

1988

Walter P. Larson v. Stephen Wade : Brief of Appellant

Utah Supreme Court

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88 0344

IN THE SUPREME COURT OF THE
STATE OF UTAH

WALTER P. LARSON, an	:	
individual, and LARSON	:	
FORD SALES, INC., a	:	
Delaware corporation,	:	APPELLANTS' BRIEF
Plaintiffs/Appellants,	:	
vs.	:	
STEPHEN WADE, individually,	:	
and STEPHEN WADE, BRYCE	:	
WADE, KIPP WADE, dba SBK,	:	
a general partnership, and	:	Case No. 880344
VALLEY FORD, a Utah	:	
corporation,	:	
Defendants/Respondents.	:	

Appeal from the Third Judicial District Court
in and for the County of Salt Lake,
the Honorable J. Dennis Frederick presiding,
(District Court No. C87-4273)

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JUN 23 1989

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10--Affidavit of Walter P. Larson	
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IN THE SUPREME COURT OF THE
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WALTER P. LARSON, an	:	
individual, and LARSON	:	
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Delaware corporation,	:	
Plaintiffs/Appellants,	:	
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WADE, KIPP WADE, dba SBK,	:	
a general partnership, and	:	
VALLEY FORD, a Utah	:	
corporation,	:	
Defendants/Respondents.	:	

JURISDICTION OF THIS COURT
AND NATURE OF PROCEEDINGS BELOW

This is an appeal from an order of the Third Judicial District Court of Salt Lake County, the Honorable J. Dennis Frederick presiding, denying a motion of plaintiffs [hereinafter sometimes "the Larsons" or "Mr. Larson" as appropriate by context] for a one day extension of time to appeal a prior order of the district court dismissing plaintiffs' entire complaint against defendants on grounds of Utah's four year statute of limitations, Section 78-12-25, Utah Code (R. 73, 94, Add. 4). This court has jurisdiction of this appeal under Section 78-2-2(3)(j), Utah Code.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in denying plaintiffs' motion for a one day extension of time to appeal the district court's dismissal of plaintiffs' complaint, where (1) defendants provided no notice of entry of judgment as required by Rule 58A(d) of the Utah Rules of Civil Procedure, (2) plaintiffs' counsel did not in fact know judgment had been entered; (3) plaintiffs' counsel affirmatively told plaintiffs that the order had not yet been signed so there was no need to file a notice of appeal; (4) plaintiff Mr. Larson learned, one day late, of the deadline for filing a notice of appeal through his own efforts; (5) plaintiff Mr. Larson filed a pro se notice of appeal, that same day, through his own efforts; (6) the Larson family no longer resided in this state; (7) the Larson family's California home was threatened with foreclosure; and (8) one member of the Larson family was experiencing blindness and nervous breakdown, and another was suffering from traumatic neck injury?

2. Alternatively, did the District Court err in refusing to permit Mr. Larson, who had come from California to the hearing on plaintiffs' motion for an extension of time to appeal, to testify or otherwise present supplemental evidence as to the reasons for which the notice of appeal was filed one day late?

3. Did the District Court err in dismissing plaintiffs' entire complaint, including plaintiffs' claims in both tort and contract, because of bankruptcy court confirmation more than four years prior to the filing of suit, of a plan of

reorganization put forth by an entity which is not a party to either this suit or to the oral agreement?

CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, RULES, AND REGULATIONS

Rule 4(e) of the Rules of the Utah Supreme Court provides:

"The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by Paragraph (a) of this rule. Any such motion which is filed before expiration of the prescribed time may be ex parte unless the district court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with the district court rules of practice. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later."

Rule 4(a) of the Rules of the Utah Supreme Court provides in part:

"...[T]he 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 appealed from...."

Rule 58A(d) of the Utah Rules of Civil Procedure provides:

"The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision."

Section 78-12-25 Utah Code provides, in part:

"Within four years:

(1) An action upon a contract, obligation, or liability not founded upon an instrument in writing....

(2)

(3) An action for relief not otherwise provided for by law."

STATEMENT OF THE CASE

Nature of the Case

This is a suit by plaintiffs against defendants for breach of contract, interference with business relations, breach of fiduciary duty, unjust enrichment, conversion, and punitive damages (R. 2-9, Add. 1).

Course of Proceedings

By order entered July 14, 1988, the District Court dismissed plaintiffs' amended complaint in its entirety (R. 73-74, Add. 4). Thereafter, on August 16, 1988, plaintiffs filed a Notice of Appeal and a "Notice of Extension of Time to Appeal" (R. 75-78, Add. 5-6).

Thereafter, on September 12, 1988, a hearing convened on plaintiffs' "Notice of Extension of Time to Appeal," deemed to be a Rule 4(e) motion for extension of time to appeal, and the court denied plaintiffs' motion (R. 89, Add. 8, 11). On September 14, 1988, plaintiffs filed a timely notice of appeal from this denial (R. 90-91, Add. 9).

Disposition in the Court Below

The court below dismissed plaintiffs' amended complaint in its entirety (R. 73-74, Add. 4) and thereafter denied plaintiffs' motion for extension of time to appeal (R. 89, 97-98, Add. 8, 11).

Statement of Facts

1. On June 24, 1987, plaintiffs filed their complaint against defendants alleging:

a. breach of an oral contract to purchase Larson Ford Sales, Inc., to hold plaintiffs' harmless from certain debts and obligations of the business, and to provide other benefits;

b. interference with business relations in inducing third parties to breach their agreement with Mr. Larson;

c. breach of fiduciary duty, unjust enrichment, and conversion in that defendant Stephen Wade used his status as a bishop in the L. D. S. Church to acquire confidential information from the plaintiffs and thereafter used that information to convert substantial assets of Larson Ford Sales, Inc. (R. 1-7).

2. On July 9, 1987, plaintiffs filed their first amended complaint which stated the same causes of action (R. 11-19, Add. 1).

3. On July 28, 1987, defendants filed a Motion to Dismiss (R. 7-8).

4. Defendants based their motion to dismiss on the Second Amended Plan of Reorganization of Stephen Wade, Inc. in the bankruptcy case of Larson Ford Sales, Inc., confirmed on June 10, 1983, more than four years prior to filing of the Larsons' complaint in this action (R. 34-36, Add. 2).

5. Defendants never placed the confirmed plan itself into evidence in this action. cf. Record.

6. Plaintiffs opposed this motion to dismiss by arguing

that the statute of limitations constitutes an affirmative defense which must be affirmatively pled by way of answer (R. 47) and by submitting an affidavit from plaintiff Walter P. Larson to the following:

(a) that he learned of the default under the oral contract only on June 24, 1983, within four years prior to filing, when he was ordered to vacate the Larson Ford Sales facilities;

(b) that the \$200,000.00 parts inventory converted by defendants was intact as of June 24, 1983 and that an official sale of the final \$5,000.00 portion of those parts did not occur until eighteen months after June 24, 1983; and

(c) that Stephen Wade, Inc., which submitted the plan of reorganization confirmed by the bankruptcy court, was not a party to the present suit (R. 49-50, Add. 3).

7. On October 19, 1987, Judge Sawaya took defendants' motion under advisement and thereafter, on October 29, 1987, recused himself from the action (R. 53).

8. On March 25, 1988, the Larsons' counsel withdrew from the proceedings (R. 56).

9. On June 7, 1988, Dannis M. Adamson and Peter H. Waldo entered their appearance as counsel for the Larsons (R. 70).

10. On June 20, 1988, Judge J. Dennis Frederick heard argument on defendants' motion to dismiss (R. 27).

11. Judge Frederick signed an Order dismissing plaintiffs' entire complaint on July 14, 1988 (R. 74, Add. 4); the Order was

entered that same day (R. 73-74).

12. The record discloses no notice of signing or entry of judgment from defendants to plaintiffs as required by Rule 58A(d) of the Utah Rules of Civil Procedure. cf. Record.

13. On August 16, 1988, plaintiff Walter Park Larson, filed a pro se Notice of Appeal [Supreme Court Case No. 880386] (R. 77, Add. 6) and a "Notice of Extension of Time to Appeal" (R. 75, Add. 5).

