

1990

Meadow Fresh Farms, Inc. v. Utah State University
Department of Agriculture and Applied
Science Von T. Mendenhall. Archie Hurst, Claudia
Clark, Nancy G. Robinette, Barbara Prater and
John/Jane Does 1 through 20 : Brief of
Respondent

Utah Court of Appeals

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COURT OF APPEALS
BRIEF

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900410-CA

IN THE UTAH COURT OF APPEALS

MEADOW FRESH FARMS, INC.,	:	
Plaintiff/Appellant	:	
v.	:	Case No. 900410-CA
	:	Priority No. 16
UTAH STATE UNIVERSITY DEPT. OF AGRICULTURE AND APPLIED SCIENCE, STATE OF UTAH STATE DEPT. OF AGRICULTURE, VON T. MENDENHALL, ARCHIE HURST, CLAUDIA CLARK, NANCY G. ROBINETTE, BARBARA PRATER and JOHN/JANE DOES 1 THROUGH 20,	:	
Defendants/Respondents	:	

BRIEF OF RESPONDENTS UTAH STATE UNIVERSITY DEPT. OF
AGRICULTURE AND APPLIED SCIENCE, VON T.
MENDENHALL AND BARBARA PRATER

APPEAL FROM ORDER DENYING MOTION TO SET ASIDE
ORDER OF DISMISSAL BY THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, HONORABLE J. DENNIS FREDERICK

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IN THE UTAH COURT OF APPEALS

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Plaintiff/Appellant	:	
v.	:	Case No. 900410-CA
	:	Priority No. 16
UTAH STATE UNIVERSITY DEPT.	:	
OF AGRICULTURE AND APPLIED	:	
SCIENCE, STATE OF UTAH STATE	:	
DEPT. OF AGRICULTURE, VON T.	:	
MENDENHALL, ARCHIE HURST,	:	
CLAUDIA CLARK, NANCY G.	:	
ROBINETTE, BARBARA PRATER and	:	
JOHN/JANE DOES 1 THROUGH 20,	:	
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STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to Section 78-2a-3(2)(j) UTAH CODE ANNOT. Plaintiff/Appellant originally filed this appeal with the Utah Supreme Court, but that court poured this matter over to this Court on July 31, 1990 pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Pursuant to Rule 24(b) of the Utah Rules of Appellate Procedure, Defendant/Respondent First Security herein sets forth its Statement of Issues Presented for Review.

1. Did the trial court abuse its discretion in denying Meadow Fresh's motion to set aside order of dismissal when Meadow Fresh's counsel and Meadow Fresh were both advised of the hearing on the order to show cause and failed to appear or otherwise show good cause for not dismissing the matter?

2. In the event this Court renders an advisory opinion on the effect of Section 78-12-40 Utah Code Annot., whether Utah's savings statute allows more than one refiling period following successive dismissals of a matter other than on the merits?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Rule 4-103 Utah Code of Judicial Administration-Civil Calendar Management.

(2) If a certificate of readiness for trial has not been served and filed within 180 days of the filing date and absent a showing of good cause, the court shall

dismiss the case without prejudice for lack of prosecution.

§ 78-12-40 UTAH CODE ANNOT.

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

Rule 41(b) Utah Rules of Civil Procedure

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . .

STATEMENT OF THE CASE

Nature of the Proceedings Below

Plaintiff/Appellant Meadow Fresh Farms, Inc. ("Meadow Fresh") originally commenced its action against these defendants by filing a complaint against Defendants/Respondents on April 25, 1983. (R. at 205-221). That case was dismissed on September 27, 1985 by Judge Scott Daniels of the Third District Court for Meadow Fresh's failure to prosecute. (R. at 246). On March 13, 1987 Judge Daniels denied Meadow Fresh's motion to set aside the September 27, 1985 order of dismissal. (R. at 255-59).

