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IN THE SUPREME COURT OF THE STATE OF UTAH

DONALD H. MEYERS, and ENGINEERING ENTERPRISES, INC., d/b/a INTERMOUNTAIN AERIAL SURVEYS,	:	
Plaintiffs-Respondents,	:	No. 17070
-vs.-	:	
INTERWEST CORPORATION, a Utah corporation; SKYCHOPPERS OF UTAH, a Utah corporation; and SKYCHOPPERS OF COLORADO, a Colorado corporation,	:	
Defendant-Appellant.	:	

REPLY BRIEF OF APPELLANT
SKYCHOPPERS OF COLORADO

Interlocutory Appeal from Orders
of the Third Judicial District Court for Salt Lake County,
Honorable Bryant H. Croft, Judge

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FILED

FEB 2 1981

Clerk, Supreme Court, Utah

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Defendant-Appellant.	:	

REPLY BRIEF OF APPELLANT
SKYCHOPPERS OF COLORADO

INTRODUCTORY STATEMENT

Defendant/Appellant Skychoppers of Colorado feels compelled to file this Reply Brief because of various misstatements, irregularities and improprieties incorporated in plaintiffs' responsive brief.

ARGUMENT

I. Re Respondents' Statement of Facts. On page 2, plaintiffs state that "Several negotiations were undertaken between the parties and Complaints were finally filed on August 7, 1978." Plaintiffs make no citation to the record to support the statement that "several negotiations were undertaken between the parties", and, in fact,

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an examination of the record on appeal will reveal no affidavit, exhibit or testimony of any kind which would place this alleged fact in the record. Making such a statement that settlement negotiations were ever undertaken is a flagrant attempt to create a factual issue on appeal where no such fact was ever introduced before the trial court. Defendant trusts that the impropriety of such a practice is so obvious and well understood that citation of authority regarding the same is not necessary.

II. Re Respondents' Argument to Amend Summons (under Point I). The simple answer to plaintiffs' argument of this point is that this Court has heretofore stated what errors in process are mere irregularities", e.g., failing to name a guardian ad litem, Ballard v. Buist, 8 Utah 2d. 308, 333 P.2d 1071 (1959) and those which are "jurisdictional", e.g., improper designation of statutory period for making appearance, Martin v. Nelson, 533 P.2d 897 (Utah 1975) or failing to endorse the date of service on the copy of the summons served, Reese v. Scott, 8 Utah 2d. 134, 329 P.2d 877 (1958). Plaintiffs' argument in effect is suggesting that this Court now change the rule it has heretofore established by making a defect which has previously been held to be jurisdictional to now be only a mere irregularity. Such a vacillation of law would not be in the best interests of maintaining a reasonably consistent and predictable jurisprudence in the State of Utah.

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III. Re Respondents' Abuse of Discretion Argument (under Point I). Plaintiffs argue that a trial court ruling on a discretionary matter should not be reversed unless it is found to be clearly arbitrary. Such is admittedly the rule with respect to a trial court's ruling on a matter in which it is to decide what is "just and proper under the circumstances", sometimes referred to as "judicial discretion." Whereas, "abuse of discretion" means that such discretion has not been lawfully exercised. See State ex rel Nielsen v. Superior Court for Thurston County, 110 P.2d 645 (Wash. 1941); Nix v. State, 213 So.2d 554 (Miss. 1968).

A trial court has no discretion to alter statutory provisions, court rules or prior pronouncements of this Court regarding jurisdictional requirements. When a trial court makes such an error in law, it is also referred to as an "abuse of discretion," but since it involves an error in law rather than an equitable evaluation of facts and circumstances, the court has no discretion.