14. This notice of appeal was one day late, the last day for filing a notice of appeal being Monday, August 15, 1988, the thirtieth day after July 14, 1988 falling on a Saturday (R. 94).

15. Thereafter, the Larsons' new counsel, John J. Borsos, noticed for hearing on September 12, 1988 plaintiffs' Motion for Extension of Time to Appeal, previously mistitled a "Notice of Extension of Time to Appeal" (R. 80).

16. In connection with that hearing, Peter H. Waldo filed an affidavit stating:

a. that he had discussed with the Larsons the option of an appeal of the dismissal;

b. that he was not aware of the time of entry of the Order of dismissal;

c. that no appeal was filed by his office due to a lack of communication with the Larsons (R. 87-88, Add. 7).

17. At the hearing on September 12, 1988, the Larsons' attempted to present their reasons for filing one day late by

profer and by oral testimony because Mr. Larson had been in San Diego defending against a foreclosure of his home there, but Judge Frederick did not permit the Mr. Larson to do so (R. 91, 95, Add. 9, 10).

18. The Court denied the Larsons' motion for extension of time to appeal [the order expressly reciting denial of "plaintiffs'" motion in the plural form], (R. 89, Add. 8, 11) and the plaintiffs, on September 14, 1988, filed a timely notice of appeal to this court, which appeal is the basis of this proceeding (R. 90, Add. 9).

19. Walter P. Larson filed an affidavit dated September 13, 1988 stating the following:

a. After retaining Adamson and Waldo to represent him in connection with the pending motion for dismissal, Mr. Larson returned to San Diego to report for a new job and to fight a pending eviction (R. 93, Add. 10).

b. Mr. Larson's 20 year old daughter Rachel had gone blind in one eye and was in the midst of a nervous breakdown, and his 14 year old son Nathan was immobilized from a traumatic neck injury (R. 93, Add. 10).

c. He had asked his counsel to request a continuance of the hearing on the motion to dismiss but this did not occur (R. 93, Add. 10).

d. He did so because he had an affidavit coming from Connecticut for the hearing on the motion to dismiss but it had not yet arrived (R. 93, Add. 10).

e. After the hearing on the motion to dismiss, his counsel Mr. Waldo told him "that he would have no problem making an appeal or asking for a re-hearing and said he and his partner would decide which course of action would be best" (R. 94, Add. 10).

f. Mr. Larson then returned to San Diego to fend off the pending foreclosure (R. 94, Add. 10).

g. Thereafter, he "called Mr. Waldo at least three times and was told the court had not yet signed the order so there was no need to file a notice of appeal" (R. 94, Add. 10).

h. On August 15, 1988, Mr. Waldo called Mrs. Larson on another matter, at which time she asked him about the appeal to which he responded that "he did not know when the last day to file was" (R. 94, Add. 10).

i. On calling the Clerk of the Court the next morning, Mr. Larson learned that the last day to file an appeal had been Monday, the day before (R. 94, Add. 10).

j. Upon being so informed, Mr. Larson made arrangements for the immediate filing of a notice of appeal that same day and a subsequent hearing on his motion for an extension of time to appeal (R. 94-95, Add. 10).

k. At the hearing on his motion for an extension of time to appeal, Mr. Larson sought to present his reasons for filing an appeal one day late by proffer and by oral testimony because he had again come from California for the hearing, but this was refused (R. 95, Add. 10), and the motion for an

extension was denied (R. 89, Add. 8, 11).

SUMMARY OF ARGUMENT

The District Court erred in denying plaintiffs' Rule 4(e) motion for a one day extension of time to appeal the District Court's dismissal of plaintiffs' complaint, where (1) defendants provided no notice of entry of judgment as required by Rule 58A(d) of the Utah Rules of Civil Procedure, (2) plaintiffs' counsel did not in fact know judgment had been entered; (3) plaintiffs' counsel affirmatively told plaintiff that the order had not yet been signed so there was no need to file a notice of appeal; (4) plaintiff Mr. Larson learned, one day late, of the deadline for filing a notice of appeal through his own efforts; (5) Mr. Larson filed a pro se notice of appeal, that same day, through his own efforts; (6) plaintiffs no longer resided in this state; (7) the Larson family home in California home was threatened with foreclosure; and (8) one member of plaintiff's family was experiencing blindness and a nervous breakdown, and another was suffering from traumatic neck injury.

Alternatively, the District Court erred in refusing to permit plaintiff, who had come to the hearing from California, to testify as to his intent and to the reasons for which the notice of appeal was filed one day late and the case should be remanded for the taking of further evidence on the question of whether or not the notice of appeal was one day late due to excusable neglect or good cause.

The District Court erred in dismissing plaintiffs' entire

complaint, including plaintiffs' claims in tort, pursuant to Utah's four year statute of limitations, Section 78-12-25 Utah Code, solely on the grounds that Stephen Wade, Inc., an entity which is neither a party to the oral agreement nor to this suit, had obtained confirmation of a plan of reorganization more than four years prior to filing of plaintiffs' complaint.

ARGUMENT

- I. THE DISTRICT COURT'S REFUSAL TO EXTEND THE TIME FOR FILING A NOTICE OF APPEAL FOR ONE DAY SHOULD BE REVERSED ON GROUNDS OF BOTH EXCUSABLE NEGLIGENCE AND GOOD CAUSE.

In this case, the court squarely confronts the failure of a prevailing party below, in this case the defendants, to comply with Rule 58A(d) of the Utah Rules of Civil Procedure and to provide to the plaintiffs notice of signing or entry of judgment, as a result of which, plaintiff's counsel did not know that judgment had been entered and affirmatively represented to plaintiffs that no judgment had been entered. As a consequence, no appeal was filed within 30 days after entry of the order of dismissal.

Defendants should not profit from their omission.

There is no Rule 58A(d) in the Federal Rules of Civil Procedure, however, Rule 77(d) of the Federal Rules requires the Clerk of the Court to serve notice of entry of judgment upon all parties not in default. Rule 77(d) provides that "lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for

failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure."

Similarly, Rule 58A(d) provides that "the time for filing a notice of appeal is not affected by the notice requirement of this provision."

Under the federal rules it is clear that, although the failure of the clerk to provide notice does not automatically extend the time to appeal, that failure is "certainly a factor in the excusable neglect determination" in the context of a motion to extend the time to appeal. McGarr v. United States, 736 F. 2d 912 (3rd Cir., 1984).

This court has taken a similar approach. In Graco v. Ironwood Exploration, 735 P. 2d 62 (Utah, 1987), the lower court granted an ex parte extension of time to appeal, apparently on the ground that no 58A(d) notice was provided. This court remanded to permit respondents an opportunity to oppose the motion since the motion was made after the expiration of the initial thirty day period to appeal. This Court could have said that the failure to provide a Rule 58A(d) notice is not relevant in the context of a motion for an extension of time to appeal and summarily reversed the extension, but it did not do so, all of which indicates that this court does indeed view the failure to provide such notice as a factor to consider in the context of a motion for extension of time to appeal.

In the present case, plaintiff's notice of appeal was only one day late. In fact, plaintiff caused a notice of appeal to be

filed immediately upon learning that a judgment had in fact been entered and that the last for filing an appeal had expired the day before (R. 94, Add. 10). He did all of this despite the fact that he was residing out of state (R. 94, Add. 10). All of this should show to the Court that the plaintiff did indeed intend to appeal and that he did indeed rely on representations of counsel that no judgment had yet been entered, which representations his counsel would not have made had a Rule 58A(d) notice been provided.

In Reagan Outdoor Adv. v. Utah Dept. of Transp., 589 P. 2d 782 (Utah, 1979), this court considered then Section 27-12-136.9 Utah Code, which required an appeal from a transportation commission decision to "be taken within 30 days of the commission's decision." It concluded that this language really meant that an appeal must be taken "within 30 days after reasonable notice of the Commission's decision," 589 P. 2d at 783. In so doing, it reversed the district court and saved the appeal from dismissal. This court did so even though the appellant had actual knowledge of the decision well within 30 days after the Commission's decision had been made.

