

1982

K.L.C. Inc. v. Ron McLean et al : Appellant's Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Robert R. Mallinckrodt; Attorney for Defendant-Appellant;

Earl S. Spafford; Attorney for Plaintiff and Counter Defendants-Respondents;

Recommended Citation

Reply Brief, *KLC Inc. v. McLean*, No. 18103 (Utah Supreme Court, 1982).

https://digitalcommons.law.byu.edu/uofu_sc2/2728

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE STATE OF UTAH

K.L.C. INCORPORATED,)	
Plaintiff-Respondent)	
and Counter Defendant)	
)	
vs.)	
)	
RON McLEAN)	
Defendant-Appellant)	APPEAL No. 18103
and Counter Plaintiff)	
)	
vs.)	
)	
KEARN'S LIQUIDATION CENTER,)	
INC., a corporation, and JOHN PARAS,)	
Counter Defendants--)	
Respondents)	

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Third

District Court for Salt Lake County

Hon. G. Hal Taylor, Judge

Robert R. Mallinckrodt
MALLINCKRODT & MALLINCKRODT
10 Exchange Place Suite 1010
Salt Lake City, Utah 84111
(801) 328-1624
Attorneys for Defendant-Appellant

Earl S. Spafford
Spafford, Dibb, Duffin & Jensen
311 South State, Suite 380
Salt Lake City, Utah 84111

Attorneys for Plaintiff and
Counter Defendants--
Respondents

TABLE OF CONTENTS

APPELLANT'S REPLY BRIEF	Page 1
Authorities Cited	
<u>Brasher Motor and Finance Company v. Brown</u> , 461 P.2d 464 (Utah 1969)	2
<u>Johnson v. Firebrand</u> , 571 P.2d 1368 (Utah 1977)	3
<u>Westinghouse Electric Supply Company v. Paul W. Larsen Contractors, Inc.</u> , 544 P.2d 876 (Utah 1975)	3, 4
<u>Wilson v. Lambert</u> , 613P.2d 765 (Utah 1980)	1, 2

IN THE SUPREME COURT
OF THE STATE OF UTAH

K.L.C. INCORPORATED,
Plaintiff-Respondent
and Counter Defendant

vs.

RON McLEAN
Defendant-Appellant
and Counter Plaintiff

vs.

KEARN'S LIQUIDATION CENTER,
INC., a corporation, and JOHN PARAS,
Counter Defendants—
Respondents

APPEAL No. 18103

APPELLANT'S REPLY BRIEF

Defendant-Appellant files this Reply Brief to point out what he believes is a serious misstatement of fact regarding a recent case cited by respondents in their Brief.

On page six of Respondent's Brief, respondents state that the facts in the Utah case of Wilson v. Lambert, 613 P.2d 765 (Utah 1980) show that: "Plaintiff began discovery procedures, but nine months later defendant filed a Motion to Dismiss for failure to diligently prosecute,...". Respondents contend that that case is similar to the present case where discovery proceedings had been diligently pursued for an extended period before the motion to dismiss was made. The actual facts in Wilson v. Lambert are stated on page 767 of the opinion as follows:

On January 10, 1978, seven months later [after substitution of a new party plaintiff], and more than nine years after the original petition to review had been filed, the trial court sua sponte, issued an Order to the parties to appear and show cause why the action should not be dismissed because of failure to prosecute. Upon hearing argument on the matter, the Order to Show Cause was stricken and referred to the trial calendar.

Nine months later, on October 3, 1978, defendant was served with Plaintiff's First Interrogatories. Two Weeks thereafter, on October 16, 1978, defendant filed a Motion to Dismiss for failure diligently to prosecute. (emphasis added).

And further, at page 768:

Plaintiffs' predecessor in interest personally delayed the consideration of the denied applications by the lower court from 1968 until the time of his death in 1975. Thereafter, plaintiffs, even following the approval of their purchase from Baldwin's estate by the probate court, delayed sixteen months before even inaugurating discovery in the matter. No explanation justifying such delay is offered in the arguments or in the record. The trial court's issuance of a Show Cause Order put them on ample notice that their claim was in jeopardy, yet they delayed going forward for the better part of a year.