In Medina v. The District Court for the County of Otero, 493 P.2d 367 (Colo. 1972), the Court in discussing "abuse of discretion" observed:

> "The latter phrase has been given such varied interpretations we deem it necessary to clarify our view of the lower court's action and we follow the persuasive rationale in Eager v. Derowitsch, 78 Wyo. 251, 232 P.2d 713 (1951) dealing with the expressing 'abuse of discretion'. The Wyoming

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Court said, quoting from Barrett v. Board River Power Co., 146 S.C. 85, 143 S.E. 650, as follows:

> 'We are sure that in many instances, in the years gone by, the rulings of presiding judges, in matters where they are given a right to exercise their discretion, were not interferred with because of the old unfortunate statement to the effect that it must be shown that there was an 'abuse of discretion.' Recently it has been shown time after time that the term 'abuse of discretion' does not mean any reflection upon the presiding judge, and it is a strict legal term, to indicate that the appellate court is simply of the opinion that there was <u>commission of an error of law in the circumstances</u>.'" (Emphasis added.)

In <u>Brown v. Beck</u>, 169 P.2d 855 (Ariz. 1946), the Court noted:

> "The word 'abuse of discretion' as used in many cases in reference to the action of the trial court is defined as, in the case of Detroit Fidelity & Surety Co. v. Foster, 170 S.C. 121, 169 S.E. 871, 'The term 'abuse of discretion' does not mean any reflection on the presiding judge and does not carry with it an implication of conduct deserving censure, but is strictly a legal term indicating that the appellate court is of the opinion that under the circumstances the trial judge committed error of law in the exercise of his discretion.' 1 Words and Phrases, Perm.Ed., 182."

And, as stated in <u>Beck v. Wingsfield, Inc.</u>, 122 F.2d 114 (3rd Cir. 1941),

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". . . action that would be necessary in ordinary affairs to make one guilty of an abuse connotes conduct of a different grade than what is meant when a court is said to have abused its discretion. Abuse of discretion in law means that the court's action was in error as a matter of law. And where such abuse exists, reversal will be ordered. See Cervin v. W. T. Grant Co., 5 Cir., 100 F.2d 153, 155, 156."

To the same effect, see Macauley v. Query, 7 S.E.2d 519 (S.C. 1940); Wood v. Waggoner, 293 N.W. 188 (S.D. 1940); Detroit Fidelity & Surety Co. v. Foster, 169 S.E. 871 (S.C. 1933); Paine v. Cohen, 167 S.E. 665 (S.C. 1933); and Tunstal v. Learner Shops, 159 S.E. 386 (S.C. 1931).

This Court also acknowledged in State v. Draper, 27 P.2d 39, 50 (Utah 1933), that abuse of discretion includes the commission of an error of law by the trial court in stating:

"It does not imply intentional wrong or bad faith or misconduct, nor any reflection on the judge. Root v. Bingham, 26 S.D. 118, 128 N.W. 132; State v. Dist. Court, 213 Iowa, 822, 238 N.W. 290, 80 A.L.R. 339. It is a legal term to indicate that the appellate court is of the opinion that there was commission of error of law in the circumstances. Bishop v. Bishop, 164 S.C. 493, 162 S.E. 756. It is an improvident exercise of discretion; an error of law. Quinn v. Gardiner (C.C.A.) 32 F.(2d) 772; Bringhurst v. Harkins, 2 W.W. Harr. (Del.) 324, 122 A. 783. A discretion exercise to an end and purpose not justified by and clearly against reason and evidence. 1 C.J. 372."

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In the case at bar, the trial court failed to follow the statutory edict[1] and prior pronouncements of this Court.[2] The failure to designate the proper statutory period for making an appearance in a summons served upon a nonresident defendant has been held by this Court to constitute a jurisdictional defect. The trial court commited an error of law on a point of law in which it had no discretion, and, therefore, it must be reversed.

IV. Re Respondents' Argument that Process Served was Merely Irregular and not Void (under Point II). Under this point respondents merely note as stated in 62 Am.Jur.2d, Process §14 that some jurisdictions hold that a defect in the stated time for return in a summons is fatal, while others hold that it is an irregularity which may be amended. Respondents then cite some cases from jurisdictions permitting amendment. Such argument ignores the fact that Utah is aligned with those states holding such a defect to be jurisdictional, particularly where the effect of the defect is to shorten a statutorily provided period, as noted in respondents' quote from 62 Am.Jur.2d, Process §14, *supra*:

> "It seems generally agreed that a Summons which is returnable in fewer than the number of days provided by statute will be quashed on Motion." (Emphasis added.)