Certainly the plaintiffs in this proceeding, who had no notice of any kind until the time to appeal had expired, should receive one more day for the filing of a notice of appeal, particularly where Rule 58A(d) places a responsibility to give notice squarely on the defendants, and no such notice was provided.

In ruling on plaintiff's motion for an extension of time to appeal, the lower court had before it only the affidavit of Peter Waldo, prior counsel for the plaintiff, containing his explanation as to why no notice of appeal had been filed. Mr. Waldo says that the option of an appeal was discussed but no final arrangements were made (R. 87, Add. 7). He further says that he was not aware that the order had been signed and was therefore unaware of the passage of time for an appeal (R. 87-88, Add. 10). Thus, from Mr. Waldo's viewpoint, the question of appealing was open but undecided, due in large part to the fact that to his knowledge no order had been signed and therefore no final decision needed to be made.

From Mr. Larson's viewpoint, however, there is little question but that he intended to appeal (R. 94-95, Add. 10). This is shown not just from his affidavit but from his actions in filing a pro se appeal the very day he learned of entry of the order of dismissal and of the running of the time to appeal.

It should be obvious from reviewing the affidavits of Mr. Waldo and Mr. Larson that there is a clear conflict between the attorney, who has other concerns since the time to appeal has expired, and the client who very definitely wants to appeal.

Significantly, neither Mr. Waldo nor Mr. Adamson appeared with Mr. Larson at the court's hearing on plaintiff's motion for an extension of time to appeal (R. 89, Add. 8). Under these circumstances, Mr. Larson should have been permitted to explain as fully as he desired his intent to appeal and the reasons for

which his appeal was filed one day late. Instead, the lower court refused to permit him to testify in person at all, despite his coming from San Diego to do so.

The intent of a party to appeal is clearly a significant factor in determining whether or not a motion for extension of time to appeal should be granted and has justified such extensions in many cases. United States v. Ford, 627 F. 2d 807 (7th Cir., 1980); United States v. Reyes, 759 F. 2d 351 (4th Cir., 1985); Shah v. Hutto, 704 F. 2d 717 (4th Cir., 1983). In each of these cases, the appellants were aware of the deadline for appealing, yet their appeals were late because of mailing delays or for similar reasons. In each case, the appellate court concluded that the lower court would have found excusable neglect and on that basis ruled from the appellate level that the late filing was excusable.

In the present case, Mr. Larson was unaware of the deadline for appealing, yet upon being informed of entry of the order of dismissal and the passage of time to appeal, he immediately caused a notice of appeal to be filed. In so doing, he demonstrated his intent and his desire to appeal, notwithstanding (1) no notice of entry of judgment from defendants, (2) his counsel's ignorance of when judgment had entered, (3) representations from his counsel that the order had not been signed, (4) learning through his own investigation of the passage of the deadline for appealing, (5) immediate filing of a pro se appeal, (6) all while threatened with foreclosure and severe stress in his family

through illness. His late filing should be excused and under these circumstances, the failure to provide notice of entry of judgment should be deemed good cause for a one day extension of time to appeal.

This case is not unlike In re Buckingham Super Markets, Inc. 631 F. 2d 763 (D. C. C. A., 1980), in which excusable neglect was found from confusion over which attorney would file the notice of appeal since it was clear that the appealing party wanted to appeal. In that case the court outlined the history of the federal rule:

"The history of [federal rule] Rule 4(a) indicates that the excusable neglect standard has been applied with diminishing rigidity, and while extensions of time are not granted as a matter of course, they are available upon the proper showing. The civil rules did not provide for extensions of time for appeal at all until 1946. From then until the 1966 amendment, former Rule 73(a), Fed. R. Civ. P., permitted an extension of 30 days for filing a notice of appeal in a civil case only 'upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment.' [Citations omitted] The 1966 amendment to this exception changed it to read simply 'upon a showing of excusable neglect.' The Advisory Committee Notes to this amendment to former Rule 73(a) recognize that failure to learn of entry of judgment will constitute excusable neglect, but do not indicate what further grounds satisfy the standard, other than to emphasize that the district court should exercise its discretion to grant extensions of time 'where injustice would otherwise result.' Most recently, the Supreme Court again amended the rule, effective August 1, 1979, to provide that time for appeal may be extended 'upon a showing of excusable neglect or good cause.'" 631 F. 2d at 765.

Under the federal rules, the clerk of the court is to provide notice of entry of judgment. Under our rules, the prevailing party is to do so. While there is some reluctance in

federal practice to condone late filings because of errors by a neutral party, i. e., the court clerk, there should be no such reluctance when the failure is that of the prevailing party. To hold otherwise is to permit the prevailing party to benefit from his own omission.

Many practioners in this state view the Rule 58A(d) notice requirement as meaningless. In this case, however, its omission made a significant difference. This case should be reversed accordingly.

II. ISSUES OF FACT AND A CORRECT VIEW OF THE LAW OF LIMITATION OF ACTIONS AS IT APPLIES TO CONTRACT REPUDIATION REQUIRE REVERSAL OF THE ORDER OF DISMISSAL.

Summary judgment is appropriate only if there "is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Rule 56(c) Utah Rules of Civil Procedure. In this case, the lower court treated defendants' motion to dismiss as one for summary judgment and ordered dismissal of plaintiffs' entire complaint.

A motion to dismiss assumes that the plaintiff can prove the allegations of his complaint, but asserts that the pleading should be dismissed anyway as a matter of law. Liquor Control Comm. v. Athas, 121 U. 457, 243 P. 2d 441 (1952). Since plaintiff filed a motion to dismiss, plaintiffs submit that the allegations of plaintiffs' complaint must be accepted for purposes of this proceeding.

Plaintiffs argue as they did below that it is improper to

base a motion to dismiss on an affirmative defense such as a statute of limitations (R. 46-48). The defense should be deemed waived.

The district court dismissed plaintiffs' complaint, including those allegations sounding in tort, based solely on the fact that Stephen Wade, Inc., not a party either to the present litigation or to the oral agreement set forth in the complaint, obtained confirmation of a plan of reorganization more than four years prior to the filing of plaintiffs' complaint (R. 40-41, Add. 2).

The court did so without even requiring the defendants to place the plan of reorganization into evidence to determine to what extent, if any, the terms of the plan contradicted the oral agreement. cf. Record.

Plaintiff submits that the mere confirmation of a plan of reorganization by a non-party to an oral agreement cannot be said as a matter of law to have started the running of a statute of limitations.

Dismissal of plaintiffs' complaint assumes that confirmation of the plan of Stephen Wade, Inc., a corporation, constituted breach by Stephen Wade, personally, of his agreements to (1) substitute his own collateral for the SBA loan as agreed; (2) hold plaintiff harmless from the SBA debt; (3) assume the citizens bank debt and obtain a release of that claim for the plaintiffs; (4) hold the plaintiffs harmless from State Sales Tax liability; (5) provide four dealer demos; and (6) provide

health and accident insurance for four years. There is nothing in the record to support these assumptions.

The court apparently reasoned that the confirmation of the Stephen Wade, Inc. plan amounted to a repudiation of the oral agreement between Mr. Larson and Mr. Stephen Wade and started the running of the statute. But in so doing, the court never considered the terms of the plan itself, these never having been presented by defendants.

As a general rule, a statute of limitations does not commence to run until "the cause or right of action has accrued or arisen." 51 Am Jur 2d Section 107, p. 679. A cause of action does not arise or accrue until the plaintiff "could have first maintained the action to a successful conclusion." Ibid.

In cases of repudiation, this rule is further refined as follows:

"[W]here one party has repudiated an executory contract, the adverse party has an election to treat the agreement as broken or not so to treat it, and although there is some authority to a different effect, the rule is generally established by the cases that where an action is brought after the time fixed by an executory contract for the beginning of performance by a party who has committed an anticipatory breach, the period of limitations runs, not from the time of such breach, but from the time fixed by the contract for performance by the defaulting party." [Emphasis supplied.] Limitation of Actions, 51 Am Jur 2d Section 132, p. 701.

