

2000

Mary Ann Lucero Dipoma v. Brian McPhie and Does 1 through 20 : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Dipoma v. McPhie*, No. 20000466 (Utah Court of Appeals, 2000).
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IN THE UTAH SUPREME COURT

MARY ANN LUCERO DIPOMA,)

Plaintiff, Appellant)
and Respondent,)

vs.)

No. 20000466SC

BRIAN McPHIE and DOES)
1 THROUGH 20 WHOSE TRUE)
NAMES ARE UNKNOWN,)

Priority No. 12

Defendant, Appellee)
and Petitioner)

REPLY BRIEF OF PETITIONER

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FILED

FEB 03 2001

CLERK SUPREME COURT

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SUMMARY OF THE REPLY

This Court should affirm the trial court's order of summary judgment in favor of McPhie. The record before this Court shows that the material facts are undisputed. These facts reveal that Dipoma delivered her complaint right before the statute of limitations ran. When Dipoma delivered her complaint she gave the court clerk a bad check. Even though she was contacted by the court clerk regarding the unpaid filing fee, Dipoma chose to wait nearly ten months before she paid the mandatory fee with good and proper funds. In fact, Dipoma waited so long to pay the proper fees that the trial court and the court clerk's office thought that Dipoma had abandoned her claim.

Ten months later, Dipoma apparently decided to pursue her claim against McPhie. Dipoma hired an attorney, paid the required filing fee and served a copy of the complaint on McPhie. However, Dipoma had waited nearly ten months after the statute of limitations to do so. Because Dipoma had waited so long to pursue her claims and to pay the mandatory filing fees, the trial court dismissed her claim.

Under express Utah law, the trial court's ruling was correct. The Utah legislature has stated in three separate statutes that, in order to commence a civil action, a plaintiff must pay the required filing fee before her complaint is considered "filed." See U.C.A. § 21-1-1, 21-1-5, 21-7-2. This practice is universally accepted in Utah's trial courts.

Given that Dipoma attempted to pay the filing fee with a bad check, and given that Dipoma waited nearly ten months to pay the filing fee with good and proper funds, it is clear that the trial court properly dismissed Dipoma's claim. Every court that has

considered this issue has found that, where a plaintiff waits an extended amount of time to pay the required filing fee, such conduct is unreasonable as a matter of law.

In this appeal, Dipoma advocates a change in well accepted and practiced Utah law. Dipoma asks this Court to uphold the Court of Appeal's ruling that completely does away with the requirement that a civil litigant pay a filing fee in order to commence a civil action. The court held that "Rule 3 of the Utah Rules of Civil Procedure only requires a plaintiff to file a complaint in order to commence an action" Dipoma v. McPhie, 1 P.3d 564, 569 (Ut. Ct. App 2000). In order to make such a ruling, the court was required to interpret three statutes that expressly require payment of filing fees in advance. See U.C.A. §§ 21-1-1, 21-1-5, 21-7-2. Rather than reading these statutes in harmony with Rule 3, the court rendered the statutes meaningless by holding that they were "merely directive."

Dipoma claims that this Court should read Rule 3 of the Utah Rules of Civil Procedure in legal isolation from the rest of Utah law. Dipoma claims it was proper for the court of appeals to interpret three unambiguous statutes requiring the payment of filing fees as "merely directive." Dipoma claims it is proper to pay filing fees with a bad check. Dipoma claims it is reasonable for a civil litigant to wait as much as ten months before paying the fees required under Utah law. Dipoma's position is dismissive of the intent of the Utah Legislature as clearly expressed in three separate statutes. Dipoma's position is also dismissive of well accepted practice in Utah courts. Because Dipoma's position lacks merit under Utah law, this Court should affirm the trial court's grant of summary judgment in favor of McPhie.

ARGUMENT

I. UNDER UTAH LAW A COMPLAINT IS NOT “FILED” UNTIL THE PROPER FILING FEE HAS BEEN PAID.

McPhie has argued to this Court that, pursuant to Utah law, a plaintiff has not properly filed a complaint or commenced an action until she has paid the mandatory filing fee. McPhie has noted that, while Rule 3 of the Utah Rules of Civil Procedure is silent as to filing fees, the Utah Code requires that civil court clerks collect filing fees “in advance.” U.C.A. § 21-1-1. Three separate statutes specifically address this issue. See U.C.A. §§ 21-1-1, 21-1-5, 21-7-2. These statutes are in unanimous agreement that a filing fee must be paid before a civil litigant may avail herself of the services of court.¹

Dipoma asks this Court to carve out a legal exception for her in a way that would allow her to side-step the filing fees required under Utah law and extend the statute of limitations by an additional ten months. Dipoma argues that, because Rule 3 does not expressly include the requirement that a filing fee be collected in advance of filing, Utah law therefore imposes no such requirement on civil litigants. Just as Dipoma would have this Court consider the specific facts of her case in a vacuum, she would have the Court consider Rule 3 in legal isolation. Dipoma would also have this Court ignore the accepted practice of Utah trial courts.

Dipoma’s position is dismissive of three statutes that are specifically directed to civil court clerks and mandatory filing fees. Section 21-1-1 of the Utah Code provides:

¹ The Utah Legislature’s decision to repeatedly comment on the requirements that filing fees be paid in advance emphasizes the importance of such fees to the functioning of the courts and of State government.

Collection in advance by state officers.

For Services performed in their respective offices, the officers named in this chapter **shall collect in advance** for the use and benefit of the state the fees hereinafter enumerated and such other fees as may be provided by law.

