

1988

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

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Larson v. Wade*, No. 880344.00 (Utah Supreme Court, 1988).

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BRIEF

IN THE UTAH SUPREME COURT

WALTER P. LARSON, an individual,)	
and LARSON FORD SALES, INC., a)	
Delaware corporation,)	BRIEF OF RESPONDENTS
)	
Plaintiffs/Appellants,)	
)	
v.)	Case No. 88-0344
)	
STEPHEN WADE, an individual, and)	
STEPHEN WADE, BRYCE WADE, KIPP)	
WADE, dba SVK, a general)	Argument Priority
partnership, and VALLEY FORD, a)	Classification 14(b)
Utah corporation,)	
)	
Defendants/Respondents.)	

ON APPEAL FROM AN ORDER ENTERED BY THE HONORABLE
J. DENNIS FREDERICK IN THE THIRD JUDICIAL DISTRICT
COURT FOR SALT LAKE COUNTY, STATE OF UTAH

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FILED
AUG 23 1989

Clerk, Sup.

IN THE UTAH SUPREME COURT

WALTER P. LARSON, an individual, and LARSON FORD SALES, INC., a Delaware corporation, Plaintiffs/Appellants, v. STEPHEN WADE, an individual, and STEPHEN WADE, BRYCE WADE, KIPP WADE, dba SVK, a general partnership, and VALLEY FORD, a Utah corporation, Defendants/Respondents.

BRIEF OF RESPONDENTS

Case No. 88-0344

Argument Priority
Classification 14(b)

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STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) (Supp. 1988).

NATURE OF PROCEEDINGS

The district court dismissed Plaintiffs' Amended Complaint on statute of limitations grounds. The ruling was announced from the bench on June 20, 1988, and memorialized in an order which was signed and entered on July 14, 1988. R. 72-74. On August 16, 1988, thirty-three days after the entry of the order, plaintiffs filed a Notice of Appeal and a "Notice of Extension of Time to Appeal." R. 75-78. The "Notice of Extension of Time to Appeal" was treated as a Rule 4(e) Motion to Extend the Time to Appeal. R. 97-98.

On September 12, 1988, the district court denied the Motion for Extension of Time to Appeal and on the next day plaintiffs filed a Notice of Appeal of the district court's denial of its motion to extend the time to appeal. R. 89-92. The Order denying Plaintiffs' Motion for Extension of Time to Appeal was signed and entered on September 19, 1988. R. 97-98. The denial of Plaintiffs' Motion for Extension of Time to Appeal is the subject of this appeal.^{1/}

^{1/} The appeal from the July 14, 1988 Order dismissing plaintiffs' Amended Complaint was dismissed by this Court as untimely. (Case No. 880386).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

There is only one issue on appeal: Did the district court abuse its discretion in denying plaintiffs' motion for extension of time to appeal?

APPLICABLE LAW

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

Appeal from final judgment and order. 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 appealed from; provided however, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 10 days after the date of entry of the judgment or order appealed from.

Rule 4(c) of the Rules of the Utah Supreme Court provide:

(c) Filing prior to entry of judgment or order. Except as provided in Paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment or order but before the entry of the judgment or order of the district court shall be treated as filed after such entry and on the day thereof.

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

Extension of time to appeal. 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.

STATEMENT OF THE CASE

A. Nature Of The Case, Course Of The Proceedings And The Disposition Below.

Plaintiffs filed their original complaint on June 24, 1987 and an amended complaint on July 9, 1987. R. 2-19. Defendants moved to dismiss on statute of limitations grounds. R. 26-38. In response to defendants' Motion to Dismiss, plaintiffs filed a memorandum and affidavit in support. R. 46-50. The motion was heard on June 20, 1988 by Judge Dennis Frederick. R. 72. The district court considered the motion as a motion for summary judgment and based on the record and the absence of any material issues of fact, dismissed the complaint. R. 72. The ruling was announced in court and a proposed order was mailed to plaintiffs' counsel on June 22, 1988. R. 72-74.

The order of dismissal was entered on July 14, 1988. R. 73-74. The order became final and appealable on August 15, 1988. On August 16, 1988, plaintiffs filed a Notice of Appeal and a "Notice of Extension of Time to Appeal. R. 75-78. On September 12, 1988, Judge Frederick considered the "Notice of Extension of Time to Appeal" as a Rule 4(e) motion to extend the time to appeal. After consideration of the affidavit of Peter Waldo and the arguments of counsel, the district court denied plaintiffs' motion for extension of time to appeal. R. 89.

