1981. The record is clear. The arguments of Michels are not supported by the record. This Court should reverse the second decision of lower court and vacate again the earlier judgment. It was rendered with sloppy language which fails to mention Mr. Christenson personally. It refers to "Defendants" in a broad brush. Certainly that brush was intended only to paint the named, served, noticed and appearing Defendants and not parties who were never involved in the case.

DATED this 15th day of July, 1999.

NELSON, SNUFFER & DAHLE

A large, stylized handwritten signature in black ink, appearing to be 'Denver Snuffer', is written over a horizontal line.

Attorneys for Appellant Richard A. Christenson

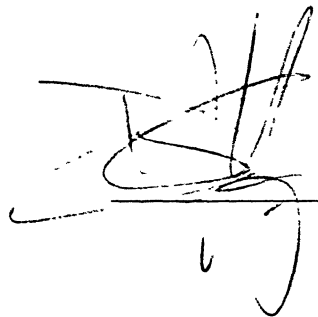
CERTIFICATE OF SERVICE

I hereby certify that I am employed by the office of Nelson, Snuffer & Dahle, P.C.
and that I caused to either be placed in the United States mail, first class, postage prepaid;
faxed: and/or hand-delivered; a true and correct copy of the foregoing APPELLANT'S
REPLY BRIEF to the following:

Bruce J. Nelson
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Sent via:
☒ Mail
☐ Facsimile
☐ Hand-delivery

DATED this 14 day of July, 1999.


A handwritten signature in dark ink, appearing to be "Bruce J. Nelson", is written over a horizontal line.