U.C.A. § 21-1-1 (1999) (emphasis added).

Section 21-7-2 of the Utah Code is equally clear. This section, which also expressly applies to court clerks, provides:

Payment of fees prerequisite to service — Exception.

(1)(a) The state and county officers mentioned in this title may not perform any official service **unless the fees prescribed for that service are paid in advance.**

U.C.A. § 21-7-2 (1999) (emphasis added).

Finally, section 21-1-5 indicates that the filing fee for any civil complaint invoking the jurisdiction of the court of record is \$120.00. Subsection (cc) to this statute expressly mandates that “all fees **shall be paid at the time the clerk accepts the pleading for filing or performs the requested service.**” Utah Code Ann. § 21-1-5 (cc) (1999) (emphasis added).

Dipoma’s response to McPhie’s opening brief steers clear of all three of these statutes. Dipoma’s avoidance of these statutes is, of course, based on the Court of Appeals’ interpretation of these statutes as “merely directive.” Dipoma’s position serves as an explicit example of the types of arguments that will be advanced if the Court of Appeals’ decision below is allowed to stand.

Dipoma cites Avco Financial Services v. Caldwell, 547 P.2d 756, 760 (Kan. 1976) for the proposition that, in Kansas, filing fees do not have to be paid before a

complaint is considered “filed.” However, Avco dealt with appellate jurisdiction of a district court over an appeal taken from a magistrate court where the appealing party had failed to pay a docket fee in small claims court. The Avco decision turned on the interpretation of Kansas Statute 61-2102 entitled The Code of Civil Procedure before Courts of Limited Jurisdiction. See id. at 758. Moreover, Kansas does not employ the statutory framework set forth by the Utah Legislature in Sections 21-1-1, 21-1-5 and 21-7-2. As such, Dipoma’s reliance on Avco is misguided as it does not apply to this case.

Dipoma relies heavily on Southeast Pennsylvania Transportation Authority v. DiAntonio, 618 A.2d 1182 (Pa. Commw. 1992) (hereinafter “SEPTA”).² Dipoma claims this case rejects the notion that a filing fee must be paid before an action is properly commenced. Dipoma misinterprets and misapplies this case. SEPTA involved a plaintiff who filed a personal injury complaint after allegedly being injured in a bus accident involving a SEPTA bus. The plaintiff’s complaint went unanswered until the plaintiff notified SEPTA that she would file a default judgment. When it finally filed its answer with the court, SEPTA delivered the answer with a series of pleadings involving a number of cases. SEPTA was required by Pennsylvania law to file a docketing fee with its answer. SEPTA paid the docketing fees for the entire series of pleadings with a single check that was later determined to be written for an incorrect amount. Without explanation, the court clerk determined that only the filing fee for the answer was

² Dipoma incorrectly cites SEPTA as if it were a Pennsylvania Supreme Court case. In reality, SEPTA’s appeal was heard by the Commonwealth Court of Pennsylvania, a court that hears appeals from Common Pleas Courts from various Pennsylvania counties. See id. at 1182.

deficient and entered a default judgment against SEPTA. The court clerk did not notify SEPTA of the incorrect filing fee until after the default judgment had been entered.

SEPTA then filed an appeal with the commonwealth court claiming that the trial court should have opened its default judgment on the grounds that SEPTA had not been informed of the docketing fee deficiency until after the judgment had been entered. The court specifically noted that it was not considering the issue of whether SEPTA's answer had been timely filed as the issue had been intentionally waived by both parties. See id. at 1185 n. 4. The court decided that, because SEPTA had not been informed of the docket fee deficiency until after default judgment had been entered, and because SEPTA had a meritorious defense, the default judgment should be opened. See id. at 1185.

For a number of reasons, SEPTA is clearly not this case. First, SEPTA involved the filing of an *answer* and the payment of fees required to accompany an answer under Pennsylvania law. As such, SEPTA did not involve *commencement of an action* as provided for under Rule 3. Second, the SEPTA court specifically noted that it was not deciding the issue of whether Pennsylvania law required a litigant to pay a docketing fee before a pleading was considered filed. Third, SEPTA did not involve the statutory framework adopted by the Utah Legislature in Sections 21-1-1, 21-1-5 and 21-7-2 or the application of Pennsylvania's version of Rule 3. Fourth, unlike Dipoma, SEPTA was not notified of the insufficient amount of its check until after entry of judgment. Dipoma on the other hand was notified by the court clerk on more than one occasion that she had not properly paid the filing fee. Dipoma then chose to ignore her bad check and

waited nearly ten months before she paid the proper fee. Lastly, SEPTA involved the application of default judgments which, under Pennsylvania law, are opened where there exists a “reasonable excuse” for failure to respond. See SEPTA, at 1183. The instant case, on the other hand, involves the application of the statute of limitations which is applied with an entirely different standard, and for which excuses for failure to comply are not entertained.³ See Vigos v. Mountainland Builders, Inc., 993 P.2d 207, 219 (Utah 2000).

Dipoma disagrees with the Colorado Court of Appeal’s decision in Broker House International v. Bendelow, 952 P.2d 860 (Colo. Ct. App. 1998), and claims that People v. Davenport, 998 P.2d 473 (Colo. Ct. App. 2000) narrows the Broker House decision. McPhie submits that Dipoma reads the Davenport decision too generously and in a way that was not intended by the Colorado Court of Appeals.

Similar to SEPTA, Davenport involved a default judgment against a criminal defendant under the Colorado Contraband Forfeiture Act. After being notified of the potential default judgment, the defendant’s counsel filed a response, but failed to pay the fee required by the Forfeiture Act. As such, the trial court ordered the response stricken.

