

1956

# Milton C. Brandon v. Howard C. Teague : Brief of Respondent

Utah Supreme Court

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STATE OF UTAH

MILTON C. BRANDON,  
*Plaintiff and Appellant,*

—vs.—

HOWARD C. TEAGUE,  
*Defendant and Respondent.*

No. 8473

RESPONDENT'S BRIEF

SKEEN, WORSLEY,  
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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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—vs.—

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*Defendant and Respondent.*

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RESPONDENT'S BRIEF

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STATEMENT OF FACTS

The parties will be designated as they appeared in the trial court. Defendant does not agree with the statement of facts in plaintiff's brief because it is incomplete and, in part, inaccurate. Therefore, the following statement is submitted:

Although the case has already been before the Supreme Court of Utah on defendant's original proceeding in the nature of prohibition (see Supreme Court Case No. 8232, 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, Defendants”), it is believed that it will be helpful if the facts are stated in chronological order from the inception of this matter to the present time.

References to the record will be limited to avoid confusion which might result from the fact that the present record is numbered in red from pages 1 through 10, but page 10 is actually the record which was before this Court in Case No. 8232, and it likewise is numbered in red, from page 1 forward.

On October 1, 1953, plaintiff filed an action against the defendant in the District Court of Salt Lake County to recover damages for personal injuries suffered in an accident which occurred when plaintiff was a guest in a car driven by defendant. The case was assigned No. 99973. Service of summons was attempted under the provisions of the Non-Resident Motorist Act (U.C.A., 1953, 41-12-8).

On March 25, 1954, defendant filed his motion to quash the purported service of summons upon the ground that the defendant was not a nonresident of Utah at the time the cause of action arose.

The hearing on defendant's motion to quash was held in the District Court of Salt Lake County before the Honorable Ray Van Cott, Jr., Judge, on April 20, 1954. In support of his motion, defendant submitted an af-

fidavit signed by one of his counsel which alleged in substance and effect that for many months prior to the date of the accident out of which this case arose, the defendant was residing as a soldier at Deseret Chemical Depot, Tooele County, Utah, and he could be located there for personal service for many months before the accident and many months following the accident. Upon hearing, plaintiff introduced as an exhibit a copy of the investigative report of the Utah Highway Patrol, which contained information indicating that the defendant's automobile carried North Carolina license plates at the time of the accident. Plaintiff's counsel also testified and defendant's counsel was cross-examined.

The District Court denied defendant's motion to quash and the defendant petitioned the Supreme Court of Utah for an Interlocutory Appeal, which petition was denied June 1, 1954.

On July 1, 1954, defendant filed a complaint in the Supreme Court of Utah in an original proceeding, which was assigned Case No. 8232. In substance, defendant's complaint alleged that the defendant was not a nonresident of Utah at the time of the accident, and the Supreme Court was urged to prohibit the District Court of Salt Lake County, and Brandon, from proceeding further in Case No. 99973. The District Court of Salt Lake County did not plead to the complaint, but Brandon, plaintiff herein, filed a motion to dismiss. Upon the issues joined by these pleadings, the matter was argued and submitted

to the Supreme Court after preparation and filing of briefs by plaintiff and defendant.

By decision of the Supreme Court filed August 5, 1955, the Court, speaking through its Chief Justice, held:

“We have not been cited to a case holding that such scant evidence as we have here before us was sufficient to support a finding of non-residence, and since the element of jurisdiction is necessary to Brandon’s case, the failure of proof must lie with him. The trial court erred in denying the motion to quash; hence, the alternative writ heretofore issued will be made permanent.”

The remittitur from the Supreme Court was filed in the District Court of Salt Lake County on August 26, 1955. Five days later plaintiff filed an amended complaint in the same case, Case No. 99973, but the only amendment consisted of the allegation that the defendant “is, and at all times herein mentioned was,” a non-resident of the State of Utah. In the original complaint, plaintiff had alleged merely that defendant “is a non-resident.”

At the time the decision of the Supreme Court was rendered, no formal writ was issued by that Court, prohibiting further action in Case No. 99973. However, when plaintiff filed his amended complaint, the fact of such filing was brought to the attention of the Supreme Court, which thereafter issued its writ under date of September 20, 1955, commanding the District Court of Salt Lake

County “to refrain and desist permanently from any further proceedings in the matter . . .”

Upon further consideration, the Supreme Court issued its supplemental writ under date of September 30, 1955, in which the Court’s order was :

“We command and require the said District Court of the County of Salt Lake to refrain and desist permanently from any further proceedings in the matter entitled ‘Milton C. Brandon, Plaintiff vs. Howard C. Teague, Defendant,’ Civil No. 99973, *until such time as jurisdiction of the defendant is acquired.*” (Italics added to show new matter in supplemental writ.)

After the issuance of the first writ by the Supreme Court, but before the issuance of the supplemental writ, the plaintiff, on September 23, 1955, filed a new complaint on the same cause of action. This was given Civil No. 106335, and the identical language was used as had been used in the amended complaint which had been filed August 31, 1955. Service of summons was again attempted in the same language as had been previously used, and again plaintiff urged the applicability of the Non-Resident Motorist Act previously cited.