Thus, even assuming that the plan of reorganization repudiated the oral agreement, plaintiff could have sued for breach of part or all of that agreement, but that ability to elect does not start the running of the statute. That happens only "from the time fixed by the contract for performance by the defaulting

party." Ibid.

What is that time? In this case, there was no set time for performance under the terms of the oral agreement and therefore, there was no set time for the statute of limitations to start running.

Where there is no set time for performance under a contract, the law implies a reasonable time, and the statute of limitations does not start to run until a reasonable time has elapsed, reasonable time being a question of fact. O'Hair v. Kounalis, 23 Utah 2d 355, 463 P. 2d 799 (1970). This question of fact alone precludes the granting of a motion for summary judgment.

Plaintiffs submit that the terms of the plan of reorganization are not nearly so inconsistent with the oral contract as defendants imply. Plaintiffs further submit that the defendants know this as well and that it is for this reason that they never placed the plan into the record. But be that as it may, there simply is no adequate factual basis for the legal conclusion that the confirmation of the plan of reorganization started the running of the statute of limitations, whether on a theory of repudiation or otherwise.

In opposing the motion to dismiss, plaintiff explained that it was not until he was actually evicted from the dealership premises on June 24, 1983 that he knew that Mr. Wade was not going to live up to the terms of the oral agreement. Again, this issue is not susceptible of resolution on the bare facts presented in the context of defendants' motion to dismiss.


With respect to plaintiffs' tort claims, it is difficult to see how confirmation of the plan of reorganization impairs them at all. There is no repudiation theory, sounding in tort, which can start the running of the statute.

This is particularly true with respect to the torts of breach of fiduciary duty and conversion. By affidavit, Mr. Larson has explained that the \$200,000.00 parts inventory was intact when he left the dealership on June 24, 1983. Only thereafter could it possibly have been converted. By affidavit, Mr. Larson states that the conversion was not complete until eighteen months later, when what remained of the parts was sold for \$5,000.00. All of this is well within the applicable statute of limitations.

CONCLUSION

The decisions of the district court to dismiss plaintiffs' complaint and to refuse to extend the time for filing of a notice of appeal by one day should be reversed. Alternatively, appellants seek remand to the district court with instructions to consider all of plaintiffs' evidence on the question of excusable neglect or good cause, under such guidance as the Court determines to be appropriate, and with further instructions on the law to be applied to the issues created by defendants' motion to dismiss, or such other relief as the court deems appropriate.

RESPECTFULLY SUBMITTED this 23 day of June, 1989.

By: 
L. Edward Robbins
Attorney for Plaintiffs/Appellants

Certificate of Service

I hereby certify that on the 22 day of June, 1989, I served the foregoing Appellants' Brief together with the accompanying Addenda upon the following individuals by hand delivery of four copies thereof to their offices, one copy manually signed by counsel, and by leaving said copies with their receptionist at the following address:

Gary E. Jubber
Patrick L. Anderson
FABIAN & CLENDENIN
Twelfth Floor
215 South State
Salt Lake City, Utah 84111

Attorneys for Defendants/Respondents



ADDENDA

- 1--First Amended Complaint
- 2--Affidavit of Stephen Wade
- 3--Affidavit in Opposition to Motion to Dismiss
- 4--Order (of Dismissal)
- 5--Notice of Extension of Time to Appeal
- 6--Notice of Appeal dated August 16, 1988
- 7--Affidavit of Peter Waldo
- 8--Minute Entry on Motion for Extension of Time
- 9--Notice of Appeal dated September 13, 1988
- 10--Affidavit of Walter P. Larson
- 11--Order Denying Motion for Extension of Time to Appeal

3.32/7.16

LORIN N. PACE #2498
PACE & PARSONS
350 South 400 East, Suite 101
Salt Lake City, Utah 84111
Telephone: (801) 364-1300

FILED IN CLERK'S OFFICE
SALT LAKE COUNTY, UTAH

JUL 9 3 48 PM '87

HONORABLE JUDGE
Lorin N. Pace

IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

WALTER P. LARSON,
an individual, and
LARSON FORD SALES, INC., a
Deleware Corporation,

Plaintiffs,

vs.

STEPHEN WADE, individually, and
STEPHEN WADE, BRYCE WADE, KIPP
WADE, d/b/a SBK, a General
Partnership, and VALLEY FORD,
a Utah Corporation,

Defendants.

:

:

FIRST AMENDED COMPLAINT

(Jury Demanded)

:

:

:

Civil No. 20704273

:

:

:

:

PLAINTIFFS for cause of action against the Defendants,
allege as follows:

General

1. Plaintiffs, WALTER P. LARSON is an individual residing
in Salt Lake County, State of Utah.

2. Plaintiff LARSON FORD SALES is a Delaware Corporation
of which WALTER P. LARSON is the sole shareholder thereof.

3. STEPHEN WADE, BRYCE WADE, and KIPP WADE are individuals residing in Salt Lake County, State of Utah who are doing business as individuals and as a General Partnership under the name and style of SBK as well as VALLEY FORD.

4. On or about the 10th day of Jan., 1983, the Defendant STEPHEN WADE entered into a verbal agreement with the Plaintiff. Whereby the Defendant would purchase and acquire the business known as LARSON FORD SALES from the Plaintiff, WALTER P. LARSON with SYBIL LARSON and 3 children as witnesses. Included in the terms of said agreement were the following:

(a) The Defendant STEPHEN WADE agreed to substitute collateral for the Small Business Administration loan agreement and assume the S.B.A. loan to LARSON FORD SALES and hold Plaintiff, WALTER P. LARSON harmless from the requirements of said S.B.A. loan as guarantor.

(b) Citizens Bank and Commercial Security Bank had made claim against LARSON FORD SALES and WALTER P. LARSON for \$670,000.00 overdraft. STEPHEN WADE agreed to assume this debt to the extent he would obtain a release of said claim by which Plaintiffs would be relieved of this obligation.

(c) STEPHEN WADE agreed to assume and pay the Sales Tax liability of LARSON FORD SALES in an amount of approximately \$512,000.00 and to hold Plaintiffs harmless from the demands thereof.

(d) Defendants agreed to submit on behalf of LARSON FORD SALES, a debtor's plan in the Chapter XI Bankruptcy and obtain approval thereof at no cost to WALTER P. LARSON. Such plan to include payment of \$175,000.00 to WALTER P. LARSON.

(e) To provide WALTER P. LARSON with 4 dealer demos for a period of 4 years.

(f) To provide for WALTER P. LARSON and family health and accident insurance for a period of 4 years after the transaction date.

5. The above referred to verbal contract was based upon good and valuable consideration in that the Plaintiff in reliance on the assurances of Wade did not search further for a backer to support the Larson Ford debtor plan of reorganization except for Wade and two other groups.

First Cause of Action

Breach of Contract

6. Plaintiff incorporates paragraphs 1 through 5 of the First Cause of Action and make them a part hereof.

7. Notwithstanding the agreement between the parties as set forth above, the Defendant STEPHEN WADE breached the contract with the Plaintiff in the following particulars:

(a) No substitution of collateral was made in the S.B.A. loan case as agreed and the Plaintiff has been damaged in the amount of \$509,000.00 and interest thereon at 19.25% since the 30th day of June, 1983.

(b) As a result of the failure of Defendant STEPHEN WADE to settle with Citizens Bank and Commercial Security Bank and obtaining the releases for the Plaintiff, it was necessary for Plaintiff to employ counsel and engage in a grevous lawsuit by which Plaintiff was damaged in the amount of \$100,000.00

(c) The failure of STEPHEN WADE to obtain a release from the Utah State Tax Commission and holding harmless, WALTER P. LARSON from the sales tax responsibility of LARSON FORD SALES has damaged Plaintiff in an amount of approximately \$512,000.00.

(d) The failure to submit an acceptable plan in the Bankruptcy Court Chapter XI Bankruptcy of LARSON FORD SALES which would protect the Plaintiff and cause payment of \$175,000.00 to be made to the Plaintiff has caused a loss of \$175,000.00 as well as the failure to receive \$175,000.00 as agreed.