On appeal, the court noted that it was dealing with a default judgment and stated that “[e]ntry of default judgment is the harshest of all sanctions, and it should be

³ Dipoma also relies on Foley v. Foley, 147 Cal.App.2d 76 (Cal. Ct. App. 1956). This case is discussed in more detail below. However, it should be noted at this point that, like SEPTA, Foley did not involve the commencement of an action. Instead, Foley involved a motion for new trial filed in a divorce case. Such a situation does not involve the principles embodied in Rule 3 of the Utah Rules of Civil Procedure. These principles were not discussed by the Foley court.

used only in extreme circumstances.” Id. at 475. After examining the facts leading up to the defendant’s failure to pay the required docketing fee, the court concluded that “[t]he inadvertent failure to pay a docket fee at the time of filing, without any other aggravating factor, does not constitute an extreme circumstance. Therefore, we hold that striking the defendant’s response and entering a *default judgment* in the circumstances here was an abuse of discretion.” Id. (emphasis added).

The court recognized that some litigants might be inclined to read its decision in Davenport in a way that conflicted with or narrowed Broker House. As such the court took the opportunity to explain the difference between the two cases. The court stated that:

To the extent that Broker House International, Ltd. v. Bendelow, 952 P.2d 860 (Colo. App. 1998), might be interpreted to reach a contrary conclusion, we find it distinguishable from this case. In Broker House, the plaintiff’s failure to perfect the commencement of the action impacted the defendant’s right to rely on the *statute of limitations*.

Id. at 475 (emphasis added).

Dipoma claims that this statement is an attempt to narrow the Broker House decision. (See Brief of Respondent, p. 20.) McPhie submits that this statement in Davenport is a recognition that default judgments, which are imposed at the discretion of the court, and statutes of limitations, which are not discretionary, are imposed under entirely different standards that require differing results. The court’s statement merely recognizes that, while courts try to avoid seemingly harsh results when default judgments are concerned, the courts often intentionally impose such results where statutes of

limitations are concerned. Utah courts have often discussed and applied this principle. See, e.g., Vigos, 993 P.2d at 219; Fields v. Mountain States Telephone & Telegraph Co., 754 P.2d 677 (Utah Ct. App. 1988). As such, this statement in Davenport is an admonition to future litigants to not read the Davenport and Broker House decisions as narrowing each other, but as dealing with different legal standards.

By reading the Davenport decision too generously, Dipoma has read over the court's admonition. Broker House continues to be accepted law in Colorado where a mandatory filing fee and a statute of limitations is involved.⁴ More importantly, unlike the cases cited by Dipoma, and unlike the appellate rule decisions relied on by the Utah Court of Appeals, Broker House is directly on point to the issue now before this Court.⁵ Broker House and Davenport clearly stand for the principle that where a civil litigant fails to pay mandatory filing fees, her complaint is not properly filed for purposes of Rule 3.

The Broker House and Davenport decisions are supported by those courts that have considered this specific issue in the context of filing fees, Rule 3 and statutes of limitations. See Wanamaker v. Columbian Rope Co., 713 F.Supp. 533, 538 (N.D.N.Y. 1989) aff'd., 108 F.3d 462, 465 (2nd Cir. 1997) (finding that, under the federal rules,

⁴ Broker House has also been cited by the Colorado Supreme Court as continuing to be accepted law. See Bebo Constr. Co. v. Mattox & O'Brien, P.C., 990 P.2d 78 (Colo 1999). Though Bebo involved a different issue, the court's citation to Broker House is indicative of its continuing acceptance.

⁵ The Utah Court of Appeals noted the factual similarities between the instant case and Broker House and also pointed out that both Utah and Colorado have similar rule and statutory constructs. The court stated "[s]imilar to Utah, Colorado's rules of civil procedure are modeled after the federal rules, and Colorado has a statute which requires payment of fees at the time a complaint is filed." Dipoma, at 566.

failure to pay filing fee is jurisdictional); Keith v. Heckler, 603 F.Supp. 150, 156-57 (E.D. Va. 1985) (same); De-Gas, Inc. v. Midland Resources, 470 So.2d 1218, 1222 (Ala. 1985) (finding that, under the Alabama rules of civil procedure, failure to pay filing fee is jurisdictional); Boostrom v. Bach, 622 N.E.2d 175, 176-77 (Ind. 1993) (finding that, under the Indiana rules of civil procedure, failure to pay filing fee is jurisdictional).

Despite these cases, the Utah Court of Appeals went on to discuss and cite two Kansas cases that have held that Rule 3 does not require the payment of filing fees. However, important distinctions exist between the cases discussed above and the Kansas cases. In Burnett v. Perry Mfg., Inc., 151 F.R.D. 398, 402 (D. Kan. 1993),⁶ the plaintiff originally commenced an action resulting from injuries sustained on January 3, 1989. The action was dismissed voluntarily without prejudice on September 17, 1992. On March 17, 1992, the clerk of the United States District Court for the District of Kansas received a complaint unaccompanied by a filing fee. However, an application to proceed *in forma pauperis* did accompany the complaint. The application was denied on March 30, 1992. On July 28, 1992, the court advised the plaintiff that the clerk was unable to accept the complaint for filing due to the absence of the proper fee. Subsequently, on

⁶ It is interesting to note that, later in its opinion, the Dipoma majority criticized Judge Bench's citation to several federal cases on the issue of the reasonableness of Dipoma's conduct. The Dipoma majority claimed that "these federal cases all turn on the interplay of provisions of federal law and practice, including Title VII's ninety-day period within which to sue after getting an EEOC right-to-sue letter . . ." Dipoma, at 570 n. 4. Ironically these same cases were cited by the majority to support its conclusion that Utah law does not require a civil litigant to pay filing fees. See Dipoma, at 567 (citing Burnett v. Perry Mfg., Inc., 151 F.R.D. 398 (D. Kan. 1993); Jarrett v. US Sprint Communications Co., 22 F.3d 256 (10th Cir. 1994)).