STATEMENT OF FACTS

The facts involved in this case are as follows:

1. On June 24, 1987 plaintiffs filed their complaint and on July 9, 1987 plaintiffs filed their first amended complaint. R. 2-10 and 11-19.

2. Defendants moved to dismiss plaintiffs' Amended Complaint on the grounds that the plaintiffs' claims were barred by the applicable statute of limitations. R. 26-33.

3. In response to defendants' Motion to Dismiss, plaintiffs filed a memorandum that was supported by the Affidavit of Walter P. Larson dated October 16, 1987. R. 46-50.

4. After considering the memoranda, affidavits and arguments of counsel, Judge Frederick granted defendants' Motion to Dismiss Plaintiffs' First Amended Complaint and announced this decision from the bench at the hearing held on June 20, 1988. R. 72.

5. A copy of the order, which was signed by Judge Frederick on July 14, 1988 without any modifications, was mailed to plaintiffs' counsel, on June 22, 1988. R. 73-74.

6. The Order of Dismissal was signed and entered on July 14, 1988. R. 73-74.

7. Pursuant to Rule 4(a) of The Rules of the Supreme Court, plaintiffs had thirty (30) days to file a Notice of Appeal with the clerk of the district court.

8. The thirty days expired on August 15, 1988 without plaintiffs having filed the requisite notice or motion for extension of time. R. 73-78.

9. On August 16, 1988, after the time period had expired, plaintiffs filed a Notice of Appeal and "Notice of Extension of Time to Appeal." R. 75-78.

10. Plaintiffs admit in their Notice of Appeal and "Notice of Extension of Time to Appeal" that they were represented by counsel during the appeal period.^{2/} R. 75-78.

11. On September 12, 1988, Judge Frederick denied plaintiffs' Motion for Extension of Time to Appeal (mistitled "Notice of Extension of Time to Appeal") and announced this ruling from the bench. R. 89.

12. Plaintiffs were represented by counsel, John J. Borsos, at the September 12, 1988 hearing. R. 89.

13. On September 14, 1988, plaintiffs filed a Notice of Appeal to this Court, which appeal is the basis of this proceeding. R. 90-92. This Notice of Appeal included an Affidavit of Walter P. Larson, dated September 13, 1988. R. 90-95.

^{2/} Defendants believe that paragraphs 13 through 15 of plaintiffs' Statement of Facts are misleading. Those statements refer to the pro se filing of a Notice of Appeal, yet the record discloses no absence of counsel during the appeal period. Furthermore, the August 16, 1988 Notice of Appeal was signed by John J. Borsos on behalf of Walter P. Larson, pro se and John J. Borsos formally appeared as plaintiffs' counsel on September 8, 1988. R. 77-78 and 80. Peter Waldo has never withdrawn as plaintiffs' counsel.

14. The September 13, 1988 Affidavit of Walter P. Larson was not presented to the district court and was not considered by the district court.^{3/} R. 89-95.

15. On September 19, 1988, the district court signed the Order Denying Plaintiffs' Motion for Extension of Time. R. 97-99.

SUMMARY OF ARGUMENT

The only issue properly presented for appeal is whether the district court abused its discretion in denying plaintiffs' motion for an extension of time to appeal after the notice of appeal was filed late. Not only did the district court act well within the boundaries of its discretion, but its ruling in denying plaintiffs' Motion for Extension of Time was clearly correct.

Plaintiffs have failed to make a sufficient showing of excusable neglect. The only reason given for the late filing -- that plaintiffs' attorney did not know the last day in which notice of appeal could be filed -- indicates inadvertence and oversight on the part of plaintiffs' counsel. Therefore, the district court did not abuse its discretion in denying the motion.

^{3/} Defendants object to the consideration of paragraph 19 of plaintiffs' Statement of Facts since those facts were not considered by the district court in ruling on plaintiffs' Motion for Extension of Time. R. 89 and 90-95. See Point IIA, infra.

Defendants petition the Court to strike Section II of plaintiffs' brief. That section addresses the district court's ruling on defendants' motion to dismiss. An appeal on that decision has already been dismissed by this Court. Furthermore, plaintiffs did not raise any issue addressed in Section II as an issue in their docketing statement. These arguments are not properly before the Court.

