

1988

Malgorzata Jung-Leonczynska and Boguslaw J.  
Leonczynski, husband and wife v. Showalter Ford  
Company, Inc.; Gary Showalter, Individual; Randy  
Sidebottom, Individual; Thrifty Auto Repair, Inc.;  
John R. Slaugh, Individual and John Does 1  
through 5 : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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~~DOCKET NO. 88-0124-CA~~  
~~MALGORZATA JUNG-LEONCZYNSKA~~ :  
and BOGUSLAW J. LEONCZYNSKI,  
husband and wife, :

Plaintiffs-Appellants, :

vs. :

SHOWALTER FORD COMPANY, INC.; :  
GARY SHOWALTER, Individual; :  
RANDY SIDEBOTTOM, Individual; :  
THRIFTY AUTO REPAIR, INC.; :  
JOHN R. SLAUGH, Individual :  
and JOHN DOES 1 through 5, :

Defendants-Respondents. :

88-0124-CA

Case No. 870076

PRIORITY 14 (b)

BRIEF OF RESPONDENT

Appeal from the Judgment of  
The Seventh Judicial District Court  
of Uintah County, State of Utah  
The Honorable Judge Richard C. Davidson

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FILED  
JAN 12 1988

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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MALGORZATA JUNG-LEONCZYNSKA :  
and BOGUSLAW J. LEONCZYNSKI,  
husband and wife, :

Plaintiffs-Appellants, :

vs. :

Case No. 870076

SHOWALTER FORD COMPANY, INC.; :  
GARY SHOWALTER, Individual; :  
RANDY SIDEBOTTOM, Individual; :  
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#### STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether the appellants timely filed a Notice of Appeal and where they failed to do so, is their failure a jurisdictional bar.

2. If their appeal was timely and this Court has jurisdiction, do principals of res judicata bar the present case.

#### STATEMENT OF FACTS

It is important to understand the procedural posture of this case.

The appellants filed an action in the Seventh Circuit Court in and for Uintah County naming Thrifty Auto Repair, John R. Slaugh, Randy Sidebottom and Showalter Ford and various John Does and alleging as cause of action a dispute over a repair bill to their automobile and the wrongful detention of that automobile by the defendants in combination with the primary culpability and involvement against the defendants other than Showalter Ford.

The appellants prayed for actual damages and punitive damages up to the extent of the jurisdiction of the Court. Answers were filed by the respective defendants when, after a deluge of pleadings, the respondents, Sidebottom and Showalter Ford, tendered return of the vehicle pursuant to the Utah Rules of Civil Procedure on or about January 20,

1986. Various affidavits were filed and a motion for summary judgment was made in behalf of Showalter Ford; memorandum having been submitted by both parties, the Circuit Court entered its summary judgment in favor of Showalter Ford which was granted by Judge Donald D. Crist on or about April 8, 1986. A motion was filed to add the defendant, Gary Showalter, which was considered by the court and denied, [Tr. 19], and the plaintiffs filed a notice of appeal and paid their filing fee appealing that action to the Seventh District Court as a Court of Appeals on or about April 30, 1986. That matter is still pending.

On or about June 18, 1986, the appellants filed a new action in the Seventh District Court naming Showalter Ford Company, first; Gary Showalter, individually, next; then Randy Sidebottom; Thrifty Auto; John R. Slaugh, etc. This action included some allegations under the Utah Consumer Practices Act, but essentially set forth the same factual allegations concerning the same transactions and occurrences that were pending in the proceeding that had been appealed from the Circuit Court.

From this point various pleadings were filed bearing the old Circuit Court number under the heading of Seventh Circuit Court, and District Court pleadings were filed in the new District Court case with erroneous civil numbers, many of the pleadings undated, many of the pleadings

untitled and many of the pleadings not understandable creating a tremendous burden and legal expense upon the respondents, Showalter Ford, Inc., and Gary Showalter.