(e) Plaintiff has suffered damages in the approximate amount of \$50,000.00 for not being able to have the demo automobiles to drive for a 4 year period.

(f) Plaintiff has been damaged by the failure to have health and accident insurance and the cumulative medical and hospital charges since that time have resulted in \$20,000.00 damages.

8. Plaintiff has been damaged in the amounts set forth above.

WHEREFORE Plaintiff prays judgment as hereinafter set forth.

Second Cause of Action

(Interference with Business Relations)

9. Plaintiff incorporates paragraphs 1 through 8 of his introductory allegations as well as the First Cause of Action and incorporates the same by reference.

10. Subsequent to the breach of contract by WADE as set forth in the First Cause the Plaintiffs negotiated an agreement with a partnership known as HGBH, a partnership composed of Owen C. Hogle, Dennis Gay, Stephen Bruno and James Hogle, Jr.

11. In said agreement HGBH agreed to purchase LARSON FORD SALES on terms substantially similar to those set forth and agreed to by WADE as set forth in the First Cause of Action.

12. Plaintiff believes and therefore alleges that the Defendant STEPHEN WADE communicated with HGBH and prevailed upon HGBH to breach its contract with the Plaintiff.

13. The conduct of the Defendant was wrongful in that Defendant STEPHEN WADE, having breached his agreement with the Plaintiff, conspired with and induced the HGBH partnership to breach their contract to provide like benefits. This breach of HGBH was induced in order that the Defendant STEPHEN WADE could submit a creditors plan in Chapter XI Bankruptcy.

WHEREFORE, Plaintiff prays judgment as hereinafter set forth.

Third Cause of Action

(Breach of Fudiciary duty and unjust enrichment and conversion)

14. Plaintiff incorporates paragraphs 1 through 12 and specifically make them a part hereof.

15. In the process of and concurrent with the negotiations involved in the contract referred to in the First Cause of Action herein, the Plaintiff made available to the Defendant confidential data and information in order that the Defendant could formulate and provide a debtor in possession plan for the Larson Ford Sales Chapter XI Plan of Reorganization. This information was provided STEPHEN WADE for the express reason that Defendant WADE gave his solemn word of honor as a bishop in the L.D.S Church that if Defendant WADE could not support a debtors plan of reorganization as agreed with Plaintiff that the Defendant would take no action whatsoever that would harm or injure Plaintiff, but would back off and not interfere with Plaintiff's debtors Plan of Reorganization.

16. The Defendant STEPHEN WADE made use of the information received and with the afore mentioned assurances that Defendant would take no action to harm Plaintiff, he, together with his brothers, Defendant BRYCE WADE and Defendant KIPP WADE d/b/a SBK, a partnership took actions allowing Defendants to come into possession of the following assets.

(a) J. & J. lease, value \$1,800,000.00 which became the property of SBK while LARSON FORD SALES had substantial unsecured indebtedness and since SBK took the lease (approx. June, 1983) SBK has profitted in an amount of approximately \$25,000.00/month thereafter. None of which has accrued to the unsecured indebtedness.

(b) Automobile parts inventory, value approximately \$200,000.00.

(c) Furniture equipment, value approximately \$90,000.00.

These above assets (a), (b), and (c) had been pledged by LARSON FORD SALES to the S.B.A. as security for the SBA Guaranteed Loan for which Plaintiff is obligated as guarantors.

17. The Defendant having received the confidential data and information about the operation of LARSON FORD SALES, INC., did utilize said information such that based upon a claimed debt of \$130.12 did submit a contrary and adversary Plan to the Plaintiff's plan as a creditors plan to the bankruptcy court which plan violated the contractual agreement between Plaintiff and Defendants as well as took an unfair advantage of confidential information provided by Plaintiff which use constituted a breach on the S.B.A. loan of LARSON FORD SALES, however, the assets were converted to the use and benefit of the Defendants and the Defendants were unjustly enriched thereby in an amount of \$2,155,000.00 and the Plaintiff was diminished in a like amount to his damage.

WHEREFORE, Plaintiff prays judgment as hereinafter set forth.

Fourth Cause of Action

(Punitive Damages)

18. Plaintiff incorporates paragraphs 1 through 16 and specifically make them a part hereof.

19. The damages occasioned to the Plaintiff herein are substantial and are the result of intentional, malicious conduct calculated to unjustly enrich the Defendants STEPHEN WADE, BRYCE

WADE and KIPP WADE individually and in the form of SBK, a partnership, and of VALLEY FORD, a Corporation.

20. By reason of the malicious conduct of the Defendants the Plaintiff is entitled to punitive damages in the amount of \$500,000.00.

WHEREFORE, Plaintiff prays damages as follows:

1. On his First and Second Cause of Action as follows:

(a) Failure to substitute collateral and to hold Plaintiff harmless from S.B.A. loan, the sum of \$509,000.00 plus interest at 19.25% per anum since July 1, 1983, even through the SBA had agreed to Defendant's proposal to substitute his collateral for the LARSON FORD loan and assume the said loan.

(b) For failure to resolve the dispute with Citizens Bank and Commercial Security Bank in an amount of \$100,000.00 with release for Plaintiff.

(c) For failure to obtain releases for Plaintiff's liability in the amount of approximately \$512,000.00 in Utah State Sales Tax matter.

(d) For failure to submit the agreed upon debtor's plan in bankruptcy, the sum of \$11,175,000.00.

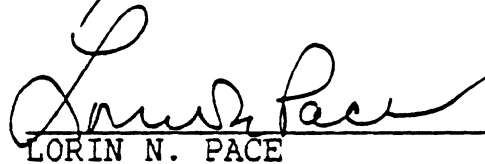
(e) For failure to provide demo autos for 4 years the sum of \$50,000.

(f) For failure to provide health and accident insurance for 4 years, damages in the amount of \$20,000.00

2. On his Third Cause of Action for breach of fiduciary duty and unjust enrichment and conversion for \$2,155,000.00 plus interest since July 1, 1983.

3. For punitive damages \$500,000.00.

DATED this 8th day of July, 1987.


LORIN N. PACE

ADDENDUM 2

JUL 31 12 59 PM '87

H. JUDICIAL CLERK

Earl Matheson

Gary E. Jubber, A1758
Patrick L. Anderson, A4787
FABIAN & CLENDENIN,
a Professional Corporation
Attorneys for Defendants
Twelfth Floor
215 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 531-8900

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

WALTER P. LARSON, an individual
and LARSON FORD SALES, INC., a
Delaware corporation,

Plaintiffs,

vs.

STEPHEN WADE, individually, and
STEPHEN WADE, BRYCE WADE, KIPP
WADE, d/b/a SBK, a general
partnership, and VALLEY FORD,
a Utah corporation,

Defendants.

AFFIDAVIT OF STEPHEN WADE

Civil No. ~~G-0704273~~

C-87-4273

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

STEPHEN WADE, being duly sworn, states as follows:

1. I am the President, a Director and the principal
shareholder of Stephen Wade, Inc.

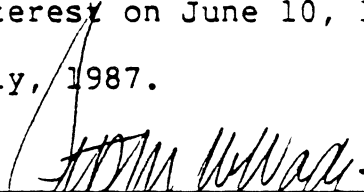
2. I am a named defendant in the above-referenced mat-
ter and have personal knowledge of the creditors Plan of Reorga-
nization submitted on behalf of Stephen Wade, Inc. in In re
Larson Ford Sales, Bankruptcy No. 82C-02186.

3. In early spring of 1983, the creditors Plan of Reorganization referred to in paragraph 1 was submitted on behalf of Stephen Wade, Inc., in connection with the aforementioned bankruptcy case.

4. On or about June 1, 1983, a Second Amended Plan of Reorganization was submitted on behalf of Stephen Wade, Inc., in the Larson Ford Sales Chapter 11 bankruptcy.

5. On June 10, 1983, the Bankruptcy Court confirmed the Plan of Reorganization filed by Stephen Wade, Inc. and entered an order confirming the plan. Notice of the Confirmation Order was mailed to all parties in interest on June 10, 1983.