ARGUMENT

I. THE DISTRICT DID NOT ABUSE ITS DISCRETION BY DENYING PLAINTIFFS' MOTION FOR AN EXTENSION OF TIME.

Rule 4(a) of the Rules of the Utah Supreme Court, provides that a "notice of appeal . . . 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." The filing of a notice of appeal within thirty days of the entry of judgment is a jurisdictional prerequisite essential to securing appellate review. Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d 952, 958 (Utah 1984). See Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264-65 (1978); Mayfield v. United States Parole Comm'n, 647 F.2d 1053, 1055 n.5 (10th Cir. 1981) (per curiam).

The court may grant an extension of time in which to file a notice of appeal "upon a showing of excusable neglect or good cause" Utah RSC 4(e). However, this Court has declared that standard "necessarily a strict one." Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d at 959. See

Varian-Eimac Inc. v. Lamoreaux, 767 P.2d 569, 570-71 (Utah Ct. App. 1989) (Utah appellate courts have consistently held that jurisdiction is terminated once a statutory time limit is exceeded). Furthermore, a district court's factual determination in applying that standard will not be overturned absent an abuse of the court's discretion. Buckley v. United States, 382 F.2d 611, 615 (10th Cir. 1967), cert. denied, 390 U.S. 997 (1968); Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d at 961.

The Advisory Committee Notes to Rules of the Utah Supreme Court, Rule 4 states:

Excusable neglect or good cause under [Rule 4] refers generally to an extraordinary circumstance that prevented the movant from filing a timely notice of appeal and not to inadvertence or oversight on the part of counsel or to the failure of the client to authorize an appeal.

The Supreme Court of Utah has reaffirmed that "[i]nadvertence or mistake of counsel does not constitute the type of unique or extraordinary circumstances contemplated by [the] strict standard" of Rule 4. Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d at 960.

In this case, plaintiffs have failed to show any extraordinary circumstances. The only reason offered for the late filing is that the attorney "did not know when the last day to file an appeal was." Appellants' Brief at 9 (emphasis added). There is no dispute that plaintiffs' attorney was present in court on June 20, 1988 when the district court made its ruling and that both plaintiffs and their attorney were aware of that

ruling. Rule 4(c) of Rules of the Utah Supreme Court allows for a notice of appeal to be filed prior to the entry of an order. The appeal therefore could have been filed immediately after the district court's decision was announced in court.^{4/} The decision to wait until the last possible day -- and to then fail to calculate what that day was -- amounts to nothing other than inadvertence and oversight.

In their brief, plaintiffs also claim that their attorney stated that "'the court had not yet signed the order so there was no need to file a notice of appeal.'" Appellants' Brief at 9 (citing R. 94). This statement indicates that counsel was aware of the opportunity to file but rather chose to wait until after the entry of the order. This further indicates inadvertence, not extraordinary circumstances.

The affidavit of Peter Waldo, filed in support of plaintiff's Motion for Extensions of Time, states in paragraph 4 that "[d]ue to lack of communications with the Larsons, an appeal was not filed by our office." R. at 87-88. This statement also demonstrates oversight and inadvertence on the part of plaintiffs' attorney. Lack of communication between counsel and client does not give rise to a showing of extraordinary circumstance. See Prowswood, Inc. v. Mountain Fuel Supply Co.,

^{4/} This appeal is taken from an order entered September 19, 1988. The notice of appeal was filed prior to the entry of the order on September 13, 1988, and only one day after the hearing. Plaintiffs are obviously aware of the provisions of Rule 4(c).

676 P.2d at 960-61. The Waldo affidavit actually supports the district court's ruling.

The affidavit of Walter Larson upon which plaintiffs now rely so extensively, see Appellants' Brief at 8, ¶ 19, was not before the district court at the time of the hearing on September 12, 1988. The Larson affidavit is dated September 13, 1988, one day after the district court decided this matter. The affidavit was filed as an attachment to the notice of appeal. Since this affidavit was not considered by the district court it is not properly part of the record on appeal and cannot be considered by this Court in determining whether the lower court abused its discretion.

The affidavit, even if considered, does not demonstrate excusable neglect. Plaintiffs lament that they had moved from the state, that the California family home was threatened with foreclosure, and that one of the family members was suffering blindness and a nervous breakdown while another had sustained a traumatic neck injury. Appellant's Brief at 10. Furthermore, plaintiffs complain that there is now a conflict between themselves and the attorney who represented them throughout the time period for appeal. However, these facts are irrelevant to the issue of excusable neglect. As the Tenth Circuit stated in Buckley, "[t]he multiplication of inadequate reasons for holding [counsel's] neglect excusable serves only to emphasize their inadequacy." Buckley v. United States, 382 F.2d at 615.