Respondents cite no reasons why Utah should now change its recent (1975) pronouncement[2] that a summons was defective for tw

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[1] Section 78-27-27, U.C.A., 1953, as amended.

[2] *Martin v. Nelson*, 533 P.2d 897 (Utah 1975).

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reasons, the second being "and because the summons served on the California defendant required answering within 20 rather than 30 days." Appellant submits that in the absence of some compelling reason to change a well-recognized and recently announced principle of law, the same should not be changed.

V. Re Respondents' Waiver Argument (under Point II).

Respondents on page 10 of their brief make the statement that:

> "This case, however, is a case which involves a defendant who has participated in settlement negotiations for a period of time in excess of 20 months, . . . This additionally involves a case in which the defendant has now chosen to appear only after 20 months to quash the service originally considered by all parties to be valid."

This is a flagrant and, in appellant's judgment, a censurable misstatement of the record. There is no evidence in the record that this defendant ever, a fortiori over a 20 month period, participated in any settlement negotiations.

Respondents also on page 10 of their brief infer that appellant (defendant Skychoppers of Colorado) is at fault in this matter by

> ". . . inducing an adverse party's inaction to their detriment. If plaintiffs had not been induced into inaction on the complaint, . . ."

Again, there is not a single document or other item of evidence introduced before the trial court to support the contention that the appellant did anything to induce the respondents into inaction. Such a statement is a bald-faced misrepresentation of the record in this matter.

Respondents did not even allege, vis-a-vis introduce evidence,

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before the trial court that appellant induced respondents into inaction in this matter. The relevant allegations on this point are contained in paragraphs 2 and 3 of respondents'/plainti Motion for Leave to Amend Process (R. 16) which allege:

> "2. Service of process was made on August 15, 1978; and plaintiffs since that time have extended to defendants through its insurer time within which to answer in that no answer would be required so long as negotiations for settlement were pending.
>
> 3. Plaintiffs have to this point in time never demanded that their Complaint be answered, nor have they ever asserted a right to nor attempted to have a default entered against any of the defendants in this action."

It is clear from the record that respondents have never claimed that appellant, Skychoppers of Colorado, has done anythin to induce respondents to do, or not to do anything in this case.

As a matter of fact, respondents/plaintiffs never made a settlement offer in this matter, either before or after the complaint was filed. Respondents pointed out on page 12 of its brief that it is impossible to cite a negative fact in the record, but challenged plaintiffs to acknowledge that the record was devoid of any offer of settlement having been made either during the four-year period between the time of the accident and when suit was commenced, or during the 20-month period after the suit was filed until appellant moved to quash the summons. As noted above, respondents make the irresponsible statement under their <u>STATEMENT OF FACTS</u> that "Several negotiations were underta between the parties. . .", but failed to cite any evidence in the

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record to support such a statement. Appellant contends that there is no such evidence in the record and if such fact had existed, certainly such evidence would have been introduced by plaintiffs/respondents before the trial court by way of documents or affidavit of someone having such knowledge.

As noted above, before the trial court the plaintiffs alleged only that they had indicated to defendant that no answer would be required so long as negotiations for settlement were pending. Plaintiffs did not allege that settlement negotiations had ever commenced. As the record shows, the plaintiffs did not file their complaint until the day before the statute of limitations ran on the cause of action alleged and then ignored their lawsuit. This defendant likewise ignored the lawsuit until it made the motion to quash which is the subject of this appeal. Plaintiffs now claim that they were misled by the defendant, who did only that which the plaintiffs did, to-wit: ignore plaintiffs' lawsuit for 20 months.

After making the erroneous and unsupported statements that defendant induced plaintiffs into inaction, plaintiffs state on page 11 of their brief that:

> "However, a closer investigation indicates that the defendant's failure to make a timely Motion has caused the waiver of its rights to claim that the irregularities render the service of process void."

