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Milton C. Brandon v. Howard C. Teague : Brief of Appellant

Utah Supreme Court

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Case No. 8473

IN THE SUPREME COURT
of the
STATE OF UTAH

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MILTON C. BRANDON,
Plaintiff and Appellant,

— vs. —

HOWARD C. TEAGUE,
Defendant and Respondent.

FILED
MAR 23 1953
Clerk, Supreme Court, U. of U.

APPELLANT'S BRIEF

RAWLINGS, WALLACE
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PRELIMINARY STATEMENT

All italics are ours.

Throughout this brief Milton C. Brandon, plaintiff and appellant, will be referred to as plaintiff and Howard C. Teague, defendant and respondent, will be referred to as defendant.

STATEMENT OF FACTS

This appeal arises out of an action between the same parties which was once before this Court on an intermediate appeal from the District Court order denying a motion to quash service of summons and dismiss the action. That decision is entitled, Howard

C. Teague, plaintiff, vs. The District Court of the Third Judicial District, in and for Salt Lake County, State of Utah, and Milton C. Brandon, case No. 8232. The decision of this court having been filed on the 5th of August, 1955. Following the decision plaintiff filed on the 23rd day of September, 1955, a complaint in the district court entitled Milton C. Brandon, plaintiff, vs. Howard C. Teague, defendant, Civil No. 106335. Jurisdiction over the defendant was again sought by compliance with the Non-Residence Motorist Statute U.C.A. 1953, Section 41-12-8. Following the service defendant filed a motion to dismiss and quash the service of summons in case No. 106335.

The basis of the motion was the decision of this Court in case No. 8232. The matter was argued before the district court and on the 18th day of November, 1955, a judgment of dismissal was entered and the service of summons quashed.

No attack was made on the adequacy of the service by plaintiff.

It appears from the motion that it was defendant's position that the decision of this Court in Case No. 8232 precludes plaintiff from ever obtaining jurisdiction over defendant in the State of Utah by service through the Non-Resident Motorist Act, UCA 1953, Section 41-12-8. From the judgment of dismissal plaintiff has perfected this appeal.

STATEMENT OF POINTS

THE DECISION OF THE UTAH SUPREME COURT IN CASE NO. 8232 DID NOT PASS UPON THE RESIDENCY OF DEFENDANT TEAGUE.

ARGUMENT

THE DECISION OF THE UTAH SUPREME COURT IN CASE NO. 8232 DID NOT PASS UPON THE RESIDENCY OF DEFENDANT TEAGUE.

In the district court the defendant's sole argument as a basis to dismiss the complaint of plaintiff and quash the service of summons was that this Court in the decision in Case No. 8232 had passed upon the residency of defendant Teague. That the decision precluded plaintiff from ever filing an action against Teague and using the Non-Resident Motorist Act as a basis of obtaining jurisdiction over him.

In the present case neither party attempted to present any new or additional evidence concerning the residency or nonresidency of Teague and the motion as is stated in its body was based solely upon files in Civil No. 99973 and the decision of this Court in 8232.

The complaint of plaintiff in the present action alleges that Howard C. Teague is and at all times mentioned in the complaint was a non-resident of the State of Utah and alleges that his last known address is Route No. 1, Mooresboro, North Carolina. This allegation of the complaint has not been denied and apparently as far as the present appeal is concerned must be assumed

to be true unless the decision of this Court in 8232 and the proceedings in case No. 99973 precludes plaintiff from going forward under a new complaint.

The only question which has been determined by the trial court on the motion to dismiss the complaint and to quash the service of summons is that this Court by its decision in case No. 8232 has forever determined the matter of jurisdiction and plaintiff cannot proceed under the Non-Resident Motorist Act to obtain jurisdiction over defendant.

The decision of this Court in Case No. 8232 did not pass upon the residency of the defendant Teague. The decision was concerned with two basic questions. The first question being, was the evidence of plaintiff, Milton C. Brandon, in the district court sufficient to support a finding that Teague was a non-resident of the State of Utah at the time of the accident out of which Brandon's claims arose. The Court in approaching this problem first decided the question as to who had the burden of proof in determining the residency of Teague. It then examined the law of numerous jurisdictions and concluded that upon challenge the person using substituted service must prove a prima facie case that the defendant was a non-resident. This determination by the Supreme Court was a reversal of the procedure which was followed in the trial of the original attack on substituted service.

