

1999

Mary Ann Lucero Dipoma v. Brian McPhie and Does 1-20 : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Dipoma v. McPhie*, No. 990526 (Utah Court of Appeals, 1999).

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IN THE UTAH COURT OF APPEALS

MARY ANN LUCERO
DIPOMA,

Plaintiff-Appellant,

vs.

Appellate No. 990526-CA
Category No. 15

BRIAN McPHIE and DOES I
through 20, WHOSE TRUE NAMES
ARE UNKNOWN,

Defendants-Respondents.

REPLY BRIEF OF APPELLANT

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Judith Atherton

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FILED

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REPLY BRIEF OF APPELLANT

The following is written in reply to the Brief of Appellee filed October 21, 1999.

STATEMENT OF THE CASE

Appellant Dipoma would dispute the statement made by Appellee in the "Statement of the Case" that "the Clerk of the Court notified Dipoma of the same [that her check had been returned] shortly thereafter." (Appellee's Brief, p. 2). It should be noted there is no citation to the record for this assumption which is utilized by Appellee to argue that Dipoma did not act promptly upon notification of the check problem. The Statement of

Undisputed Facts filed by the Appellee (R. 16-17) and the Appellant (R. 29-30) did not indicate when Dipoma was notified of the returned check. Likewise, the Docketing Statement also does not indicate any date of notification to Dipoma.

ARGUMENT

THE TRIAL COURT INCORRECTLY DETERMINED THAT DIPOMA'S CAUSE OF ACTION WAS NOT COMMENCED ON NOVEMBER 27, 1997.

Appellant Dipoma relies upon her opening Brief to support her contention that the lower court erred in holding as a matter of law that she had failed to meet the statute of limitation requirement because her initial filing fee check subsequently was dishonored. Appellant will, however, briefly address several arguments and citations raised by the appellee in his responsive brief.

It is apparent that there is a split of authority between state jurisdictions and federal circuits in the interpretation of problems involving filing fees and commencement of actions. Since this exact issue has not been decided in Utah, cases cited by both parties are helpful but do not control the interpretation of Utah law. It should also be noted that this case does not involve an instance where a litigant has attempted to file a complaint with a

clerk but has been refused because the litigant would not tender a proper filing fee. Here, the case was commenced with a District Court number, a judge was assigned, and the judicial process continued in all respects identical to any other case filed in the District Court. Thus, the question of “filing” and the question of “payment” are similar but nevertheless distinct.

Appellee relies upon Title 21 of the Utah Code Annotated relating to the obligation of clerks to accept fees prior to filing documents. While this title clearly governs the duties of public servants it does not affect a court’s determination of jurisdiction for purposes of a statute of limitation defense. In essence, if a potential litigant does not have the correct fees at the time of attempting to file a complaint the District Court Clerk may by statute refuse to process the paperwork until such fee is paid. This governmental fee statute is not jurisdictional for purposes of commencing a civil action.

In Foley v. Foley, 147 Cal. App.2d 76 (Cal. App. 1956) an argument similar to Appellee’s was made. A California statute required clerks to collect fees in advance. A litigant failed to pay a filing fee timely but the clerk still accepted the papers and filed them. The fees were not paid until after the statutory period had expired for filing of the original papers.

The California Appellate Court found the filing date effective even though the fee was not paid within the statutory period. The Court

emphasized there was no indication that the legislature intended the filing be rendered void if the filing fee was not timely paid. The Court said:

If it had been the legislative intent that the effectiveness of certain official acts would depend on the payment of fees by the persons interested in them, a provision directed to those interested persons and in our case contained in the Code of Civil Procedure would have been expected. *Id.* at 78.

The appellee acknowledges that Rule 3 of the Rules of Procedure controls the determination of when an action commences. (Appellant's Brief, at 6, 7). This rule does not discuss the payment of fees in any way. It is therefore necessary for the appellee to utilize the governmental internal statutes contained in Title 21 to argue that the term "filing" does not occur "until the mandatory filing fees have been paid." (Appellee's Brief at 7). Just as the Foley court observed, if payment of a filing fee is in fact jurisdictional, it would have been included in the language of Rule 3 and 4—it was not.

Another provision of Utah law also supports Dipoma's position. Rule 3 provides that an action can be commenced "by service of a summons together with a copy of the complaint in accordance with Rule 4." Rule 4(c)(2) states, "If the action is commenced under Rule 3(a)(2), the summons shall state that the defendant need not answer if the complaint is not filed within ten days after service" Thus, under Utah Rules the time for

measuring a statute of limitation defense can occur upon the service of a summons when no complaint or fee has been filed with the Clerk.

Obviously, both Rules 3 and 4 are written with exact detail which must be followed if an action is to be correctly commenced. Failure to do so will result in lack of jurisdiction. Lock v. Peterson, 285 P.2d 1111 (Utah, 1955); Martin v. Nelson, 533 P.2d 897 (Utah 1975); Garcia v. Garcia, 712 P.2d 288 (Utah 1986); Dennett v. Powers, 536 P.2d 135 (Utah 1975); and Fibreboard Paper Products v. Ditrich, 475 P.2d 1005 (Utah 1970). Certainly, the jurisdictional requirement of a filing fee could easily have been included in Rule 3 and Rule 4 of the Rules of Civil Procedure.