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There is no evidence in the record that defendant ever did anything from which it could be inferred that it waived its right to challenge any service made upon it. It is horn-book law that a person alleging waiver must show an intentional, voluntary relinquishment of a known right by the party against whom the waiver is alleged. As stated in 28 Am.Jur.2d, Estoppel and Waiver §154, p.836:

> "A waiver, according to the generally accepted definition, is the voluntary and intentional relinquishment of a known right, claim or privilege. It has also been defined as the intentional surrender of a known right or privilege, such surrender modifying other existing rights or privileges, or varying the terms of a contract. Waiver is a voluntary act and implies election by a person to dispense with something of value or to forego some right or advantage which he might at his option have demanded and insisted upon. * * *"

Since plaintiffs admit they never demanded a response to the service of process made upon this defendant, no duty to act thereon arose, and since the record discloses no act or omission which would indicate an intentional, voluntary relinquishment of the right to challenge any process served upon it, this defendant cannot now be held to have waived the right to challenge the sufficiency of the process served upon it.

Also, with respect to plaintiffs' contention that defenda[nt's] motion was not timely filed, it should be noted "timeliness" is

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a concept which must interact with duty to act, or in fact action which has been taken that may create an estoppel. Plaintiffs cite Miller v. Ziegler, 3 Utah 17, 5 Pac. 518 (1881) on the timeliness issue. However, the case is clearly not applicable to the fact situation of the case at bar since in Miller the defendant sat quietly by while a judgment was taken against him and then sought reversal on appeal. The Court noted that the defendant could not "sit quietly by and *seek* judgment against him by default. . ." (emphasis added). In the case at bar, the defendant has sought nothing from the plaintiffs and the plaintiffs have done nothing and, therefore, there is no conduct on the part of the defendant of which they can complain.

Likewise, Thomas v. District Court of Third Judicial District in and for Salt Lake County, 171 P.2d 667 (Utah 1946) cited by plaintiffs is not helpful in resolving the issues of the case at bar. In fact, the case strongly supports defendant's position that a summons which incorrectly designates the time in which to appear is defective. In Thomas, *supra*, at 668, it is stated:

> "It would seem that such defects in the return of service, which could properly have been amended had application therefor been made, are not as vital as is the endorsement of time of service upon the summons, because the endorsement of the date of service is in effect a part of the summons *as fixing the time in which defendant must appear*. Dolan v. Jones, 37 Wash. 176, 79 P. 640. Williams v. Pittock, 35 Wash. 271, 77 P. 385." (Emphasis added.)

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The fixing of time in which to appear is affected by two elements, the date of service which must be endorsed upon the summons and the period of time stated within the summons when an appearance must be made. If there is an error or omission in either element, the summons is then defective because it does not correctly advise the defendant of the time in which he must appear.

Also, from a full reading of Thomas, supra, it is clear that the "timeliness" requirement referred to is that the motion and special appearance to attack jurisdiction must be made before the defendant appears generally and defends on the merits. The Court quoted with approval at page 669 its prior decision in Glassmann v. District Court, 80 Utah 1, 12 P.2d 361 (1932), where it held:

> "We have no hesitation in saying that the court erred in overruling the motion to dismiss the writ. If the defendant had appeared and pleaded without first interposing the motion, the case would be entirely different but such was not the fact, and his motion was well taken."

The requirement that a timely motion to quash must be made speci[ally] before appearing generally was again stated by the Utah Court in the recent case of Martin v. Nelson, 533 P.2d 897 (Utah 1975) wh[ere] the Court observed:

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> "Service of process here was defective, not only because of the false return, but because it required answer in 20 days instead of 30 days. Such service is jurisdictional. Defendant, as was his right, appeared specially and raised the point." (Emphasis added.)

In the instant case, defendant's motion to quash was timely not only in the sense that a special appearance for that purpose was made before defendant filed a general answer and defended on the merits, but defendant responded to the service made upon it before it was ever required to do so. As plaintiffs admit, at the time of service they indicated no response would be required at that time and have never since required a response. It is difficult to understand how plaintiffs can contend defendant's motion was not timely when plaintiffs, by their own conduct, gave an open extension of time in which to respond and never up to the time that the motion was filed, demanded a response. It was the plaintiffs, not the defendant, who by their voluntary, intentional acts, waived the right to demand a "more timely" response to their service of process than that which they in fact received.

