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Walter P. Larson v. Stephen Wade : Reply Brief

Utah Supreme Court

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Gary E. Jubber, Patrick L. Anderson; Fabian and Clendenin; Attorneys for Respondents.

L. Edward Robbins; Attorney for Appellants.

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BRIEF

880344

IN THE SUPREME COURT OF THE
STATE OF UTAH

WALTER P. LARSON, an	:	
individual, and LARSON	:	
FORD SALES, INC., a	:	
Delaware corporation,	:	APPELLANTS' REPLY BRIEF
Plaintiffs/Appellants,	:	
vs.	:	
STEPHEN WADE, individually,	:	
and STEPHEN WADE, BRYCE WADE,	:	Case No. 880344
KIPP WADE, dba SBK, a general	:	Cat 14(b)
partnership, and 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)

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

Attorneys for Respondents

L. Edward Robbins, #2766
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 355-7030

Attorney for Appellants

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OCT 5 1989

Clerk, S.C.

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Attorney for Appellants

Attorneys for Respondents

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SUPPLEMENTAL STATEMENT OF APPLICABLE COURT RULES

Plaintiffs submit that the following supplemental court rules are applicable and relevant.

Rule 2.7(e) of the Rules of Practice in the District Courts and Circuit Courts of the State of Utah, 1983 Replacement, provides:

"(e) Affidavits not filed within the time required by any Rule of Civil Procedure shall not be received except on stipulation of the parties or for good cause shown." [Emphasis supplied.]

Rule 4-103(2) of the Utah Code of Judicial Administration, not effective until on or after October 30, 1988, provides:

"(A) Orders to show cause and other matters requiring

written notice shall be heard only after written notice served no less than five (5) days prior to the date specified in the notice for hearing, unless the Court for good cause shown orders the period of time for notice of hearing shortened.

"(B) Documents in support of law and motion matters, including returns of service on supplemental orders and bench warrants, must be filed in the Clerk's office at least two days before the hearing on the matter.

"(C) Proceedings based upon supporting documents which are not filed in accordance with this rule may be dismissed." [Emphasis supplied.]

SUMMARY OF ARGUMENT

There is no question but that dismissal of plaintiffs' action based on Utah's four year statute of limitations was in error. Since the error is plain, this Court has full power not only to order a one day extension of time to appeal but also to reverse the order of dismissal.

The district court had before it proffered facts upon which a one day extension should have been granted. The district court abused its discretion in not doing so. Alternatively, the district court erred in not permitting the plaintiff Walter Park Larson, who had driven from California in order to personally appear at the hearing on the motion, to present any concrete evidence as to either his reasons for filing an appeal one day late or his reasons for not having filed an affidavit in support of his pro se motion for a one day extension.

ARGUMENT

- I. THE ERROR OF THE DISTRICT COURT IN DISMISSING PLAINTIFFS' AMENDED COMPLAINT IS PLAIN AND CLEAR. THIS COURT HAS FULL POWER NOT ONLY TO REVERSE THE DISTRICT COURT ON THE EXTENSION OF TIME ISSUE BUT ON THE DISMISSAL ISSUE AS WELL.

Two things are clear about this appeal.

The first is that Judge Frederick dismissed plaintiffs' amended complaint in error; the second is that unless this court intervenes, as it has full power to do, these plaintiffs will not have their claims litigated, notwithstanding the clear error which occurred below.

Without restating the argument on the dismissal issue contained in plaintiffs' opening brief, plaintiff notes that the amended complaint alleges breach of fiduciary duty, unjust enrichment and conversion, among other matters. The affidavit of Walter Park Larson states that the assets subject to these allegations were intact as of a date within four years' prior to the filing of plaintiff's original complaint (R. 50, Add. 3). This affidavit creates a clear issue of fact which precludes dismissal of plaintiffs' suit on grounds of Utah's four year statute of limitations. And, as stated in plaintiff's opening brief, there is no evidence in the record to support defendants' conclusion that the plan of reorganization repudiates the contract in question, since the plan itself was never put into the record of these proceedings.

Judge Frederick granted defendants' motion most likely because he did not read Mr. Larson's affidavit. The affidavit of

Peter Waldo, prior counsel to plaintiffs, states:

"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" (R. 88, Add. 7).

If he had read the affidavit, there is no question but that Judge Frederick would have denied the motion.

Plaintiffs submit that this court has full power not only to reverse the district court on the extension issue but on the dismissal issue as well, notwithstanding defendants' citation to Reese Enter., Inc. v. Lawson, 220 Kan. 300, 553 P. 2d 885, 899 (Kan. 1976). Kansas appellate court rules apparently require assignments of error. Plaintiffs are aware of no ruling by this court equating the docketing statement with assignments of error as used in Kansas.

Moreover, this court has full power to recognize and remedy plain errors "even though such errors were not raised or were not properly raised by the parties," just as the federal courts do. Federal Practice and Procedure, Section 361, 32 Am Jur 2d 845. In this case, prior counsel did not include the dismissal issue in the docketing statement on this appeal because that issue was already the subject of a separate appeal. Judicial economy justifies eliminating a second appeal to address the issue of the dismissal, in the event of reversal on the extension of time issue.

The pivotal issues then become should this court intervene,

and if so, in what manner.