Meadow Fresh appealed Judge Daniel's denial of the motion to set the dismissal aside. On May 27, 1987, the Utah Supreme Court summarily disposed of Meadow Fresh's appeal and affirmed Judge Daniel's dismissal of the original complaint. (R. at

261-62). Its order stated, "The grounds for review are so insubstantial that they do not merit further review." On January 12, 1988, Meadow Fresh filed its lawsuit again. (R. at 2-19). Nearly one year later, on December 5, 1989, Judge Frederick issued an Order to Show Cause pursuant to Rule 4-103 of the Utah Code of Judicial Administration and mailed a copy to Meadow Fresh's counsel, citing Meadow Fresh's failure to prosecute its lawsuit as grounds for dismissal. (R. at 165). Although both Meadow Fresh and its counsel were aware of the hearing, neither Meadow Fresh nor its counsel appeared at the hearing on the Order to Show Cause, and Judge Frederick entered his Order of Dismissal on January 18, 1990. (R. at 180).

On February 22, 1990 Meadow Fresh moved the trial court for an order to set aside this second dismissal of Meadow Fresh's complaint for failure to prosecute. (R. at 189-90). After receiving memoranda from all parties and after considering the matter, Judge Frederick denied Meadow Fresh's motion to set aside his order of dismissal on May 22, 1990. (R. at 481-82). It is from that Order that Meadow Fresh appeals.

Statement of the Facts

The law firm of Harris & Chambers (now Preston & Chambers) represented Meadow Fresh at all times from January 12, 1988 to January 9, 1990. This is demonstrated by the following pleadings of record:

1. Mr. B.H. Harris withdrew from personal representation of Meadow Fresh because of a judicial appointment on December 14, 1988. Nothing in his withdrawal indicated his firm was withdrawing from representation. (R. at 163).

2. On December 22, 1988, after Mr. Harris' withdrawal, Mr. Harris' former law firm, then under the name of Preston & Chambers, continued to represent Meadow Fresh in the case and responded to outstanding interrogatories on behalf of Meadow Fresh and certified the same to the court. (R. at 167).

3. On January 12, 1989, nearly one month after the law firm of Preston & Chambers claims it withdrew from representing Meadow Fresh, a stipulation executed by Preston & Chambers on behalf of Meadow Fresh was filed with the trial court. (R. at 175-77).

4. The law firm of Preston & Chambers did not withdraw from Meadow Fresh's representation until January 9, 1990. (R. at 171-172).

The President of Meadow Fresh, Mr. Roy Brog, was made aware of the Order to Show Cause hearing in December, 1989.

On May 14, 1990 Meadow Fresh filed its lawsuit a third time, which complaint was dismissed by reason of the pendency of this appeal. See Addenda to Brief of Appellant Meadow Fresh.

SUMMARY OF ARGUMENT

This Court should affirm the trial court's denial of

Meadow Fresh's motion to set aside the order of dismissal. The first time Meadow Fresh appealed such a denial, the Utah Supreme Court affirmed the denial of Meadow Fresh's motion to set aside the first order of dismissal without considering the matter of sufficient moment to even require briefing. The policy and equitable reasons for effectively affirming the second dismissal of Meadow Fresh's claims for its failure to prosecute them are even greater now than they were at the time the Utah Supreme Court summarily disposed of Meadow Fresh's first appeal of such a dismissal.

The Utah Rules of Civil Procedure has committed to the sound discretion of the trial court the decision of whether an order of dismissal should be set aside. Meadow Fresh has shown no abuse of that discretion. Meadow Fresh had adequate opportunity to appear before the trial court to demonstrate reasons why its case should not be dismissed, and chose not to do so. Further, Meadow Fresh had adequate opportunity to demonstrate a reason why the order of dismissal should not be set aside, pursuant to Rule 60 of the Utah Rules of Civil Procedure. In both instances, Meadow Fresh failed to meet its burden. After nearly ten years since Meadow Fresh's claims arose, and after two separate filings have run their course and have each been dismissed by reason of Meadow Fresh's dilatory prosecution of its claims, Meadow Fresh cannot show and has not shown an abuse of the trial court's

discretion in refusing to set aside its order of dismissal. Because Meadow Fresh cannot show an abuse of discretion, this court should affirm the trial court's decision.