On October 14, 1955, defendant, by special appearance, in Case No. 106335, filed his motion to quash service of summons upon the ground of insufficiency of service, and to dismiss the complaint of the plaintiff upon the ground that the court lacked jurisdiction over



the person of the defendant. The motions were grounded upon the contents of the files and records of the trial court in the first case, No. 99973, and upon the decision of the Supreme Court in that case.

Hearing on defendant's motions was had before District Judge Martin M. Larson on November 1, 1955. The trial court heard arguments of counsel and defendant submitted to the Court for its consideration the files and records in Case No. 99973. Although the jurisdiction of the Court was being challenged by the defendant in exactly the same fashion as it had been challenged in the first case, plaintiff offered no proof of any kind and the motion was submitted for decision on the former record.

On November 14, the District Court orally advised counsel that "the motions are granted and the action dismissed." This order assumed formal stature on November 18, 1955, when the Court signed and entered a formal judgment of dismissal in which it was ordered and adjudged that the service of summons be quashed and the motion to dismiss be granted and the action was ordered dismissed. This appeal followed.

## STATEMENT OF POINTS

### POINT I.

THE ISSUE OF WHETHER DEFENDANT WAS A NON-RESIDENT WITHIN THE MEANING OF THE STATUTE WAS SQUARELY PRESENTED AND DETERMINED IN

THE FORMER CASE, AND IS, THEREFORE, RES JUDICATA AS BETWEEN THESE PARTIES.

## POINT II.

EVEN IF THE PRINCIPLE OF RES JUDICATA IS NOT APPLIED HERE, PLAINTIFF HAS FAILED TO SUSTAIN THE BURDEN OF SHOWING THE NONRESIDENCE OF DEFENDANT.

## ARGUMENT

### POINT I.

THE ISSUE OF WHETHER DEFENDANT WAS A NON-RESIDENT WITHIN THE MEANING OF THE STATUTE WAS SQUARELY PRESENTED AND DETERMINED IN THE FORMER CASE, AND IS, THEREFORE, RES JUDICATA AS BETWEEN THESE PARTIES.

In the first action, which was Case No. 99973, plaintiff alleged defendant was a nonresident and that he was entitled to sue defendant under the terms of the Utah Non-Resident Motorist Act. Defendant, by his motion to quash, challenged that allegation and, by the affidavit filed in support of the motion, stated facts in contradiction of plaintiff's claim.

Thus, the issue was joined upon the first hearing before Judge Van Cott. The nature of this issue cannot longer be in doubt, for this Court, in its decision in Case No. 8232, stated as follows:

“An issue of fact, i.e. whether or not Teague was a resident at the time of the accident, was joined at the hearing on the question of jurisdiction . . .”

The Court then went on to say that when a plaintiff attempts to use this method of substituted service, he must, “*upon challenge*,” prove a prima facie case that defendant was a nonresident.

The Court then examined the evidence which had been presented and concluded that there was not sufficient evidence presented to show that Teague was a nonresident. Determination of that issue by the Supreme Court was indispensable to its decision since, if the defendant were a nonresident at the time of the accident, defendant’s motion to quash ought to have been denied, but if defendant were not a nonresident at that time, the motion ought to have been granted.

Defendant contends that the language of this Court in *McCarthy v. State* (Utah, 1953), 265 P. 2d 387, leads irresistibly to the conclusion that the judgment of the trial court ought to be affirmed.

In that case the Court said:

“ . . . A judgment of dismissal<sup>4</sup> for want of jurisdiction is conclusive *as to the matters upon which the ruling was necessarily based*.”

As Mr. Justice Crockett commented :

“No reason is apparent why the rule should be less applicable to a decision denying jurisdiction than to one sustaining it.”

In the McCarthy case the Court was discussing what had transpired in the United States District Court for Utah when that Court had entered a judgment of dismissal upon the ground that it had no jurisdiction of the action. In concluding that the action of the Federal Court was conclusive upon the question before this Court, it was said :

“The issue having been squarely presented and determined, it is *res judicata* as between these parties.”

These principles are clearly applicable to the present case. The very same issue which was squarely presented to and determined by this Court in Case No. 8232 was again before the District Court in the present case. Plaintiff alleged defendant's nonresidence, and defendant moved to quash and to dismiss upon the grounds which he had previously urged in the first case. Plaintiff offered no evidence to the contrary. Since the issue was determined adversely to the plaintiff in the former case by the judgment of this Court and since such judgment is now final, the principle of *res judicata* ought to apply.

Plaintiff has advanced only one reason why the doctrine of *res judicata* should not be applied here. In

summary, plaintiff contends that he did not have the opportunity to present proof on the question of Teague's nonresidence on the first hearing because both parties proceeded under the "erroneous concept of law" that the burden of proof was on defendant and not plaintiff. Plaintiff states (Brief, page 4) that the decision by the Supreme Court in Case No. 8232 "was a reversal of the procedure which was followed in the trial . . ."

Further, it is contended by plaintiff (Brief, page 5) that:

" . . . 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."