It is thus clear that in Wilson v. Lambert no discovery other than the mere serving of interrogatories had been pursued prior to the dismissal. The Motion to Dismiss for failure to prosecute was filed just two weeks after interrogatories had been served, the interrogatories being the first action by any party after the period of inactivity. No answers had been filed or other actions taken by defendant prior to filing his motion. Thus, the Motion to Dismiss for failure to prosecute was timely filed before either party had spent extensive time and effort in prosecuting the action or preparing for trial. In the present case, the action had been actively prosecuted by both parties for over one and one-half years before the Motion to Dismiss was made. A deposition of one of the respondents had been taken and he had submitted answers to interrogatories. It is submitted that the Wilson case is clearly **not** similar to the present one.

Brasher Motor and Finance Company v. Brown, 461 P.2d 464 (Utah 1969) is also distinguishable from the present facts. In Brasher, the issue was whether the court had authority to dismiss the action sua sponte under Rule 41 of the Utah Rules of Civil Procedure. In that case, it was held that the court had such authority when neither party had prosecuted the action for over _____ at the

result would have been if both parties, prior to the sua sponte dismissal, had reactivated the litigation after a long period of inactivity was not addressed by the court.

Johnson v. Firebrand, 571 P.2d 1368 (Utah 1977) is applicable to the present case. In Johnson, the court reversed a dismissal for lack of prosecution where both parties had been unexplainably inactive for nearly four years and where either party could have brought the action to a conclusion during that period. The fact that one party hired new counsel to reactivate the litigation supported the contention that the trial court abused its discretion. In the present case, all parties had been unexplainably inactive for a long period of time prior to appellant obtaining a new attorney and diligently prosecuting the case and, during that period of inactivity, any of the parties could have brought the action to a conclusion. Furthermore, all parties in the present case had reactivated the litigation over one and one-half years before the Motion to Dismiss was made.

In Westinghouse Electric Supply Company v. Paul W. Larsen Contractors, Inc., 544 P.2d 876 (Utah 1975), the case relied upon by respondents as the "key" case in this Court's line of cases dealing with dismissals for lack of prosecution, and a case where the lower court's dismissal was reversed, the Court stated at pages 878-879:

It is not to be doubted that in order to handle the business of the court with efficiency and expedition the trial court should have a reasonable latitude of discretion in dismissing for failure to prosecute if a party fails to move forward according to the rules and the directions of the court, without justifiable excuse. But that prerogative falls short of unreasonable and arbitrary action which will result in injustice. Whether there is such justifiable excuse is to be determined by considering more factors than merely the length of time since the suit was filed. Some consideration should be given to the conduct of both parties, and to the opportunity each has had to move the case forward and what they have done about it; and also what difficulty or prejudice may have been caused to the other side; and most important, whether injustice may result from the dismissal.

Here, none of the parties took any action to advance the litigation to a conclusion until appellant began discovery proceedings and had the case set for trial. Although the long delay between filing the complaint and a trial in this matter may cause some hardship to the parties, both parties are affected equally. Defendant-Appellant submits that, most importantly, an injustice is done if he is denied his day in court.

As stated by this Court in the Westinghouse case:

It is indeed commendable to handle cases with dispatch and to move calendars with expedition in order to keep them up to date. But it is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them.

Respectfully,

MALLINCKRODT & MALLINCKRODT



Robert R. Mallinckrodt

CERTIFICATE OF SERVICE

The foregoing Appellant's Reply Brief was served on plaintiff-respondent and counter defendants-respondents by mailing two copies thereof, first class mail, postage prepaid, to Earl S. Spafford, Esq., Spafford, Dibb, Duffin & Jensen, 311 South State, Suite 380, Salt Lake City, Utah 84111, their attorneys, this 15th day of June, 1982.



Robert R. Mallinckrodt