Meadow Fresh has asked this court to render an advisory opinion on whether, assuming this court allows the order of dismissal in Meadow Fresh's second case to stand, Section 78-12-40, UTAH CODE ANNOT., would permit a third filing to come within the one year savings clause of the statute. In other words, Meadow Fresh asks this court to render an opinion that interprets Utah's savings statute to permit multiple refilings of claims after multiple dismissals of those same claims, if those dismissals are not on the merits. Rendering such an opinion is not necessary to resolve the issues on this appeal. However, the issue is almost certain to arise should Meadow Fresh file its complaint a third time. If this court elects to render an opinion on whether Utah's savings statute allows multiple filings, this court should rule that Section 78-12-40, UTAH CODE ANNOT., allows only one opportunity to take advantage of the additional one year following a non-prejudicial dismissal. The policies behind statutes of limitation, judicial economy, and finality affording potential defendants a point in time at which they may rest from fear of litigation, combined with the express language of the statute, all combine to weigh heavily against creating a rule of law that would allow a cause of action to live forever so long as

the plaintiff continued to neglect its prosecution and simply refiled within a year of its repeated dismissals.

ARGUMENT

A. JUDGE FREDERICK'S DENIAL OF THE MOTION TO SET ASIDE HIS ORDER OF DISMISSAL WAS NOT AN ABUSE OF DISCRETION.

In Utah, filing a lawsuit imposes obligations upon the plaintiff. A plaintiff has obligations to the court as well as to the defendants that it will pursue its claims vigorously, and that the case will not be allowed to languish, burdening both the court and the defendants. This is the rationale expressly underlying Rule 4-103 of the Utah Code of Judicial Administration and Rule 41(b) of the Utah Rules of Civil Procedure. The strong public policy against claims having indefinite duration is also necessarily implied in the many statutes of limitation governing the timing of when claims must be brought, or lost forever.

Meadow Fresh asks this Court to ignore all of the policies governing the conduct of plaintiffs in lawsuits, and to continue the uncertainty under which these defendants have labored since these claims were first brought nearly eight years ago. In that eight years, Meadow Fresh has now twice neglected to prosecute its claims against the defendants herein. For the reason that two judges of the Third District have dismissed Meadow Fresh's claims, and because Meadow Fresh has failed in its burden of showing an abuse of discretion, this Court should affirm the

lower court's denial of Meadow Fresh's motion to set aside the order of dismissal.

1. The Trial Court Has Considerable Discretion to Refuse to Set Aside a Dismissal.

The Utah Supreme Court has held that a trial court is endowed with considerable latitude of discretion in determining whether a movant has made a sufficient showing to overcome an entry of judgment, and that such a determination shall not be overturned without a clear showing of abuse of that discretion. Larsen v. Collina, 684 P.2d 52, 54 (Utah 1984). Meadow Fresh has made no showing of such an abuse. Instead, Meadow Fresh has argued that the danger of a harsh result following an affirmance of Judge Frederick's decision necessarily implies some kind of abuse of discretion. That is not the law. That a party may suffer because of a trial court's decision is not a sufficient reason to warrant reversal, especially when the decision has expressly been left to the discretion of the trial court, and the trial court has exercised that discretion after being fully advised of the facts and the law by all parties.

2. Meadow Fresh Was Accorded Due Process.

Meadow Fresh claims that it was denied due process because of inadequate notice of the show cause hearing. (Brief of Appellant at 13-15). This claim is unsupported by the record. On December 5, 1989, when the trial court sent notice of the hearing,

Meadow Fresh was represented by Preston & Chambers, the law firm to whom the notice was sent. The fact of Meadow Fresh's representation is necessarily implied from the wording of B.H. Harris' withdrawal as counsel in December, 1988, but more importantly by two other facts. First, the law firm of Preston & Chambers continued to file pleadings for and on behalf of Meadow Fresh after Mr. Harris' withdrawal, in late December, 1988 and middle January, 1989. (R. at 167, 175-77). Therefore, notice was sent to Meadow Fresh's counsel, which constitutes notice to Meadow Fresh.

Second, and perhaps more importantly, Meadow Fresh had actual notice of the show cause hearing and had opportunity to be heard, as established by the Affidavit of Roy Brog, filed in support of Meadow Fresh's motion to set aside the order of dismissal. (R. at 183-185.) Therefore, Meadow Fresh's constitutional arguments are irrelevant, and without factual support.

3. The Westinghouse Test For Explaining Delays Is Not Applicable On Appeal Since Meadow Fresh Elected Not To Argue That Test At The Trial Court.