A. Rule 58A(d) Does Not Affect The Time For Filing A Notice Of Appeal.

Plaintiffs rely heavily on Rule 58A(d), Utah Rules of Civil Procedure. However, that rule deals with the entry of a judgment. In this case, the defendants had no obligation under Rule 58A(d) since no judgment was entered. The court simply granted their motion to dismiss.

Furthermore, the rule itself states expressly that "the time for filing a notice of appeal is not affected by the notice requirement of this provision." Utah RCP 58A(d). It is clear that Rule 58A(d) does not extend the filing period, nor does non-compliance give rise to excusable neglect.

The case of McGarr v. United States, 736 F.2d 912 (3rd Cir. 1984), relied on by plaintiffs is distinguishable. In McGarr, the attorney had written two letters to the court seeking an extension of time to appeal prior to the expiration of the period. The court considered the letters as ex parte applications for extensions of time. Id. at 918. In this case, plaintiffs' attorney did nothing prior to the expiration of the period to perfect the appeal. Plaintiffs' reliance on Graco Fishing & Rental Tools Inc. v. Ironwood Exploration, Inc., 735 P.2d 62 (Utah 1987) is similarly misplaced. In that case this Court did not address the extension of time issue but instead remanded "to allow the respondents the opportunity to oppose the appellants' motion for an extension of time . . . , and for the district court to then rule on the motion". Id. at 63. Also

Reagan Outdoor Advertising, Inc. v. Utah Dep't of Transp., 589 P.2d 782 (Utah 1979) is distinguishable. In that case appellant's notice of appeal from an administrative decision was found timely. Id. at 783.

In Buckley v. United States, 382 F.2d at 613, the defendant's attorney attempted to argue that failure to receive notice gave rise to excusable neglect. The Tenth Circuit unequivocally stated that counsel's "claim that his neglect was caused by waiting for a notice from the clerk is not a basis for a plea of excusable neglect." Id. at 614. There -- as here -- "not only . . . was [there] no clear abuse of the trial judge's discretion, but . . . his ruling was clearly correct." Id. at 615.

B. Plaintiffs Were Represented By Counsel At All Relevant Times.

Page 15 of the plaintiffs' brief suggests that their late filing should be considered under a more lenient standard because, subsequent to the inaction of their attorney, they filed a notice of appeal pro se. However, plaintiffs admit that during the period of time during which an appeal could have been filed they were represented by counsel. In fact, the notice of appeal that was filed was actually signed by the attorney on behalf of the plaintiffs. Furthermore, whether the appeal was pro se or not, plaintiffs' failure to make a motion before the end of the filing period extinguished any right to appeal. Mayfield v. United States Parole Comm'n, 647 F.2d at 1055. See Shah v.

Hutto, 722 F.2d 1167, 1168 (4th Cir. 1983) (en banc), cert. denied, 466 U.S. 975 (1984) ("proceeding pro se does not change the clear language" of Rule 4(a)); superseding Shah v. Hutto, 704 F.2d 717 (4th Cir. 1983); United States ex. rel. v. Leonard O'Leary, 788 F.2d 1238, 1240 (7th Cir. 1986) (per curiam) (circuits agree that proceeding pro se does not warrant exception to Rule 4(a)).

II. NO ISSUE RELATING TO THE STATUTE OF LIMITATIONS DEFENSE IS BEFORE THE COURT.

A. Section II Of Plaintiffs' Brief Should Be Stricken.

The district court granted defendants' motion to dismiss on the basis that plaintiffs' causes of action were barred by the statute of limitations. In Section II of their brief, Appellants' Brief at 17-21, plaintiffs undertake to argue that "[i]ssues of fact and a correct view of the law of limitation of actions . . . require reversal of the order of dismissal." Plaintiffs then argue that the district court's decision should be reviewed as though the order of dismissal was on appeal before this Court.^{5/}

An appeal of the order of dismissal has already been dismissed by this Court. Case No. 880386. As part of that ruling, this Court also denied plaintiffs' motion to consolidate

^{5/} Plaintiffs also contend that a statute of limitations defense cannot be raised by a motion to dismiss. This position is contrary to well-established legal authority. See 2A Moore's Federal Practice ¶ 12.10. See In re Estate of Sullivan, 506 P.2d 813, 817 (Wyo. 1973); Kellar v. Snowden, 87 Nev. 488, 489 P.2d 90, 92 (Nev. 1971).