August 7, 1992, plaintiff paid the filing fee.

The defendant brought a motion for summary judgment on the basis that the plaintiff had failed to file his second complaint within six months of the voluntary dismissal as provided under the Kansas saving statute. The defendant claimed that, because the plaintiff had failed to pay the fee required by 28 U.S.C. § 1914 before the six month time limit expired, the complaint was barred. Thus the court was required to determine whether section 1914 was jurisdictional.

The court focused on a provision of the statute that allowed local district courts to determine for themselves whether they would require pre-payment of filing fees before accepting jurisdiction. Noting that neither Kansas, nor the federal district court had chosen to implement such a local rule, the court held that the pre-payment of the filing fee was not jurisdictional. The court reasoned as follows:

When read with 28 U.S.C. § 1914(c), in which Congress allows each district court to require by rule advance payment of fees, it seems clear that Congress did not intend by 28 U.S.C. § 1914(a) to require parties to pre-pay the fee. Instead, Congress grants each district the discretion to decide whether it will require parties to pre-pay the fee. Unlike some districts, the local rules for the District of Kansas do not contain a provision requiring the parties to pay the filing fee in advance. Thus, the District of Kansas did not explicitly exercise the authority to require pre-payment granted in 28 U.S.C. § 1914 (c).

Id. at 402.

As such, the outcome in Burnett turned on the fact that the jurisdiction had chosen not to adopt a local rule as provided in the statute. Burnett is substantially distinguishable from the case now before this Court. Unlike the rule-making bodies in

Burnett, the Utah Legislature has chosen to require, in three separate unambiguous statutes, that court clerks collect filing fees before a plaintiff can properly file a complaint. These statutes, read consistently with Rule 3, mandate the well-accepted principle and practice that, in order to commence a cause of action in Utah, a plaintiff must first pay a filing fee. Because the Utah Legislature has specifically adopted the statutory construct missing from Burnett, Burnett is not applicable to this case.

Burnett is also distinguishable as it involved a plaintiff who had filed an application to proceed *in forma pauperis* that is not at issue in this case. In Utah, the limitations and standards applicable to *in forma pauperis* plaintiffs are set forth in rules and statutes that are not applicable here. Furthermore, Burnett relied on Avco Financial Services, 547 P.2d at 760. As discussed above, Avco involved different procedural rules arising from an appeal from a magistrate court. As noted in Burnett and Avco, neither Kansas nor the Federal District Court for the District of Kansas employed a statutory or rule construct like those used in Colorado and Utah.⁷

Unlike the cases relied upon by the Court of Appeals below, this case presents this Court with a set of express statutory rules that specifically apply to trial court clerks. In light of the principles discussed in Broker House, Wanamaker, Keith, De-Gas and

⁷ The Utah Court of Appeals also cited Jarrett v. US Sprint Communications Co., 22 F.3d 256, 258-59 (10th Cir. 1994) (applying Kansas law) for the proposition that district court authority could be found that supported both sides of the debate regarding prepayment of filing fees. This case involved a plaintiff who failed to pay the proper filing fee prior to expiration of the ninety day time limit provided for in 42 U.S.C. § 2000e-5(f)(1) where a right-to-sue letter is received from the EEOC. Not only did Jarrett not involve a statute of limitations, it did not involve rule or statutory provisions similar to those at issue in this case. This case is discussed in more detail below.

Boostrom, it is difficult to understand how both Dipoma and the Court of Appeals can completely disregard the intent of the Utah Legislature as clearly expressed in these statutes. There is no indication within these statutes that would signal that they are to be applied as “merely directive” such that civil litigants do not have to pay filing fees to commence a civil lawsuit. The net result of the Court of Appeals’ approach towards these statutes is that it judicially renders the Legislature’s expressed intent null and void.

McPhie submits that the legally appropriate way to apply Rule 3 is to avoid legally isolating the Rule by applying it in a manner consistent with Utah law. Until the Court of Appeals’ decision, the requirement that a civil litigant must pay filing fees prior to commencing her action was well accepted practice in Utah trial courts. The Court of Appeals’ decision that holds “Rule 3 . . . only requires a plaintiff to file a complaint in order to commence an action,” changes this practice. Where this practice is expressly set forth in a number of Utah statutes, McPhie submits that the Court of Appeals misapplied Rule 3 and misinterpreted the intent of the Utah Legislature as expressed in the statutes discussed above.

**II. UNDER ACCEPTED RULES OF STATUTORY
INTERPRETATION, THE TRIAL COURT PROPERLY
FOUND THAT UTAH LAW REQUIRES A FILING FEE TO
BE PAID BEFORE A COMPLAINT IS PROPERLY
“FILED.”**

The legal isolationism advocated by Dipoma directly violates the principles of statutory interpretation often discussed by this Court. McPhie has argued that the Court of Appeals’ decision violates accepted rules of statutory interpretation in two ways. First, Utah law requires that rules and statutes be read in harmony with existing Utah law. By

holding that “Rule 3 of the Utah Rules of Civil Procedure only requires a plaintiff to file a complaint in order to commence an action . . .” the Court of Appeals has read Rule 3 in isolation from other Utah law that specifically applies to the exact same issue as Rule 3.