DATED this _____ day of July, 1987.



Stephen Wade

SUBSCRIBED AND SWORN TO before me this 30 day of ~~June~~, 1987.
July



NOTARY PUBLIC

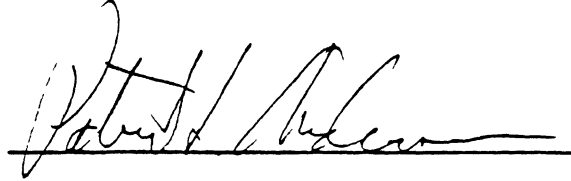
Residing At: W.C. VT

My Commission Expires:

9-25-89

CERTIFICATE OF SERVICE

This is to certify that on this 30th day of July, 1987, I caused to be mailed a true and correct copy of the foregoing Affidavit of Stephen Wade, postage prepaid, to Lorin N. Pace, Esq., Pace & Parsons, 350 South 400 East, Suite 101, Salt Lake City, Utah 84111.

A handwritten signature in cursive script, appearing to read "Robert H. Adams", is written over a horizontal line.

072987A:PLA

ADDENDUM 3

LORIN N. PACE #2498
PACE & PARSONS
350 South 400 East #101
Salt Lake City, Utah 84111
Telephone: (801) 364-1300

Attorney for Plaintiffs

FILED IN CLERK'S OFFICE
SALT LAKE COUNTY, UTAH

OCT 19 2 40 PM '87

BY Rafael Trujillo

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-oOo-

WALTER P. LARSON, an individual,)
and LARSON FORD SALES INC., a)
Delaware Corporation,)
Plaintiffs,)

AFFIDAVIT IN OPPOSITION
TO DEFENDANTS' MOTION
TO DISMISS

-vs-

STEPHEN WADE, individually, and)
STEPHEN WADE, BRYCE WADE, KIPP)
WADE dba SBK, a General Partnership)
and VALLEY FORD, a Utah Corporation,)
Defendants.)

Civil No. C-0704273

C87-4273

STATE OF UTAH)
COUNTY OF SALT LAKE)
:ss.

Walter P. Larson, being first duly sworn deposes and says:

1. That neither he nor any agent knew that Defendant Stephen Wade, Bryce Wade, Kipp Wade, or the partnership, or Valley Ford were not going to comply with the oral contract made with Walter P. Larson until June 24, 1983.

2. It was only on June 24, 1983, that Plaintiff became aware that the Defendants would not honor their agreement. This happened when Plaintiff was advised on June 24, 1983, that he would be required to vacate the Larson Ford Sales facilities. Until this time he expected Wade to perform on his word of honor."

3. The parts (value \$200,000.00) pledged as collateral to SBA loan were intact on June 24, 1983. It was only learned eighteen (18) months later when an official sale took place that all but \$5,000.00 (appraised) had disappeared.

4. The reorganization plan was of Stephen Wade Inc. which organization is not a party to this action.

DATED this 16 day of Oct., 1987.


WALTER P. LARSON

Personally appeared before me Walter P. Larson who duly acknowledged to me that he had executed the above and foregoing Affidavit and that the information contained therein is true and correct to the best of his knowledge, information and belief.

SUBSCRIBED and SWORN to before me this 16 day of Oct 1987.


Notary Public

My Commission Expires:

8-23-91

Residing At: S. h. County, Utah

ADDENDUM 4



STATE OF UTAH

Defendants.

• • • • •

Civil No. C87-04273
(Judge Dennis Frederick)

This matter came before this Court for hearing on June 20, 1988, pursuant to Stephen Wade, Bryce Wade, Kipp Wade, d/b/a S.B.K. and Valley Ford's Motion to Dismiss Plaintiffs' First Amended Complaint. At the hearing, defendants were represented by Gary E. Jubber and plaintiffs Walter P. Larson and Larson Ford Sales, Inc., were represented by Peter Waldo. The Court having considered the memoranda and arguments of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss plaintiffs' First Amended Complaint shall be considered as a Motion for Summary Judgment and based on the record and the absence of any material issues of fact, plaintiffs' First Amended Complaint is dismissed with prejudice.

DATED this 14th day of July, 1988.

BY THE COURT

Dennis Frederick
District Court Judge

ATTEST
H. C. [illegible]

CERTIFICATE OF SERVICE

This is to certify that on this 22nd day of June, 1988, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Order, to the following:

Peter Waldo, Esq.
5250 South 300 West, Suite 255
Salt Lake City, Utah 84107

Karen Lichner

062188A:PLA

ADDENDUM 5

WALTER PARK LARSON, PRO SE
8505 El Paseo Grande
La Jolla, California 92037
(619) 459-2208

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

Walter H. Horduch

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WALTER P. LARSON, an individual and
LARSON FORD SALES, INC., a Delaware
corporation,

Plaintiffs,

vs.

STEPHEN WADE, an individual, and
STEPHEN WADE, BRYCE WADE, KIPP WADE
dba SBK, a General Partnership and
VALLEY FORD, a Utah corporation,

Defendants.

NOTICE OF EXTENSION
OF TIME TO APPEAL

Civil No. C87-4273

Pursuant to Rule 4(e) of the Rules of Utah Court of Appeals, seeks for additional time to file his appeal and alleges the following in support of this motion:

1. Plaintiff is represented by counsel, Peter Waldo;
2. Plaintiff has not received Notice of the time the time that Judgment of Dismissal was filed;
3. Plaintiff is in the process of changing residence to California and has been out of the State of Utah during the month of July and until this date;
4. Plaintiff conveyed to his attorney that he wished to appeal the dismissal action in this matter;


5. Plaintiff's attorney stated he would appeal or file motion for rehearing.

6. The date of Judge Fredericks order was July 14, 1988, and under Rule 6 of Utah Rule of Civil Procedure would require filing an appeal by August 15, 1988.

7. Plaintiff is presently in San Diego and is filing this motion by telephone and will supply necessary documents attesting to the truthfulness of these facts within 10 days from this date.

Plaintiff hereby requests extension of the time for filing a notice of appeal for 10 days.

DATED THIS 16th day of August, 1988.

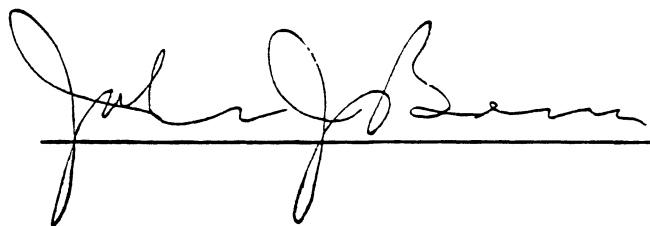

WALTER PARK LARSON, PRO SE WBL:sk

CERTIFICATE OF MAILING

I certify that a true and correct copy of the above MOTION FOR EXTENSION OF TIME TO APPEAL was mailed postage prepaid on this 16th day of August 1988 to the following:

Gary E. Juber and
Patrick L. Anderson
Fabian and Clendenin
215 South State Street
P. O. Box 510210
Salt Lake City, UT 84151

Peter Waldo
Dan Adamson & Associates
5250 South 300 West
Busch Atrium Building, #255
Salt Lake City, UT 84107



ADDENDUM 6

WALTER PARK LARSON, PRO SE
8505 El Paseo Grande
La Jolla, California 92037
(619) 459-2208

FILED IN CLERKS OFFICE
SALT LAKE COUNTY, UTAH

AUG 16 4 07 PM '03

H. L. CLERK

3026924 IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WALTER P. LARSON, an individual, and
LARSON FORD SALES, INC., a Delaware
corporation,

Plaintiffs,

vs.

STEPHEN WADE, an individual, and
STEPHEN WADE, BRYCE WADE, KIPP WADE
dba SBK, a General Partnership and
VALLEY FORD, a Utah corporation,

Defendants.