The appellants filed a motion to change venue and a motion to combine or consolidate the cases which motions were denied on July 23, 1986. Respondents, Showalter Ford, Inc., and Gary Showalter, filed a motion to dismiss or in the alternative for summary judgment on July 14, 1986, and after due consideration, with opportunities of response, Judge Davidson made a ruling of total dismissal of the case on August 13, 1986, [Tr. 78]. The ruling of the Court setting forth the Court's reasoning was mailed to all parties, presumably the date it was entered. Respondents, Showalter Ford, Inc., and Gary Showalter, prepared a judgment of dismissal and mailed copies to all parties and the original to the Court for signature, pursuant to Rule 2.9(b) of the District Court Rules of Practice on August 18, 1986, [Tr. 83, 93]. This judgment was signed and entered by the Court on September 10, 1986. A portion of Judge Davidson's ruling is appropriate:

"In the event the plaintiffs intend to pursue this action through an appeal, the Court reminds them that the rules of civil procedure must be followed. The suggestion is made that plaintiffs consult with an attorney to assist them and be sure their legal and procedural rights are preserved." [Tr. 79].



The appellants next filed a series of pleadings criticizing the Court and then criticizing the clerks office for their apparent lack of notice of the precise date of the entry of the judgment of dismissal. It is unclear from the record whether the appellants knew of the date and were trying to cover their tracks or whether they in good faith did not know the date of the entry of the judgment, however, the notice of appeal was filed, apparently, with the appropriate filing fee on February 13, 1987, five months and three days after the entry of the order of dismissal.

#### SUMMARY OF FACTS

Appellants filed an action in Circuit Court which litigated certain justicible issues on the merits and they appealed. Appellants filed a second action in the District Court being unhappy with the result in the Circuit Court; the District Court dismissed the case and an untimely appeal was filed.

#### SUMMARY OF ARGUMENT

I. Respondents take the firm position that the failure to file the notice of appeal within 30 days is jurisdictional. The failure to file the notice of appeal and the appropriate filing fee is jurisdictional and pursuant to the requirement of the 30 day filing rule, the

Supreme Court has no jurisdiction whatsoever in the matter and any corrective measures or late filing of any other papers are immaterial.

II. Assuming arguendo, that the Supreme Court has jurisdiction, the District Court was proper in dismissing the case where the case was simply a refiling or an amendment of a Circuit Court case that the appellants were not happy with.

#### ARGUMENT

##### I.

WHEN AN APPEAL IS PERMITTED FROM A DISTRICT COURT  
TO THE SUPREME COURT, THE TIME WITHIN WHICH AN  
APPEAL MAY BE TAKEN SHALL BE 30 DAYS AFTER  
THE DATE OF ENTRY OF THE JUDGMENT OR ORDER  
APPEALED FROM

In a case in which an appeal is permitted as a matter of right from the District Court to the Supreme Court, the notice of appeal required by Rule 3, shall be filed with the clerk of the District Court within 30 days after the date of entry of the judgment or order. The timely filing of the notice of appeal is mandatory and jurisdictional. Utah Rules of Appellate Procedure, Rule 4. Appeal From Final Judgment and Order.

Filing of notice of appeal within time required by law was essential to clothe Supreme Court with jurisdiction to adjudicate questions raised by appeal. Anderson v. Halthusen Mercantile Co., 83 Pac. 560, (Utah 1906).

The appeal would be dismissed for lack of jurisdiction where notice of appeal was not filed within one month after entry of judgment as required by rule. Ratliff Estate of v. Conrad, 19 Utah 2d 346, 431 P.2d 571, (1967).

The appeal would be dismissed on respondent's motion when not taken within time allowed by statute. Blyth & Fargo Co. v. Swenson, 49 Pac. 1027, (Utah 1897).

Respondents respectfully submit that the 30 day appeal rule is jurisdictional and does not require the clerks office, opposing counsel or any other party to notify the adverse party of the precise date of the entry of the order or judgment.

The current law under the Appellate Rules require the beginning modicum of notice to simply be in compliance with the District Court Rules of Practice, Rule 2.9(b). See, e.g., Calfo v. D.C. Stewart Co., 717 P.2d 697 (Utah 1986); Bigelow v. Ingersoll, 618 P.2d 50 (Utah 1980).

Respondents, pursuant to Rule 2.9(b) mailed a proposed copy of the judgment to all parties on August 18, 1986, [Tr. 83, 93].

The duty to determine when the order was signed and/or entered is incumbent upon the party seeking the appeal. The simple fact of the matter is, as litigious as the appellants have been, they simply failed to determine the date of the entry of the judgment of dismissal. There is a pleading in

the record [Tr. 88], although not a valid motion to amend or alter a judgment, objecting to the language of the judgment.