The Court of Appeals interpreted Rule 3 and sections 21-1-1, 21-1-5 and 21-7-2 in a manner that placed the Rule in conflict with the statutes. In order to resolve this false conflict, the Court of Appeals was required to insert the caveat that the statutes were “merely directive.” The Court of Appeals applied this interpretation to the statutes without any signal from the Legislature or any Utah court that the statutes were directive, and without explaining how they reached such a conclusion. The reading of Rule 3 in a manner that requires the disabling of three Utah statutes is not in keeping with the rules of statutory interpretation often enunciated by this Court.

Second, by interpreting sections 21-1-1, 21-1-5 and 21-7-2 as “merely directive,” the Court of Appeals stole all legal meaning and effect from three unambiguous statutes. As this Court has often held, McPhie argues that the construction of a statute such that it ceases to have any meaningful or practical application to the subject matter it was intended to govern is not in keeping with Utah law. See, e.g., Lyon v. Burton, 5 P.3d 616, 623 (Utah 2000).

Dipoma fails to address these rules of statutory interpretation as applied to this case in any manner. Instead, Dipoma recites another rule of statutory interpretation: that when two statutes are in conflict, the more specific provision will apply. (See Brief of Respondent, p. 24.) Dipoma’s position, however, ignores the more fundamental question of whether Rule 3 and sections 21-1-1, 21-1-5 and 21-7-2 are really conflicting provisions

of law. Given this Court's admonition that rules and statutes are to be read in harmony, it is clear that Dipoma's position relies on the false conflict created by the Court of Appeals' reading of the statutes, so that she can advocate the unnecessary solution of interpreting the statutes as "merely directive." See Lyon, 5 P.3d at 622; see Roberts v. Erickson, 851 P.2d 643, 644 (Utah 1993) (per curiam).

As the plain language of Rule 3 and the statutes shows, there is nothing to indicate that these provisions are at all in conflict. A harmonious reading of these provisions results in the requirement that a plaintiff must pay the filing fee before her complaint is considered "filed." This rule is well accepted in Utah law and practice.

Dipoma recites the Court of Appeals' analogy to the Utah Rules of Appellate Procedure that took up the majority of the court's opinion. However, it must be noted that there is a distinct difference between those appellate rules relied on by Dipoma and the Court of Appeals and the rule and statutes that are at issue here. As stated by the Court of Appeals, the appellate rule cases cited in the Dipoma decision are not controlling on the issues now before this Court.

The Court of Appeals' discussion centered around three rules of appellate procedure: former Rule 73 of the Utah Rules of Appellate Procedure, as well as Rules 3 and 14(b) of the current Rules of Appellate Procedure. The court noted that former Rule 73 expressly states that payment of a docketing fee is jurisdictional. See former Utah R. App. P. 73; Dipoma, 1 P.3d at 568; (R. 106). Similarly, Rule 14(b) expressly provides that the court clerk may not accept a petition unless the docketing fee has been paid. See Utah R. App. P. 14(b); Dipoma, 1 P.3d at 569; (R. 107-08). Rule 3, on the other hand,

expressly provides that failure to pay the docketing fee is not jurisdictional.⁸ See Utah R. App. P. 3; Dipoma, 1 P.3d at 568; (R. 106-07).

The Court of Appeals then compared these appellate rules to Rule 3 of the Utah Rules of Civil procedure. Because the appellate rules expressly discussed filing fees, the Court of Appeals concluded that, as Rule 3 of the Utah Rules of Civil Procedure contains no specific reference to filing fees, and no specific incorporation of sections 21-1-1, 21-1-5 or 21-7-2, the filing fee need not be paid before a trial court takes jurisdiction over a case. See Dipoma, at 569; (R. 107-08). The court stated:

Unlike Rule 14, Rule 3 contains no specific reference to filing fees as a jurisdictional necessity nor does it incorporate sections 21-1-1, 21-1-5 or 21-7-2 of the Utah Code as jurisdictional requirements. The plain language of Rule 3 merely requires that a plaintiff "file" a complaint with the court clerk. Reference to filing fees as a jurisdictional prerequisite to commencing an action is notably absent from Rule 3, and we decline to read it into the rule. Sections 21-1-1, 21-1-5, and 21-7-2 are *merely directive* to court clerks.

Dipoma, at 568 (emphasis added).

McPhie submits that the Court of Appeals conclusion is incorrect under this Court's principles of statutory interpretation. See Hausknect v. The Industrial Commission, 882 P.2d 683, 685 (Utah Ct. App. 1994). Nothing in sections 21-1-1, 21-1-5 and 21-7-2 indicates that the Utah Legislature intended these statutes to be "merely directive" such that a civil litigant does not have to pay filing fees to commence a civil action. Such a construction of this series of statutes disables the express provisions of the

⁸ This Court recently noted as such in Gorostieta v. Parkinson, 2000 UT 99, 410 Utah Adv. Rep. 39.

Utah Legislature in a way that reduces these sections to nothing more than mere suggestions.