NOTICE OF APPEAL

Civil No. C87-4273

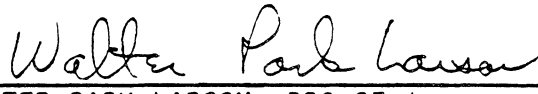
Pursuant to Rule 4(a) of the Rules of Utah Court of Appeals, Plaintiff makes this appeal based on the following information:

1. Plaintiff is represented by counsel, Peter Waldo;
2. Plaintiff has not received Notice of the time the time that Judgment of Dismissal was filed;
3. Plaintiff is in the process of changing residence to California and has been out of the State of Utah during the month of July and until this date;
4. Plaintiff conveyed to his attorney that he wished to appeal the dismissal action in this matter;
5. Plaintiff's attorney stated he would appeal or file motion for rehearing.

attorney has not filed either action and did not intend to do so.

7. Plaintiff wishes to file this Appeal in his own right until such time as he can obtain another attorney.

DATED THIS 16th day of August, 1988.



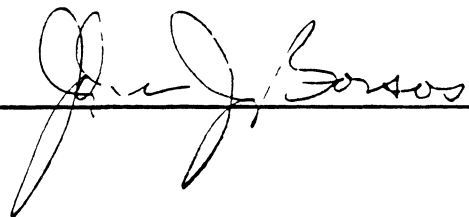
WALTER PARK LARSON, PRO SE by JJS

CERTIFICATE OF MAILING

I certify that a true and correct copy of the above NOTICE OF APPEAL was mailed postage prepaid on this 16th day of August 1988 to the following:

Gary E. Juber and
Patrick L. Anderson
Fabian and Clendenin
215 South State Street
P. O. Box 510210
Salt Lake City, UT 84151

Peter Waldo
Dan Adamson & Associates
5250 South 300 West
Busch Atrium Building, #255
Salt Lake City, UT 84107



ADDENDUM 7

UDICIAL DIST

~~JUDICIAL DIST~~

[illegible]

AFFIDAVIT OF PETER WALDO

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Civil No.: C87-4273

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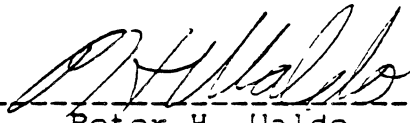
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in this matter was signed by the Court, and therefore was not aware of the time that was running for appeal of said Order.

4. Due to lack of communication with the Larsons, an Appeal was not filed by our office.

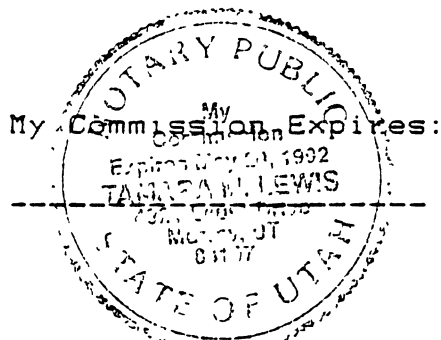
5. During the hearing on the Motion to Dismiss, I was asked by the Court whether I had filed an Affidavit on behalf of my client in opposition to the Motion. I answered the Court no I had not filed an Affidavit, however, an Affidavit was filed by the Larson's previous counsel in opposition to the Motion.

Further Affiant sayeth not.



Peter H. Waldo

SUBSCRIBED AND SWORN to before me this 8th day of September, 1988.





Notary Public

Residing In:

Murray, UTAH

ADDENDUM 8

Kitter & Larson et al,
Plaintiff
Stephen Wade et al,
Defendant

CASE NO: C-87-4273

of hearing: Div. _____ Annul. _____ Supp. Order _____ OSC. _____ Other _____
ient: Pltff. _____ Deft. _____
tty: John Barrow
tty: Gary Subber
rn & Examined: _____
ers: _____
Summons _____ Stipulation _____
Waiver _____ Publication _____
☐ Default of Pltff/Deft Entered
Date: Sept. 12, 1988
Judge: Dennis Frederick
Clerk: J. B.
Reporter: P. R. Rich
Bailiff: _____

ORDERS:

Custody Evaluation Ordered ☐ Custody Awarded To _____
Visitation Rights _____

Pltff/Deft Awarded Support \$ _____ x _____ = _____ Per Month
Pltff/Deft Awarded Alimony \$ _____ Per Month/Year ☐ Alimony Waived
Payments to be made through the Clerk's Office: _____

Atty. fees to the _____ in the amount of _____ ☐ Deferred
Home To: _____

Furnishings To: _____ Automobile To: _____
Each Party Awarded their Personal Property
Pltff/Deft. to Maintain Debts and Obligations
Pltff/Deft. to Maintain Insurance on Minor Children
Restraining Order Entered Against _____
Pltff/Deft. Granted Judgment for Arrearage in the Sum of \$ _____
90-Day Waiting Period is Waived
Divorce Granted To _____ As _____
Decree To Become Final: ☐ Upon Entry ☐ 3-Month Interlocutory
Former Name of _____ Is Restored

Based on the failure of Deft to appear in response to an order of the court and on motion of Pltffs counsel, court
orders _____ / _____ shall issue for Deft. _____
Returnable _____ Bail _____

Based on written stipulation of respective counsel/motion of Plaintiff's counsel, and good cause appearing therefor,
court orders the above case be and the same is hereby dismissed without prejudice.

Based on written stipulation of respective counsel/motion of Plaintiff's counsel, court orders _____

The Plaintiff's Motion for Extension of Time
to Appeal is Argued to the Court and Submitted
the Court denies the motion.

ADDENDUM 9

Attorney for Plaintiffs
807 East South Temple, #101
Salt Lake City, Utah 84102
(801) 533-8883

SEP 14 10 54 AM '88

H.C. CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WALTER P. LARSON, an individual and
LARSON FORD SALES, INC., a Delaware
corporation,

Plaintiffs and Appellant,

vs.

STEPHEN WADE, an individual, and
STEPHEN WADE, BRYCE WADE, KIPP WADE
dba SBK, a General Partnership and
VALLEY FORD, a Utah corporation,

Defendants and Respondent.

NOTICE OF APPEAL

Civil No. C87-4273

Pursuant to Rule 4(a) of the Rules of the Utah Supreme Court, Plaintiff makes this appeal of a denial of his motion for extension of time to appeal based on the following information:

1. Plaintiff was represented by counsel, Peter Waldo, in a hearing on a summary judgment on June 20, 1988;
2. Plaintiff was not given Notice of the time that Judgment of Dismissal was filed, although tentative drafts of the order are believed to have been sent to Mr. Waldo;
3. Plaintiff, Walter Park Larson, was in the process of changing residence to California and has been out of the State of Utah during the months of July and August and did not return until September 1, 1988;

4. Plaintiff conveyed to his attorney that he wished to appeal the dismissal action in this matter and repeatedly contacted his attorney to discover when the appeal should be filed;

5. Plaintiff thought his attorney stated he was going to appeal or to file a motion for rehearing, but due to not receiving notification of the filing date of the order, Plaintiff's attorney did not know that the order had been filed.

6. Late on August 15, 1988, Plaintiff contacted the court and was notified that Plaintiff's attorney has not filed either action and did not intend to do so.

7. On August 16, 1988, Plaintiff filed a pro se appeal with the Utah Court of Appeals;

8. On September 12, 1988, instead of an ex parte motion, at a hearing in open court on Plaintiff's motion for extension of time to appeal, Plaintiff's newly hired attorney, John Borsos attempted to have Plaintiff Park Larson present his oral testimony of the facts at issue. This proffer of testimony was objected to and such objection was sustained. Based upon the affidavit of Mr. Waldo and the notice of appeal filed August 16, 1988, Third District Court Judge, J. Dennis Frederick, denied the motion for extension of time to appeal.

9. Plaintiff wishes now to appeal to the Supreme Court of Utah to grant Plaintiff's motion for a one-day extention of time to file its Notice of Appeal.

DATED THIS 3rd day of September, 1988.