Meadow Fresh correctly cites this Court to the case of Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, 544 P.2d 876 (Utah 1975) as setting forth the primary factors to be considered in determining whether a plaintiff is justified in failing to prosecute an action. However, leaping to a

consideration of these factors ignores one essential fact. Meadow Fresh's opportunity to establish just cause for retaining the case under the Westinghouse test was at the trial court level, not now. Meadow Fresh's opportunity to make any facts weighing against dismissal of record is past, and that issue is not properly before this court. In spite of Meadow Fresh's and its counsel's opportunity to apprise the trial court of these factors at the hearing on the order to show cause, it elected to ignore that opportunity. Meadow Fresh failed to meet its burden of demonstrating justifiable reasons for not dismissing the action at the proper time and place to the trial court, and should not now be allowed to resurrect such reasons.

a. Even if applied, Westinghouse is not met.

Even if Meadow Fresh had appeared at the hearing, there is nothing in the record to suggest that Meadow Fresh's dilatory prosecution of its claims was justified by any reason. The Westinghouse test involves 1) the conduct of the parties; 2) The opportunities to move the case forward; 3) What difficulties or prejudice may have been caused to the other side by the delay; and 4) whether injustice may result from the dismissal. Id. at 879.

Applying this four-part test, the conduct of the parties element and opportunities to move the case forward element both weigh heavily in favor of dismissal. The undisputed facts clearly show that Meadow Fresh has consistently neglected to prosecute its

claims, in spite of the opportunities afforded by the intervening years and the additional time to file its second action afforded by Section 78-12-40 Utah Code Annot. As to the third element, prejudice, the defendants are prejudiced in their abilities to defend against these claims now by sheer passage of time.

Finally, examining the fourth element, what injustice is done in dismissing claims a party has historically refused to prosecute? The defendants have had to live with the prospect of liability for nearly 8 years now, not knowing if and when Meadow Fresh may decide to get serious about its claims. Meadow Fresh has obviously not considered its claims against the defendants to be of sufficient merit or import to prosecute them in either of the two separate actions it has brought. In light of this conscious disregard, Meadow Fresh's suggestion that it would be unjust to affirm the dismissal of its claims is unsupported and unsupportable.

In summary, Meadow Fresh has entirely failed in its burden of showing any cause, let alone good cause, to excuse its habitual negligence in prosecuting its claims. Judge Frederick doubtless took all relevant factors into consideration when he made his decision to allow the dismissal to stand. Because Meadow Fresh has set forth no adequate reason for overturning that exercise of discretion, this Court should affirm Judge Frederick's denial of Meadow Fresh's motion to set aside dismissal.

- B. SHOULD THIS COURT RENDER AN OPINION ON THE AVAILABILITY OF SECTION 78-12-40 FOR MULTIPLE REFILINGS, IT SHOULD LIMIT THE EFFECT OF THE SAVINGS STATUTE TO FILINGS WITHIN THE FIRST ADDITIONAL YEAR ONLY.

Assuming this Court rules in favor of the defendants and affirms the trial court order, Meadow Fresh asks this Court to render an advisory opinion on whether it can timely refile its complaint a third time. Because a consideration of this issue is not necessary to rule upon the denial of the motion to set aside dismissal, any opinion on the savings statute issue would be advisory.

However, Meadow Fresh is correct in stating that if it files its complaint a third time, these defendants will assert statute of limitation defenses based upon an interpretation of the Utah saving statute which limits the "saving" of a cause of action to the year following the first non-prejudicial dismissal only. Should this Court determine that the circumstances merit rendering an opinion on the availability of Section 78-12-40 Utah Code Annot. to more than one additional filing period, this Court should reject Meadow Fresh's arguments and rule that Utah's savings statute affords only one additional filing period of one year after a non-prejudicial dismissal other than on the merits and outside of the otherwise applicable statute of limitations.

1. The One Year Savings Statute Does Not Apply To A Third Suit Brought More Than One Year After The Dismissal Of The First Suit.

Meadow Fresh has alleged three causes of action against

the defendants in this action - negligence, interference in business, and disparagement. The applicable statute of limitations is contained in § 78-12-25, UTAH CODE ANNOT., giving Meadow Fresh four years within which to bring its causes of action. The acts of which plaintiff complains took place in the months of May, June, and September, 1981. (R. at 2-19). If Meadow Fresh were to file a third action, it would file its complaint approximately ten years after the acts complained of. For the following reasons, Meadow Fresh's claims are not saved by § 78-12-40, and this Court should render an opinion making clear the applicability of the savings statute only to filings within the year following the first non-prejudicial dismissal.