Dipoma claims that she has analyzed “the statutory history” of these statutes and has concluded that it supports her position. (See Brief of Respondent, p. 23.) Dipoma then claims that the Court of Appeals “essentially adopted the analysis of Dipoma in its opinion paragraphs 10-17.” (Id.) It is not clear what Dipoma means by statutory history. A review of Dipoma’s analysis discloses not a single comment on the legislative history of the three statutes that requires advance payment of mandatory filing fees. Similarly, a review of paragraphs 10-17 of the Court of Appeals’ decision shows only a review of the history of the case, not a review of “statutory history.” (See Brief of Respondent, p. 23; Brief of Respondent, Appendix, ¶¶ 10-17.) In reality, neither Dipoma nor the Court of Appeals ever discussed the legislative history of these statutes.⁹

When Rule 3 is read consistently with sections 21-1-1, 21-1-5 and 21-7-2, the rule of law becomes that which is well accepted in practice and principle in the Utah trial courts: that in order to commence a civil lawsuit, the plaintiff must pay the mandatory filing fee before the complaint is properly filed.

III. UNDER UTAH LAW, DIPOMA’S PAYMENT OF THE MANDATORY FILING FEE WITH A BAD CHECK IS NOT A VALID OR LEGITIMATE PAYMENT.

Dipoma claims that she did in fact pay the mandatory filing fee when she

⁹ Such an exercise by the Court of Appeals would first require a finding that the statutes were ambiguous. While the Court of Appeals did interpret the statutes in a way that conflicted with Rule 3, thereby requiring the “merely directive” holding, the Court of Appeals never found that the statutes were at all ambiguous.

tendered her bad check to the court clerk. Dipoma argues that, because she tendered a check, albeit an insufficient funds check, she “clearly paid the correct filing fee to the District Court clerk.” (Brief of Respondent, p. 25.) Dipoma’s position ignores the reality of her interaction with the trial court and Utah law regarding the issuance of bad checks.

The reality of Dipoma’s situation is that, while she tendered a check to the court clerk when she delivered her complaint, the clerk only accepted the check with the understanding that the check represented good and sufficient funds. Certainly, had the court clerk known that Dipoma’s check was drawn on insufficient funds, the court clerk would have rejected the complaint. Dipoma essentially ignored the situation she created with her bad check for nearly ten months, thereby requiring the court clerk to assess additional fees and administratively track Dipoma’s outstanding balance. McPhie submits that tendering a bad check to a court clerk and then waiting nearly ten months to pay the required funds, is entirely different than “properly paying a filing fee.”

Utah law clearly supports this position. The Utah Criminal Code provides that any person who willfully issues a check, knowing it will not be paid by the drawee, is guilty of issuing a bad check. See U.C.A. § 76-6-505(1) (1999). The Code further provides that any person who issues a check that is later refused by the drawee, is guilty of issuing a bad check “if he fails to make good and actual payment to the payee in the amount of the refused check or draft within 14 days of his receiving actual notice of the check or draft nonpayment.” U.C.A. § 76-6-505(2) (1999); see State v. Bartholomew, 724 P.2d 352, 354 (Utah 1986) (discussing effect of subsection 2).

While it is not clear in the record whether Dipoma knew her check was bad at

the time she gave it to the clerk, it is abundantly clear that she failed to make good and actual payment to the clerk until nearly ten months after the check was written. Further, it is clear that Dipoma was notified by the court clerk that she had written a bad check, and that Dipoma chose to ignore this situation until many months later. As such, it is undisputed that Dipoma's refusal to make proper payment was not reasonable or proper payment under Utah law. Under the guidance provided by section 76-6-505(2) Dipoma's claim that her ten-month-late payment of the amount she owed the court was "proper payment," is disingenuous. Because Dipoma failed to make good and actual payment on her check for nearly ten months, Dipoma's payment of the mandatory filing fee with a bad check was not a proper or reasonable payment.

IV. THE EFFECT OF THE COURT OF APPEALS' OPINION IMPOSES UNREASONABLE BURDENS ON GOVERNMENT AND GIVES THE COURT CLERK DISCRETION WHERE NONE WAS INTENDED.

In his opening brief, McPhie pointed out that the effect of the Court of Appeals' opinion below is not limited to the issue of bad checks and the commencement of a cause of action. McPhie submits that the Court of Appeals' opinion opens the door for numerous parties who avail themselves of government services to claim that fees and payments do not need to be made before service. When the Utah Court of Appeals' decision held that sections 21-1-1, 21-1-5 and 21-7-2 were "merely directive," the court necessarily impacted a number of State offices expressly governed by these sections. These offices include: the Lieutenant Governor's Office; the Division of Corporations; the State Auditor's Office; and the civil courts. See U.C.A. § 21-1-1 -5 (1999).

Furthermore, the Court of Appeals' decision impacts not just the filing of a complaint in a civil trial court, but all filings of all fees in all civil courts. Just to name a few, these fees would include: divorce petition fees; small claims filing fees; appellate fees; probate filing fees; child custody filing fees; and arbitration fees. See U.C.A. § 21-1-5 (1999) (listing over thirty categories of fees governed by this section). It is not hard to imagine that, in time, court clerks would spend more time tracking, accounting for and collecting fees than they would performing their other numerous court duties.

Dipoma states that McPhie attempts to expand this case "to encompass an entire rainbow of unreal issues." (Respondent's Brief, pp. 14, 22.) Dipoma's criticism is a colorful departure from her position in the Court of Appeals. There, Dipoma stated:

As will be seen, what would normally be an insignificant event – the return of a \$120 check, now becomes a major legal issue requiring analogy to numerous statutes and rules as well as to related Utah and other jurisdiction cases [sic].

Although the scope of this appeal involved the question of a returned check, the effect of this decision will affect numerous other factual variations. For example, some lawsuits may be commenced where a clerk erroneously fails to collect a fee or fails to collect the proper fee. . . . Thus, this decision will serve to answer a variety of simple questions which have tremendous consequences for some litigants.