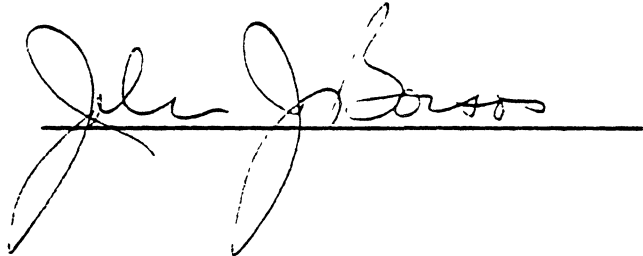

JOHN J. BORSOS
Attorney for Plaintiffs and Appellant

CERTIFICATE OF MAILING

I certify that a true and correct copy of the above NOTICE OF APPEAL
hand delivered on
was mailed postage prepaid on this 13th day of September 1988 to:

Gary E. Juber and
Patrick L. Anderson
Fabian and Clendenin
215 South State Street
P. O. Box 510210
Salt Lake City, UT 84151

Peter Waldo
Dan Adamson & Associates
5250 South 300 West
Busch Atrium Building, #255
Salt Lake City, UT 84107

A handwritten signature, likely "John J. Sasso", is written over a horizontal line.

ADDENDUM 10

AFFIDAVIT

Affiant being duly sworn deposes and says as follows:

1. Lorin Pace was my attorney of record, and he filed this lawsuit against the defendants. (July, 1987)

2. After I discovered that Mr. Pace had a conflict of interest in another matter he represented me in, I dismissed Mr. Pace and entered an appearance Pro Se in this matter. (March, 1988)

3. Upon receiving notice of the defendants' hearing for a dismissal, I contacted Peter Waldo and asked him to represent me in the Stephen Wade case. Mr. Waldo agreed and entered his appearance. I had already paid Mr. Waldo a retainer to handle other matters for me.

4. Because of impending eviction of my wife and 6 children from our California home of 14 years and to report to a new job for which I was three days late, I had to go immediately to San Diego and was unable to meet with Mr. Waldo. It was my intention to return to Salt Lake for the hearing.

5. I called Mr. Waldo a number of times about the hearing and about his preparation and explained I could not get back to Salt Lake before the hearing date because of the illness of our 20-year-old daughter, Rachel, who had gone blind in one eye and was now in the midst of a nervous breakdown, and because our 14-year-old son, Nathan, was immobilized from a traumatic neck injury. I asked Mr. Waldo if he would request an extension of time from the court as new counsel so I could get back to Salt Lake to meet with him.

6. Mr. Waldo said he did not like to ask the court for more time, that he did not think he would have a problem but did not rule out asking for a continuation.

7. I called Mr. Waldo the Friday before the hearing to see if he got the extension. He said "No." I explained I had an affidavit on the way to me from Connecticut but it had been sent to San Diego and had not arrived yet, and I would have to leave the next morning to drive to Salt Lake.

Waldo had not reviewed the legal file until that morning--the day of the hearing. (June 20, 1988)

9. The Defendant was dismissed in the hearing.

10. Mr. Waldo told me in the courtroom after the hearing that he would have no problem making an appeal or asking for a re-hearing and said he and his partner would decide which course of action would be best. He then was out of town, and I couldn't discuss the case with him.

11. I had to return to San Diego because again my home was threatened by foreclosure and I had to continue to attempt to borrow monies and obtain subordination agreements. I called Mr. Waldo at least three times and was told the court had not yet signed the order so there was no need to file a notice of appeal. Mr. Waldo at that time reminded me that the appeal would cost money. I explained that I was contacting a friend who had agreed to advance the money for me.

12. I talked by phone to Dan Adamson, senior partner of the firm, who told me he did not know how much of the retainer was left because their accounting system was out of order. I never received a statement from the law firm.

13. On August 15, 1988, Mr. Waldo called my wife in San Diego on another matter late in the day. She asked Mr. Waldo about the appeal he was going to file, and Mr. Waldo replied that he did not know when the last day to file was.

14. I called the Clerk of the Court early the next morning and was told the last day to file was the day before, Monday.

15. I called Mr. John Borsos and asked him to file in my name for an extension of time to appeal and also to file a notice of appeal.

17. On Friday, September 9, 1988, I asked Mr. Borsos to represent me and enter an appearance in time for the hearing.

18. Mr. Borsos told me he thought the affidavit I had prepared to explain all of this was not needed because I had come all the way from California for the hearing and I could give direct testimony to the court in lieu of the Ex Parte hearing that we were entitled to have.

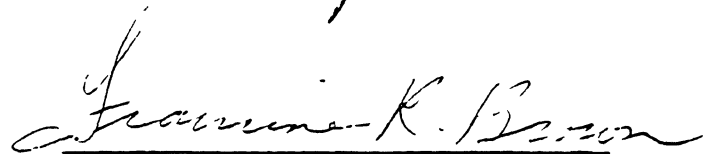
19. At the time of the hearing, I was not allowed to speak.

20. I assure the court I have a substantial case to present with arguments that are well founded in law with very impressive evidence, and I beg the court for the opportunity to present my case as it means a great deal to me and my family.

21. Mr. Borsos has agreed to represent me in future proceedings.


Walter P. Larson

SUBSCRIBED AND SWORN to before me this 13th day of September, 1988.


Notary Public

My Commission Expires:

4-26-88

Residing in:

Salt Lake County

ADDENDUM 11

Gary E. Jubber, Al758
FABIAN & CLENDENIN,
a Professional Corporation
Attorneys for Defendants
Twelfth Floor
215 South State Street
P.O. Box 510210
Salt Lake City, Utah 84151
Telephone: (801) 531-8900



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WALTER P. LARSON, an individual
and LARSON FORD SALES, INC.,
a Delaware corporation,

Plaintiffs,

v.

STEPHEN WADE, an individual,
and STEPHEN WADE, BRYCE WADE,
KIPP WADE, dba SVK, a general
partnership and VALLEY FORD, a
Utah corporation,

Defendants.

ORDER DENYING MOTION FOR
EXTENSION OF TIME TO
APPEAL

Civil No. C87-04273
Judge J. Dennis Frederick

Plaintiffs' Motion for Extension of Time to Appeal
(mistitled "Notice of Extension of Time to Appeal") dated August
16, 1988, came on for hearing before the Honorable J. Dennis
Frederick in his courtroom on September 12, 1988; John J. Borsos
appearing on behalf of the plaintiffs, Walter P. Larson and
Larson Ford Sales, Inc. and Gary E. Jubber, Fabian & Clendenin,
appearing on behalf of the defendants. After consideration of
the pleadings on file herein, the arguments of counsel and the

affidavit of Peter Waldo submitted to the court at the time of the hearing, the court found that there had been an insufficient showing of excusable neglect or good cause, as required by Rule 4(e) of the Rules of the Utah Court of Appeals, by the plaintiffs/appellants to extend the time for filing a notice of appeal. Based upon the foregoing,

IT IS HEREBY ORDERED that the Motion for Extension of Time to Appeal (mistitled "Notice of Extension of Time to Appeal") is denied.

DATED this 19th day of Sept, 1988.

BY THE COURT

J. Dennis Frederick
District Court Judge

APPROVED AS TO FORM:

John J. Borsos

John J. Borsos
Attorney for Walter Park Larson and
Larson Ford Sales, Inc.

ATTEST
HELEN HINDLEY

By

Helen Hindley
Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that on this 16 day of September, 1988, I mailed, postage prepaid, a true and

correct copy of the foregoing Order Denying Motion for Extension
of Time to Appeal to:

Peter Waldo
Dan Adamson & Associates
5250 South 300 West
Busch Atrium Building, #255
Salt Lake City, Utah 84107

Done Reudo.

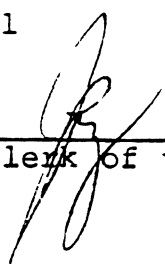
CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of
Sept, 1988, I mailed, postage prepaid, a true and
correct copy of the foregoing Order Denying Motion for Extension
of Time to Appeal to:

✓ Peter Waldo
Dan Adamson & Associates
5250 South 300 West
Busch Atrium Building, #255
Salt Lake City, Utah 84107

✓ John J. Borsos
807 East South Temple, #101
Salt Lake City, Utah 84102

✓ Gary E. Jubber
Fabian & Clendenin
215 South State, #1200
Salt Lake City, Utah 84151


Clerk of the Court

GEJ:091288A