the appeals. By including this argument in their brief, plaintiffs are attempting to obtain indirectly what they could not obtain directly. Furthermore, the issue has been waived since plaintiffs failed to include any reference to the issue in their docketing statement. Any argument relating to a statute of limitations issue is waived. See Reese Enter., Inc. v. Lawson, 220 Kan. 300, 553 P.2d 885, 899 (Kan. 1976) (point asserted for first time in appeal brief must be stricken). Defendants submit that Section II of plaintiffs' brief should be stricken since the issue addressed therein is not properly before the Court.

B. The District Court Properly Granted Defendants' Motion To Dismiss.

Since plaintiffs have argued the district court's grant of dismissal, defendants provide the following summary of arguments for this Court.

Plaintiffs filed their complaint containing four causes of action on June 24, 1987. All four causes of action related to the terms of an alleged verbal agreement whereby defendants supposedly agreed to submit a debtor's plan in the Chapter 11 bankruptcy, In re Larson Ford Sales, Bankruptcy No. 82C-02186, pending in the United States Bankruptcy Court for the District of Utah. All four causes of action were governed by a four year statute of limitations. U.C.A. § 78-12-25(1) and (3) (1953, as amended).

Plaintiffs' First Claim for Relief was for breach of the alleged verbal agreement in that defendants had filed a

creditor's plan rather than a debtor's plan of reorganization. The creditor's plan which the defendant did submit was confirmed on June 10, 1983 and notice of entry was sent on that same day to all parties by the Bankruptcy Court. As a generally accepted rule, a cause of action upon a verbal contract arises at the time of the contract's breach. Upland Indus. Corp. v. Pacific Gamble Robinson Co., 684 P.2d 638, 643 (Utah 1984). Since the creditor's plan was actually confirmed on June 10, 1983, any breach of the alleged verbal agreement occurred on or before that date. Plaintiffs' claim is time barred since June 10, 1983 is more than four years prior to the commencement of this action.

Plaintiffs' Second Cause of Action, interference with business relations, sounded in intentional tort. The statute of limitations in intentional torts begins to run when the tort or the activity leading to the tort occurs. Obray v. Malmberg, 26 Utah 17, 484 P.2d 160, 162 (Utah 1971). The complaint stated that the acts underlying this cause of action were done "in order that the Defendant Stephen Wade could submit a creditors plan in Chapter 11 bankruptcy." First Amended Complaint, ¶ 13. By plaintiffs' own admission, all of the alleged tortious conduct occurred prior to the defendants' submission of the creditor's plan. Thus, the alleged facts that form the basis for this cause of action also occurred prior to June 10, 1983. Hence this cause of action is also time barred.

Plaintiffs' Third and Fourth Causes of Action included claims for breach of fiduciary duty, unjust enrichment,

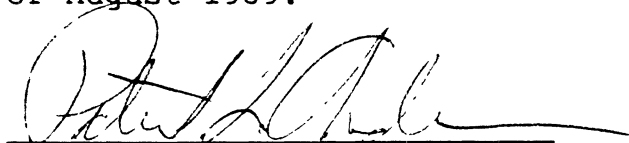
conversion and punitive damages. These claims were based on conduct which was alleged to have occurred during and in connection with the verbal contract negotiations. Since the verbal contract was alleged to have been entered into in January 1983, these causes of action are also time barred.

Plaintiffs also complain that the court granted the motion to dismiss without requiring that the creditors' plan of reorganization be placed into evidence. A copy of the notice of confirmation was attached to defendants' memorandum in support of their motion to dismiss. The notice was mailed to all parties involved in this bankruptcy proceeding on June 10, 1983. Plaintiffs cannot claim that they did know of any breach prior to June 24, 1983, because the notice states expressly that a creditors' plan had been confirmed.

CONCLUSION

For the foregoing reasons, defendants ask the court to affirm the district court's denial of plaintiffs' Motion for Extension of Time. Furthermore, defendants ask the court to strike Section II of plaintiffs' brief.

DATED this 23rd day of August 1989.




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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 1989
I caused to be mailed, first class, postage prepaid, four true
and correct copies of the foregoing Brief of Respondents to:

L. Edward Robbins, Esq.
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

A handwritten signature in cursive script, appearing to read "Peter L. Anderson", is written over a horizontal line.

pla:081889c