(Brief of Appellant, pp. 10-11.) Just as Dipoma once recognized, McPhie submits that the facts of this case cannot be considered in a legal vacuum.

Dipoma's new position aside, it is clear that the Court of Appeals' decision below can have a serious impact on those governmental entities, including trial courts and court clerks, that are subject to Sections 21-1-1, 21-1-5 and 21-7-2. By interpreting these

statutes as “merely directive,” the Court of Appeals has essentially gutted the statutes of all legal meaning and binding authority. In fact, the Court of Appeals went further and held that Utah law “only requires a plaintiff to file a complaint in order to commence an action . . .” Dipoma, at 569. McPhie submits that, had the Utah Legislature intended these statutes to be “merely directive,” the Legislature would have so indicated.

As discussed in McPhie’s opening brief, it is not hard to imagine the potential effect of the Court of Appeals’ decision. A perfect example of the administrative hardships that Dipoma’s position would work on the trial court and clerk courts can be found by looking at Dipoma’s interaction with the trial court below. On December 29, 1997, when Dipoma’s check was returned to the court clerk’s office for insufficient funds, the court was required to create a fee account to trace the unpaid filing fee as well as the \$20 returned check fee. (R. 21). A number of entries are listed on the docket showing how the court clerks were required to track, account for, review and correspond with Dipoma regarding the amounts she owed to the court. (R. 21). It is no stretch to imagine the excessive burden that would be placed on the already overworked court systems in Utah as more and more civil litigants learned that the courts would loan them the money for a filing fee for which they would be later billed. Utah’s trial courts should not be saddled with the burden of having to act as collection agencies to those who fail or refuse to pay filing fees.

The Court of Appeals approach in reading sections 21-1-1, 21-1-5 and 21-7-2 as “merely directive” to court clerks, places the court clerk, and the potential litigant on unequal footing. Such an approach requires different conduct of two parties to the same

transaction. Under Dipoma, a potential litigant could present her complaint and a copy of the Dipoma decision at the clerk's window and demand to file her complaint without paying the filing fee, as the statutes did not apply to her. At the same time, the court clerk, bound by the statutes, would have to refuse to accept the complaint. Under Dipoma, this scenario could easily be repeated in all thirty of the government departments listed in sections 21-1-1, 21-1-5 and 21-7-2. Such an inconsistent holding clearly does not accomplish the result intended by the Utah Legislature.

**V. DIPOMA'S EVENTUAL PAYMENT OF THE
MANDATORY FILING FEE NEARLY TEN MONTHS
AFTER IT WAS DUE IS UNREASONABLE AS A MATTER
OF LAW.**

Given that Dipoma waited nearly ten months to make proper payment of the required filing fee to the court clerk, it is clear that Dipoma's conduct is unreasonable as a matter of law. Knowing that her conduct is clearly unreasonable as a matter of law, Dipoma has chosen to address the technicalities rather than the substance of this argument.

Dipoma claims that "[i]t goes without citation that a party who does not assert a claim waives it on appeal." (Respondent's Brief, p. 33.) Dipoma's position goes without citation because it is not in keeping with Utah law. The Utah Court of Appeals recognized this principle below when it stated that "[i]t is true, as the dissent suggests, that we may latch on to a new ground if, on that basis, it is possible to affirm the trial court." Dipoma, at 569. Thus, even the majority in Dipoma did not hold that McPhie had waived a reasonableness argument.

In his dissent below, Judge Bench discussed this issue in detail and quoted as follows:

The appellate court will affirm the judgment, order, or decree appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court.

Dipoma, at 570 (quoting Limb v. Federated Milk Producers Ass'n., 461 P.2d 290, 293 (Utah 1969)).

Judge Bench concluded:

Thus, under controlling Utah law, an alternative ground for affirmance need not be raised in or considered by the trial court. Accordingly we must address the alternative ground for affirmance that appellee has presented on appeal.

Id. As such, it is clear under Utah law that, the issue of whether Dipoma's decision to wait ten months before paying the filing fee was reasonable, is properly before this Court.

Dipoma next argues that, even if this Court does consider the issue of reasonableness, it is not "apparent on the record" that Dipoma's conduct was unreasonable. Dipoma essentially argues that because reasonableness is a fact-based question, it cannot form the grounds for summary judgment. McPhie submits that this position substantially ignores the record of this case.

It is true that, under Utah law, issues such as reasonableness are often questions of fact that are reserved for the finder of fact. However, it is equally well accepted that, where reasonable minds could come but to one conclusion, and where there

are no genuine issues of material fact, the issue presents a question of law.¹⁰ See, e.g., Jackson v. Dabney, 645 P.2d 613 (Utah 1982). In other words, if it is clear that no reasonable jury could find that Dipoma's decision to wait nearly ten months before making proper payment of the required filing fee was reasonable, the trial court's order of summary judgment must be affirmed.

Judge Bench in the decision below, and every other court that has considered this concise issue, have held that, where a party waits an extended period of time to make proper payment of a mandatory filing fee, the party's conduct is unreasonable as a matter of law. Judge Bench reviewed the undisputed facts as they appear in the record as follows:

[Dipoma] attempted to pay the filing fee by personal check when she filed her complaint on November 24, 1997. The check was returned to the court clerk for insufficient funds on December 29, 1997. It is unclear from the record exactly when appellant received notice that her check had bounced. It may have been as early as December [1997], but it was certainly no later than March 10, 1998. This later date was when appellant attempted to pay the filing fee with a second check, but the court clerk insisted on another form of payment because the first check had bounced. In any event, appellant allowed an additional five months to elapse before she finally paid the filing fee on August 11, 1998.