- a. This Court should construe § 78-12-40 to allow only one tolling or "saving".

It is undisputed, and the record of Meadow Fresh's two filings in the Third District Court, C83-3163 and C88-00171, both establish that Meadow Fresh filed its original action within the applicable statute of limitations, which action was dismissed, as a final matter, when the Utah Supreme Court affirmed Judge Daniel's denial of the motion to set aside judgment on May 27, 1987. Meadow Fresh then took advantage of § 78-12-40 by filing its second action within one year of May 27, 1987.

Section 78-12-40 UTAH CODE ANNOT. states as follows:

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action

otherwise than on the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the removal or failure.

The express language of the statute provides only for "a" new action, and refers only to "the" reversal or failure, not to any new action or to any failure. Nothing in this statute implies that a plaintiff like Meadow Fresh may repeatedly bring successive actions following successive dismissals for year after year, regardless of the amount of time that has elapsed, and regardless of the number of dismissals. Meadow Fresh asks this Court to interpret the savings statute so that there is no limit to the number of dismissals and refilings to which a plaintiff may subject the courts and defendants. Such an interpretation directly contradicts the policies of finality and judicial economy.

Although there is no Utah case law on point, other jurisdictions have held that a plaintiff may not repeatedly utilize the applicable savings statute after its second action has been dismissed without prejudice.

In United States Fire Ins. Co. v. Smyden, 53 P.2d 284 (Okla. 1935), the Oklahoma Supreme Court held that a fourth filing was barred because the applicable savings statute only allowed one new filing within the extension period.

It is generally held that the privilege conferred by an enabling provision in the Statute of Limitations may be exercised but once; that is, that such provision does not give protection to an indefinite number of actions merely

because each has been commenced before the period allowed by the saving clause has expired.

Id. at 286 (citations omitted). The Smyden court went on to note that a savings statute does not extend the original limitation period, but "is only a conditional, limited extension granted plaintiff. . . ." Id. at 288. Other courts have similarly ruled that a savings statute may be used but once. See, e.g., Hosogai v. Kadota, 700 P.2d 1327, 1330 (Ariz. 1985) ("A 'savings' statute allows an action, dismissed for reasons unrelated to the merits after the statute of limitations has expired, to be reinstated if a second action is filed promptly thereafter.") (emphasis added); Bush v. Cole, 110 N.E. 1056 (Ohio Ct. App. 1913); Read v. Cincinnati, N.O. T.P.R. Co. 190 S.W. 458 (Tenn. 1916).

Finally, a recent decision of the Utah Supreme Court implies that a plaintiff is only entitled to a second filing under the savings statute, and not to continuous filings.

[W]e have held that if a dismissal of a first action is appealed, section 78-12-40's extension of time for filing a second action runs from the date of the dismissal's affirmance.

Madsen v. Borthick, 769 P.2d 245, 254 (Utah 1988) (emphasis added).

If this Court elects to render an opinion, it should rule that Section 78-12-40 Utah Code Annot. does not permit a plaintiff more than one exercise of the extraordinary extension of time to file a complaint provided thereby. In the instant case, by waiting until 1987 to seek a vacation of the 1985 dismissal of its

first action, and re-filing in 1988 after the Supreme Court affirmed the first dismissal, Meadow Fresh actually had over two years from the dismissal of its first action to file a second time. No reason at law or equity exists to allow Meadow Fresh or any other plaintiff to file a third time, over four and a half years after the first dismissal, and years after the original statute of limitations has run.

CONCLUSION

For the above reasons, these defendants respectfully ask this Court to affirm the denial of Meadow Fresh's motion to set aside the January 18, 1990 Order of Dismissal, and, if this Court elects to render an opinion on the interpretation of Section 78-12-40 Utah Code Annot., to rule that Utah's savings statute permits only one filing within one year of the first dismissal other than on the merits.

Respectfully submitted,



Paul S. Felt

Mark O. Morris

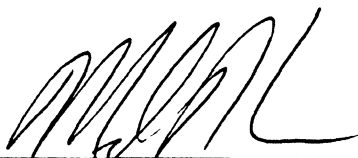
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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February, 1991,
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