In the original hearing the defendant came forward with a motion to quash the service of summons and dis-

miss the complaint and supported the motion to quash and dismiss by affidavits which alleged that he was a resident of the State of Utah. Plaintiff in that action attempted to meet and disprove the allegation that Teague was a resident. As appears from the file in the case, at no time did plaintiff assume that he had the burden of proving that Teague was a non-resident of the State of Utah. Defendant asserted the affirmative of the proposition that Teague was a resident of the State of Utah and the trial court in the original hearing as well as both parties assumed that on the question of the residency of Teague defendant had the burden of coming forward and presenting evidence to sustain his affirmative allegation that Teague was a resident. This Court held that the plaintiff had the burden of proving a prima facie case whenever the non-residency of the defendant is challenged.

In its decision this Court recognized the reliance by the trial court and both parties upon the proposition that a person's residency is best known to himself. That he normally would have the burden of proving where his residency was in any case where it was a material fact. The decision then states that the evidence which was presented by the plaintiff to refute defendant's claim of residency did not in the court's opinion make a prima facie showing that Teague was a non-resident at the time of the accident causing injury to Brandon.

The cases relied upon for the rule shifting the burden of establishing a prima facie case were not prior

decisions of this Court. They were holding from a number of foreign states primarily the case of *Welsh v. Ruopp et al*, 228 Iowa 70, 289 N. W. 760. In addition to the Roupp case there were a number of other Iowa decisions, two Colorado decisions and a decision from Illinois following the *Welsh v. Roupp* holding.

The supplemental writ of this Court which was filed on the 30th of September, 1955, set forth that the Supreme Court commanded only that the district court not proceed further in Civil Case No. 99973 until such time as jurisdiction of defendant is acquired. The writ did not specifically preclude plaintiff from going forward and attempting to acquire jurisdiction over the defendant Teague by commencing a new and different action.

The trial court interprets the Supreme Court's writ and decision as precluding any use by plaintiff of the Non-Resident Motorist Statute for the purpose of obtaining jurisdiction over defendant. Its holding is that this Court in its decision in Case No. 8232 passed upon the merits of plaintiff's case. Neither inferentially nor directly does the Court pass upon the question of Teagues residency at the time of the accident.

The basic authority in Utah which is controlling on jurisdictional questions is contained in *McCarthy v. State*, Utah, 265 P. (2d) 387. There this Court at page 389 carefully stated the rule which governs where question of jurisdiction has been passed upon.

“ * * * This rule is grounded upon sound principle that litigants are entitled to have an

adjudication upon the merits. It must be conceded that in most instances, if a tribunal has no jurisdiction, there is no trial on the merits. However, it is not open to question that a judgement of dismissal for want of jurisdiction is conclusive *as to the matters upon which the ruling was necessarily based.*"

Applying the law as set forth in the McCarthy decision the basis proposition is "Was the residence of Teague necessarily passed upon or was the ruling of the Supreme Court necessarily based upon a determination of that question?" The answer to the question is that it was not.

Both the trial court and the parties relied upon an erroneous concept of law so declared in this Court's decision. To preclude plaintiff from having an opportunity to make a prima facie showing that defendant was a non-resident after the Court has corrected the erroneous concept would be depriving him of any opportunity to try the jurisdictional question on its merits.

A close examination of this Court's opinion in case No. 8232 reveals that there was no intention on the part of the Court to preclude plaintiff from showing that defendant was actually a non-resident. The Court in its decision was first establishing that the burden of proof was upon plaintiff and then examined the evidence which he had presented to ascertain whether it was sufficient to support a finding that Teague was a non-resident. The evidence thus examined was only such as plaintiff considered necessary to refute defendant's case, plaintiff to date has never been granted an opportunity to

take up his burden and affirmatively show the residency of Teague. There is no language of the decision which indicates that the Court is finding that Teague is a non-resident or that he is a resident. The decision leaves that question completely open. If the question is open then there has not been a ruling by this Court on the essential elements or matters of jurisdiction which would preclude plaintiff from filing a new case and attempting to show the facts concerning the residency of Teague.

Plaintiff submits that he is entitled to an opportunity to litigate the question of Teague's residency and have that matter determined on its merits. To the present time he has never had such an opportunity since the only evidence which was presented by him was presented in an effort to meet the evidence of defendant.

CONCLUSION

Plaintiff respectfully submits that the decision of this Court in case No. 8232 did not pass upon the question of Teague's residence at the time Brandon received his injury. Its decision was not necessarily based upon any determination of that question. Plaintiff should be given an opportunity to litigate the merits of the question of the residency of Teague. The interpretation by the trial court of this Court's decision is erroneous and should be reversed with an order to said court to permit

the plaintiff to go forward with his case. If the allegations of the complaint that Teague was a non-resident are challenged plaintiff should be given an opportunity to present evidence concerning that question and have a determination of the question on its merits.

Respectfully submitted,

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