VI. Re Respondents' Argument that Appellant was not Misled or Disadvantaged by the Trial Court's Denial of its Motion to Quash. Again, under this point, respondents engage in the flagrant practice of stating facts not found in the record. They state, at page 14:

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"All parties consider the process to be proper and sufficient and had through mutual agreement, contemplating settlement, not required the defendant Skychoppers of Colorado to answer or otherwise plead."

There is absolutely nothing in the record to support the contention that defendant ever considered the process to be proper. Defendant was told it need not respond to the process and it did not. Nothing more is shown, or can be inferred from the record.

Since the complaint was filed the last day before the statute of limitations ran, another complaint could not have been filed or served on the defendant, and since a summons must issue for service within three months from date the complaint is filed, a proper summons could not have been issued after the 91st day after the complaint was filed. The trial court by now, more than 20 months after the summons was served, permitting the summons so served to be amended has, in effect, extended the statute of limitations against the defendant in this action by the 20 month period in question.

As stated in appellant's brief, "it is difficult to conceive of a more prejudicial situation than having a statute of limitation period extended after it has run." Respondents surely must jest when they state in their brief, p. 14:

"The question left begging in these circumstances is just exactly how the defendant Skychoppers of Colorado was disadvantaged in these circumstances where no action toward default was every taken."

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Finally, respondents contend that appellant has not shown that it was in some way misled by the defective service. Such contention is immaterial. This Court in the 1946 case of Thomas v. District Court of Third Judicial District in and for Salt Lake County, supra, observed that the trial court there, apparently as the trial court in the case at bar, takes the position that the plaintiff must allege and show that he was misled by the defect. This Court, in answer to such contention, stated:

> ". . . Such is not the provision of the statute. And we find no well reasoned, adjudicated case, holding that where service is attacked by motion before pleading or judgment, a trial court can inquire into the question of being misled. That would be strictly judicial legislation. In L.R.A. 1917C, 148. That case lays down the rule: 'It is the general rule, that, if a statute prescribes a method for serving process, the method must be followed.'
>
> ". . . The burden of the annotation is that the theory of some cases holding that the defendant must show he has been misled is unsound and is summarized in this statement: 'It is sufficient to say of them that they are utterly contrary to the modern American notions of the power and purposes of a court of justice . . . Indeed, apart from purely clerical errors or blemishes or defects in immaterial matters, the courts have no right to enter into the question of whether or not in their opinion the party was misled.' The annotation is commended to the reader."

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And, again in 1958, this Court in Rees v. Scott, 8 Utah 2d. 134, 329 P.2d 877, quashed a service of summons where the summons was not properly endorsed by the serving officer, and in so doing, stated:

> "We see no merit in the contention that the defendant has the burden to allege and prove that he was misled by the defect. The trial court properly granted the motion to quash."

CONCLUSION

The arguments raised in the BRIEF OF PLAINTIFFS-RESPONDENTS are fallacious and specious, being based on allegations of fact not supported by the record and on legal authorities which are contrary to specific holdings of this Court.

As discussed under the points of the BRIEF OF APPELLANT, the trial court, in excess of its jurisdiction, has attempted to extradict the plaintiffs from the painful position in which they now find themselves, but for which they alone are responsible. While such an effort may seem commendable, it cannot be condoned when it abridges the rights of the defendant to challenge the sufficiency of the process served upon him.

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WHEREFORE, the defendant Skychoppers of Colorado respectfully prays that the orders of the trial court be reversed and that the summons which was served upon this defendant be quashed and deemed null and void.

RESPECTFULLY SUBMITTED this _____ day of January, 1981.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed, postage prepaid, two (2) true and correct copies of the foregoing REPLY BRIEF OF APPELLANT SKYCHOPPERS OF COLORADO to Robert W. Brandt, Esq., RICHARDS, BRANDT, MILLER & NELSON, 48 Post Office Place, P. O. Box 2465, Salt Lake City, Utah 84110, this _____ day of January, 1981.

Of Defendant's Counsel

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