Appellee notes that Rule 14(b) of the Utah Rules of Appellate Procedure specifically requires, “the party obtaining the review shall pay to the Clerk of the Appellate Court such filing fees as are established by law and also the fee for docketing the appeal.” (Appellee’s Brief at 12-13). This Court in Hausknect v. Industrial Comm’n, 882 P.2d 683 (Utah App. 1994) declined to read into the rule “language limiting the jurisdictional effect of failure to comply.” Here, any jurisdictional requirement of a filing fee is also notably absent from Rule 3 and Rule 4.

It is unnecessary to elaborate in this particular case whether a litigant could demand a court clerk to file a complaint without a fee and without

signing an affidavit of impecuniosity in order to satisfy the statute of limitation requirement. Here, a filing fee was in fact paid and accepted by the Court Clerk in the form of a check and the complaint was filed, stamped, and assigned a case number. This undisputed factual scenario, therefore, is completely different from the cases relied upon by Appellee (In De-Gas, Boostrom, and Wanamaker, Appellee's Brief at 8-11) where the clerk refused to accept the complaint until a filing fee had been tendered. In all of those cases the actual filing of the complaint was not accomplished until after the statute of limitations had run.

Even assuming *arguendo* as the appellee contends that the payment of a filing fee is a necessary prerequisite to determine when a statute of limitation time is calculated, the question remains in this case what effect does payment by check have upon this requirement. Using Appellee's logic, for example, would delay the actual filing date of any complaint by several days since even checks that clear with no problem do not fund the state account on the date of the filing. In some instances, a check may require a week before funds are actually poured into the District Court's account. Should the filing date, therefore, be adjusted to the actual day that funds are received into the Clerk's account?

Clearly, such a delayed calculation would be absurd and not based upon any rule or statute. This same principle is equally applicable to dishonored checks. In other words, for purposes of Appellee's argument it is immaterial whether a good check requires three days to clear or whether a bad check requires seven days to make good the funds. In both cases neither date is the date that the complaint is filed and date stamped.

As noted in Appellant's opening Brief if the legislature and the supervisory courts of this state wish to require that payment of actual funds be made concurrently with the filing of a complaint then the various rules and statutes should require cash be paid. The use of certified funds, checks, or credit cards all require a time delay in the actual receipt of funds into the Clerk's account.

The appellee has apparently been unable to find any other case involving a returned check except for the Brokerhouse International case from the Colorado Court of Appeals. (Appellee's Brief at 7-8). Appellant would submit that a review of this half-page decision relating to this issue does not clarify the question of "payment" at all but is merely a legal conclusion without any analysis. In essence, the Colorado Court of Appeals determined that the payment of a docketing fee only occurs when cash is received by the Clerk.

Appellee has not addressed the argument that the conditional filing fee by check or credit card is no different than the conditional granting of impecunious status until a determination by a court. (Appellant's Brief at 19-20). When a date of filing is critical, equal protection does not allow the treatment of a claimed impecunious litigant to be any different than that of a paying litigant. There is no Utah statute or rule which requires a date of filing of a complaint to change if the affidavit of impecuniosity of a litigant is later denied. Instead, the litigant must pay the fee upon such denial with no effect upon the filing date. The fact that a check is dishonored and must also be subsequently paid should also have no effect upon the original filing date.

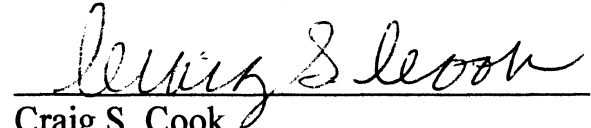
Finally, the appellee argues that as a matter of law Dipoma failed to pay the filing fees within a reasonable time even assuming that she timely filed her complaint. (Appellee's Brief at 14-18). If the question of "reasonableness" of her action is to be addressed it should be in the district court where evidence may be taken. The appellate cases cited by the appellee all involve an initial determination by a lower court as to the reasonableness of the litigant's actions. This same procedure should be followed here. The question as to what notices Dipoma received, what she was told to do by the Clerk's office, and the entire time sequence should be evaluated by a trier of fact before any legal conclusion of law can be reached.

Clearly, any issue of reasonable time is one of fact which should be remanded if such issue is deemed relevant by this Court.

CONCLUSION

For the preceding reasons, appellant Dipoma respectfully requests that this Court reverse the order of dismissal entered in this case.

DATED this 22nd day of November, 1999.


Craig S. Cook
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing to Paul N. Belnap, Attorney for Defendant, 6th Floor, Boston Building, 9 Exchange Place, Salt Lake City, Utah 84111 this 22nd day of November, 1999.