Respondents have a right to rely on the law. Knowing that the 30 day appeal rule is jurisdictional, respondents had a right to rely on the fact that their case had been concluded on or after October 11, 1986.

The new Utah Rules of Appellate Procedure differ from old Utah Rules of Civil Procedure, Rule 72 and Rule 73, only in form and, in fact, changed the required time element of one month to 30 days. The statutes and previous law which has construed the time for appeal under the old Utah Rules of Civil Procedure 72 and 73, clearly state and hold as above quoted that the time for the appeal is in fact jurisdictional. See, e.g., Armstrong Rubber Co. v. Bastian, 657 P.2d 1346 (Utah 1983); Bowen v. Riverton City, 656 P.2d 434 (Utah 1982).

That is, the appropriate steps must be taken by filing the notice and the payment of the filing fee to perfect the appeal. Other defects have been overlooked, that is, the time for filing the docketing statement, the times for filing briefs and other matters as not being jurisdictional, but the law in Utah is quite clear that the time limit for filing the notice of appeal and perfecting the appeal is clearly jurisdictional.

Failure to act properly within the required time period has caused the right of appeal to be lost and denies the Appellate Court jurisdiction of any further matters. The appellants simply did not follow the admonition given by the District Judge in his ruling; they did not follow the rules; therefore, they are precluded.

## II.

HAVING BEEN RULED AGAINST UPON THE MERITS IN THE  
CIRCUIT COURT, THE APPELLANTS CANNOT AMEND A  
COMPLAINT AND RE-FILE IN ANOTHER COURT TO  
RESURRECT THE SAME CAUSE OF ACTION UNDER  
GENERALLY RECOGNIZED PRINCIPALS OF RES JUDICATA

The motion to dismiss Showalter Ford, Inc., was supported by affidavits and briefed, memorandums were submitted, the Honorable Donald R. Crist considered the matter, the appellants had opportunity to counter the affidavits and did not, the matter was decided in favor of Showalter Ford on the basis of a duly considered motion under Rule 56 for summary judgment. Showalter Ford, Inc., was dismissed from the Circuit Court case with prejudice. The appellants filed a motion to amend to add Gary Showalter as a party, the motion was briefed, submitted and an order denying that motion was signed on May 13, 1986, [Tr. 19].

The appellants filed their notice of appeal on those issues to the District Court in the Circuit Court case.

The appellants filed a new action alleging basically the same facts and wrongs that were alleged in the Circuit Court; although the pleading is not dated and the summons served upon the defendants was dated June 22, 1986, the clerks office indicates the complaint was filed and received June 18, 1986. After further exchange of pleadings, again, some of which were not understandable, the respondents moved the Court to dismiss the new case primarily on the basis of res judicata. In fact, the plaintiffs attempted in their new complaint to allege and reallege the same factual transactions and occurrences which are presently pending in the Seventh Circuit Court and in the Seventh District Court on appeal as a means of subterfuge and as an independent cause of action which has previously been adjudicated in the court below and which is on appeal in the District Court.

Appellants make the fallacious argument that the Circuit Court does not have jurisdiction because in their new complaint they have alleged violations of the Consumer Practices Act. Respondents contend that the Circuit Court would have jurisdiction of a case or controversy under the Consumer Practices Act and that the only distinction is the prayer for damages which the appellants have asserted in their new case in the District Court.

Appellants make the argument that the District Court has exclusive jurisdiction of cases filed under the Utah

Consumer Sales Practices Act. The statute provides in Utah Code Annotated §13-11-6 (Supp. 1986) (1):

"The District Courts of the state have jurisdiction over any supplier as to any act or practice in this state governed by this act or as to any claim arising from the consumer transaction subject to this act."

This provisions has to do with jurisdiction of those parties doing business in the state or involved in consumer transactions, but certainly by the express language of the statute, does not grant the District Court with exclusive jurisdiction of unconscionable acts or practices.

The appellants are confused in that quite clearly the Circuit Courts of this state have concurrent jurisdiction of cases brought under those sections as well.

No new facts have been gleaned in discovery and the facts were present and the case could have been filed under the Utah Consumer Practices Act in the first instance, but appellants chose not to do so.