These contentions by plaintiff are not supported by the record. In fact, the record is directly contrary. The attention of the Court is called to the transcript of the hearing on the first case, which is found at page 24 of the record considered in Case No. 8232, and which reflects the position of the defendant on the hearing before Judge Van Cott on April 20, 1954. At that time counsel for the defendant stated that he was urging the court to grant the motion of the defendant, "because I don't think he (plaintiff) has sustained the burden of sustaining jurisdiction which I have placed in issue by my motion.." After further colloquy between the court and

counsel for plaintiff, the trial court commented (first Record, 24) :

“I think you ought to make some showing, Mr. King, to controvert his affidavit here.”

If there has been any misunderstanding of the effect of the decision of the Supreme Court, or if there has been any reliance by anyone upon the proposition that the burden was on the defendant to show that he was not a nonresident, such misunderstanding and reliance is shared only by plaintiff.

Defendant has always asserted, and now asserts, that the burden was upon the plaintiff to establish the jurisdictional facts in his case from the time the defendant filed a motion to quash service of summons. The Supreme Court, in its decision in Case No. 8232, stated that it held the same view, when it said :

“We hold that the plaintiff attempting to use this method of substituted service must, *upon challenge*, prove a prima facie case that the defendant is a nonresident.”

The Supreme Court then went on to examine the record, which, so far as the evidence is concerned, is the same record as is now before the Court. The Court concluded that plaintiff had not sustained the burden of proof and that defendant's motion ought to have been granted. It is difficult to understand how plaintiff can now assert that the Supreme Court, on the basis of the

same evidence, ought to arrive at a contrary decision, even if it entirely disregarded the doctrine of *res judicata*.

Plaintiff has had his day in court on the question of proving the necessary jurisdictional elements. No sound reason is set forth in his brief why he ought to be given another day in court. If he is allowed another, and if, upon that occasion, he likewise failed in his burden, what is to prevent him, under his theory, from asking a further chance to try again?

The very purpose of the doctrine of *res judicata* is to put at rest the contentions of parties when an issue has been litigated. As the Supreme Court of the United States stated, through Mr. Justice Roberts:

“Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties . . .” *Baldwin v. Iowa State Traveling Men’s Association*, 283 U.S. 522, 51 S. Ct. 517, 75 L. ed. 1244.

## POINT II.

EVEN IF THE PRINCIPLE OF RES JUDICATA IS NOT APPLIED HERE, PLAINTIFF HAS FAILED TO SUSTAIN THE BURDEN OF SHOWING THE NONRESIDENCE OF DEFENDANT.

Even if the doctrine of *res judicata* were not ap-



plicable in this case, there is still a further hurdle which plaintiff has not crossed in his attempt to obtain jurisdiction in the present action.

He alleged that defendant was a nonresident. Defendant, by his motion based upon the record in the former case, again attacked that allegation, in addition to raising the claim of *res judicata*. Again, therefore, plaintiff was put upon the burden of proof. But, when the matter came on for hearing before Judge Larson, plaintiff presented no evidence of any kind in support of that burden. Thus, it is clear that he failed again to sustain the burden of proof put upon him.

It will not suffice for plaintiff to imply, as inferred from his brief, that he was not aware that he had a duty to go forward with the proof. Even if he were not so aware of his duty in the first hearing, there can be no doubt that he is conclusively presumed to know that he had that burden in the light of the decision of this Court in its Case No. 8232. Nevertheless, although the decision had been in existence for nearly three months at the time of the hearing in the present case, plaintiff was silent when offered the opportunity to present evidence on the question of Teague's residence. The trial court, it will be recalled, did not enter judgment preemptorily, but took the matter under advisement. Both parties were allowed every opportunity to present any evidence or theory, and yet plaintiff remained silent.



Even in the absence of the doctrine of *res judicata*, therefore, the case now is in the same posture as when it was first considered by this Court in Case No. 8232. The issue was joined, plaintiff had the burden of proof, and failed to sustain it. No reason is suggested why this Court, on this record, should reach a conclusion different from its decision of August 5, 1955.

What plaintiff actually seeks here is not a second chance, but rather a third chance to prove the same issue. He had his first chance on April 20, 1954. He did not effectively utilize that opportunity. He had his second chance on November 1, 1955, before District Judge Larson, and again failed to present any evidence of any kind bearing upon the question of residence. He now asks this Court for the right to have a further opportunity to litigate the same issue. It is respectfully submitted that he has no such right.

## CONCLUSION

The following quotation expresses defendant's position on this entire matter:

“ . . . Public policy and the interest of litigants alike require that there be an end to litigation, which, without the doctrine of *res judicata*, would be endless. The doctrine . . . rests upon the ground

that the party to be affected . . . has litigated . . . the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent . . . ” 30 Am. Jur. 910-12 (Judgments, Sec. 165).

It is respectfully submitted that the decision of the trial court was correct and should be affirmed by this Court, and that the litigation on this jurisdictional question be thereby terminated.

Respectfully submitted,

SKEEN, WORSLEY, SNOW  
& CHRISTENSEN

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