II. THIS COURT SHOULD INTERVENE AND FIND REVERSIBLE ERROR
SO THAT PLAINTIFFS CLAIMS CAN BE HEARD.

- A. The District Court committed reversible error in refusing to grant a one day extension of time to appeal based on the record it had before it.

Not having been present at the proceedings below, undersigned counsel must defer to the conclusion of defendants' counsel that the September 13, 1988 Affidavit of Walter Park Larson (R. 93-95, Add. 10) was not presented to Judge Frederick (Resp. Br. 6). Indeed, Judge Frederick did not have the information contained in that affidavit because he refused to receive it. That refusal itself was error, as is argued below.

But the District Court did have before it a detailed factual statement in the form of a pro se Notice of Extension of Time to Appeal and a pro se Notice of Appeal, both of which included these proffered facts:

1. That plaintiffs had received no notice of entry of judgment;
2. That plaintiffs were moving to California and had been out of state from July through the date of the Notice of Appeal;
3. That plaintiffs had communicated to their attorney that they wished to appeal;
4. That plaintiffs' attorney had stated that he would appeal or move for a rehearing (R. 75-76, Add. 5).

There is nothing in the record to show any objection by

defendants to these facts proffered. These facts, coupled with the obvious fact that plaintiffs filed a pro se notice of appeal immediately upon learning that the time to appeal had run, support the conclusion that the district court erred in not granting plaintiffs a one day extension.

In responding to plaintiffs' opening brief, defendants do not respond to plaintiff's citation of 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 counsel would file the appeal. Therein the court stated that the "excusable neglect standard has been applied with diminishing rigidity" and extensions "are available upon the proper showing." 631 F. 2d at 765. Plaintiffs made such a showing and should have received an extension, particularly in light of the lack of any Rule 58A(d) notice of entry of the order of dismissal.

- B. The District Court committed reversible error in denying to plaintiffs the opportunity to justify their request for a one day extension.

The only record available of what transpired below is the September 13, 1988 Affidavit of Mr. Larson in which he explains that after having driven all the way from California for the hearing, he "was not allowed to speak." (R. 95, Add. 10).^{1/} As

^{1/}Undersigned counsel has no more first hand knowledge of what transpired below than this Court does since he did not appear until. Undersigned counsel has called Judge Frederick's court reporter only to be informed that no transcript was made of either the hearing on defendants' motion to dismiss, or of the hearing on plaintiffs' motion for extension of time to appeal.

is apparent from his affidavit, Mr. Larson had many more detailed reasons, not considered by the court, for which the notice of appeal was filed one day late, several of which include severe family illnesses and hardships. Yet none of this was considered by the court because Mr. Larson was not permitted to talk. This was reversible error.

In so stating, plaintiffs recognize that the applicable rules require submission of affidavits prior to hearing. However, Rule 2.7(e) of the Rules of Practice, in effect at the time of this hearing,^{2/} expressly provides for the waiver of the affidavit requirement for "good cause shown." These plaintiffs were not permitted to show good cause for anything because Mr. Larson was not permitted to speak. This was error.

Plaintiffs concede that the customary standard of review for a lower court's decision on a motion for extension of time to appeal is abuse of discretion (Resp. Br. 7-8). However, the lower court must, at a minimum, provide an opportunity to show good cause. In this case, that means, at a minimum, the opportunity to explain the unavailability of a supporting affidavit.

On many occasions, this court has made its feelings clear on the affidavit issue in the context of a motion for summary

2/ The Utah Code of Judicial Administration version of this rule was not effective until on or after October 30, 1988, which is after the hearings were held in this case. Nevertheless, plaintiffs submit that these new rules require the same result.

judgment. cf. inter alia, Strand v. Associated Students of University of Utah, 561 P. 2d 191 (Ut., 1977); Cox v. Winters, 678 P. 2d 311 (Ut., 1984). On such occasions, the court has found an abuse of discretion where the district court granted summary judgment over a request for an additional opportunity to state facts in opposition to the motion. Ibid.

In this case, the district court erred precisely because Mr. Larson, who had come from California for the hearing after having proceeded pro se as best he could, was denied the opportunity to explain anything. Therefore, at a minimum, this court should remand these proceedings to Judge Frederick to afford to the plaintiffs an opportunity to show good cause for the filing of their appeal, one day late.

Finally, plaintiffs note that respondents repeatedly attribute the failure to file a timely appeal to the lack of diligence of plaintiffs' prior counsel. Yet defendants themselves remain remiss in not providing to plaintiffs a Rule 58A(d) notice of entry of judgment. This omission should definitely be considered by the court in making its decision on plaintiffs' appeal, otherwise there is no purpose or intent to Rule 58A(d) and this court might as well order it erased from the Code of Civil Procedure.

CONCLUSION

This Court should reverse the District Court, grant plaintiffs' motion for an extension of time to appeal, and, at the same time, reverse the order of dismissal of the District

Court. Alternatively, this Court remand this case to the District Court with instructions to take and consider plaintiffs' evidence as to their reasons for filing a notice of appeal one day late.

DATED this 5 day of October, 1989.

By: 

L. Edward Robbins
Attorney for Plaintiffs/
Appellants

Certificate of Service

I hereby certify that on the 5 day of October, 1989, I served the foregoing Reply Brief upon the following individuals by hand delivery of four copies thereof to their offices, one copy manually signed by counsel, and 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