Appellants also make the argument that Gary Showalter was not a party in the Circuit Court, so a new action against Gary Showalter should be upheld in the District Court. Judge Crist duly considered the motion to amend to add Gary Showalter and on argument of counsel concluded that Gary Showalter's involvement in the case did not warrant his being included in the complaint, [Tr. 19]. It is respondents' position, therefore, that the argument letting

Showalter Ford out of the case equally applied to Gary Showalter as an individual. Arguments were adduced and made in memorandum and Judge Crist's consideration in the memorandums that any liability of Gary Showalter would be in his capacity as an agent of Showalter ford in any event.

The law of res judicata is a farily easy concept and as stated in Am. Jur. 2.d JUDGMENTS, §394, p.558.

"...As stated in many cases the doctrine of res judicata is that an existing final judgment rendered upon the merits without fraud or collusion by a court of competent jurisdiction is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction."

By virtue of res judicata, a final determination of a court of competent jurisdiction necessarily affirming existence of any fact is conclusive evidence of existence of that fact when it is again in issue in subsequent litigation between same parties in same or other courts and facts decided in first suit cannot be disputed or relitigated, although later suit is upon a different cause of action. See Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949).

The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction, and under such doctrine any issue necessarily decided in prior litigation is conclusively determined as to the parties or



their privies if it is involved in a subsequent lawsuit on a different cause of action. See Burnhard v. Bank of America Natl. Trust & Saving Ass'n., 122 P.2d 892 (Cal. 1942).

By way of conclusion the following quotation from Am. Jur. is instructive:

"The doctrine of res judicata is but a manifestation of the recognition that endless litigation leads to confusion or chaos. The doctrine reflects the refusal of the law to tolerate a multiplicity of, or needless, litigation and is based on the worthy premise that the interest of the proper administration of justice is best served by limiting parties to one fair trial of an issue or cause. It rests upon the ground that the party to be effected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate, the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent." Am. Jur. 2d JUDGMENTS, §395, pp. 561, 656.

#### CONCLUSION

Appellants failed to perfect their appeal within the 30 day time limit required by the Utah Rules of Appellate Procedure; therefore, this Court has no jurisdiction.

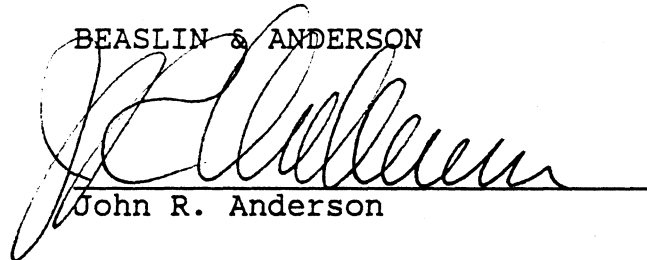
The District Court ruled properly in dismissing the new case in District Court since the factual matters, transactions, occurrences and causes of action had already been plead and/or decided on the merits in the Circuit Court case which is currently on appeal.

This case is an example of the abuse of judicial process which can create expense for the parties and the

appellants chose not to obtain the advice of counsel as specifically suggested by the District Court Judge and are not prejudiced by the dismissal of this appeal inasmuch as they still have their day in court in the case which is still pending.

RESPECTFULLY SUBMITTED, this 12th day of January, 1988.

BEASLIN & ANDERSON

A handwritten signature in dark ink, appearing to read "John R. Anderson", is written over a horizontal line. The signature is stylized with large, flowing loops.

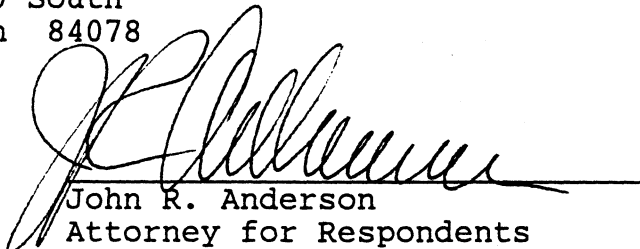
John R. Anderson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12<sup>th</sup> day of January, 1988, I caused four (4) copies each of the foregoing BRIEF OF RESPONDENT to be deposited in the United States mail, postage prepaid, and addressed to:

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