Dipoma, at 570.

Judge Bench concluded by stating:
In my opinion, waiting more than five months to pay the filing fee after being informed that a check has bounced is unreasonable, as a matter of law.

¹⁰ Before beginning its opinion, the Utah Court of Appeals noted that "[t]he facts pertinent to the issues on appeal are undisputed." Dipoma, at 565.

Id.

Every other court that either party or the Court of Appeals has located on this issue has held that, where a party waits an extended period of time to pay a mandatory filing fee, such conduct is unreasonable as a matter of law. See, e.g., Breckin v. MBNA America, 28 F.Supp. 2d 209 (D. Del. 1998) (holding that waiting three months is unreasonable as a matter of law, and that failure to pay cannot be used to extend limitations periods); Truitt v. County of Wayne, 148 F.3d 644, 648-49 (6th Cir. 1998) (waiting four months was unreasonable); Williams-Guice v. Board of Educ., 45 F.3d 161, 165 (7th Cir. 1995) (holding that waiting three months was unreasonable, and that courts do not grant indefinite extensions to pay filing fees); Jarrett v. US Sprint Communications Co., 22 F.3d 256, 259 (10th Cir. 1994) (waiting five months was unreasonable).

Dipoma does not dispute the merit of these cases, but instead claims that they all relied upon factual records concerning the actions or inactions of the litigants. However, a detailed review of these cases shows that, in each case, the courts relied on no more facts than are available on the record before this Court. The single factor dictating the holding that each party's conduct was unreasonable, was the fact that the party had waited for such an extended period of time.

McPhie submits that, even without the above cases, Utah law already provides guidelines as to the period of time that is considered reasonable. As discussed above, the Utah Criminal Code requires that a person who has paid any fee with a bad check has fourteen days after being notified of the deficiency in which to rectify the situation. In Utah, where a person fails to make good and proper payment within fourteen days after

notice, that person commits a crime. Surely, under Utah law, it cannot be considered reasonable to commit such a crime.

Dipoma cites Foley v. Foley, 147 Cal.App.2d 76 (Cal. Ct. App. 1956) for the proposition that this Court should not find that Dipoma's conduct was in violation of Utah law. This case is overwhelmingly distinguishable from the case before this Court. Foley involved a divorce action brought by a wife against her husband. The husband filed a cross-complaint against his wife alleging "extreme cruelty." After the husband was granted a judgment based on his cross-complaint, the wife filed a motion for a new trial. California law required that such a motion be filed within ten days of judgment and that it be accompanied by a fee. However, Mrs. Foley failed to pay the fee when she filed her motion, and instead paid it four days after the filing deadline. Because the motion had been filed within ten days, the trial court accepted the motion, even though the fee was late.

The husband appealed, claiming that the court should not have accepted the motion. The appellate court rejected the husband's position and held that because the case involved the filing of a motion, rather than the commencement of an action, and because Mrs. Foley paid the proper amount with proper funds only four days later, that the husband had suffered no prejudice.

Foley is different than this case in a number of respects. First, as the court noted, Foley involved the filing of a motion for a new trial, not the commencement of an action as is involved in the instant case. Second, when Mrs. Foley did pay the filing fee, she did so with a proper form of payment. Dipoma, on the other hand, paid with a bad

check that remained dishonored and unpaid for nearly ten months. Third, Mrs. Foley paid the required fee only *four days* after the applicable deadline. Dipoma, on the other hand, waited nearly 150 days longer than Mrs. Foley to pay the required filing fee to commence her action against McPhie. Lastly, Mr. Foley suffered no prejudice by the late payment of the docketing fee because he was provided notice of the motion. Dipoma, on the other hand, was able to extend the four year statute of limitations for an additional ten months. During this time, she never notified McPhie that she was bringing a claim against him.

It is important to note that Dipoma never defends her conduct as reasonable. The undisputed facts before this Court, as established by the record, show that Dipoma waited nearly ten months before properly paying the mandatory filing fee. Because Dipoma waited such an extended period of time, and because such period of time had the effect of extending the statute of limitations, Dipoma's actions are unreasonable as a matter of law.

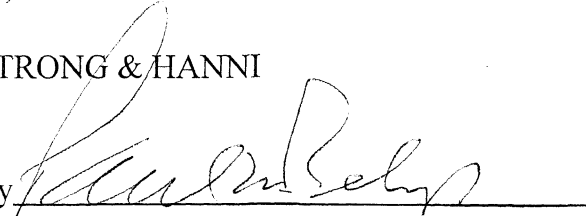
CONCLUSION

For the reasons discussed above, Petitioner-Defendant Brian McPhie respectfully requests that this Court affirm the trial court's order of summary judgment.

DATED this 5th day of February, 2001.

STRONG & HANNI

By


Paul M. Belnap

Andrew D. Wright

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 5 day of February, 2001, a true and correct copy of the foregoing **REPLY BRIEF OF PETITIONER** was served by the method indicated below to the following:

Craig S. Cook	<input checked="" type="checkbox"/>	U.S. Mail, Postage Prepaid
Attorney for the Plaintiff/Appellant	<input type="checkbox"/>	Hand Delivered
3645 East Cascade Way	<input type="checkbox"/>	Overnight Mail
Salt Lake City, Utah 84109	<input type="checkbox"/>	Facsimile

Rebecca Maffziger