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Richard A. Isaacson v. Clair Dorius et al : Reply Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD A. ISAACSON, Plaintiff and Respondent, vs. CLAIR DORIUS, Defendant and Appellant, and LAWRENCE W. LYNN, Plaintiff and Respondent, vs. CLAIR DORIUS, Defendant and Appellant.	Case No. 18166

REPLY BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR SANPETE COUNTY, STATE OF UTAH, HONORABLE DON V. TIBBS, PRESIDING

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NATURE OF THE CASE

This is an action for personal injuries and property damages brought by the plaintiffs-respondents against the defendant-appellant arising out of a collision between an automobile driven by the plaintiff-respondent, Lawrence W. Lynn, in which the plaintiff-respondent, Richard A. Isaacson, was a passenger and a vehicle driven by the defendant-appellant, Clair Dorius. The actions were brought as separate

suits and consolidated for trial.

DISPOSITION IN THE LOWER COURT

The trial court granted plaintiffs-respondents' Motion for a Directed Verdict on the issue of liability and took the issue of comparative negligence of the plaintiffs-respondents from the jury. The trial court submitted the issue of damages only to the jury.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks to have the Supreme Court rule that the trial court erred in granting the Motion for Directed Verdict and in failing to submit the issue of comparative negligence of the plaintiffs-respondents to the jury. Defendant-Appellant seeks to have the Court reverse the trial court's decision and remand the matter for a trial and submission to the jury upon comparative negligence.

STATEMENT OF FACTS

The facts germane to this reply brief are as follows:

1. The judgment on the jury's verdict was entered by the Court in this matter on the 8th day of September, 1981 (R. 68-69; 170-171). Motion for a New Trial was filed by the appellant herein on September 16, 1981 (R. 72). On the 12th of November, plaintiff-respondent mailed a copy of an

Order denying the defendant-appellant's Motion for New Trial to the Court and to the defendant-appellant (R. 95-96; 179-180). The Court executed the Order denying the Motion for New Trial on the 13th day of November and the same was docketed by the clerk on the 13th of November (R. 95; 179). Notice of Appeal was mailed on the 10th day of December, 1981 (R. 97-98; 181-182). It was docketed by the Clerk on the 16th of December, 1981 (R. 97; 181).

The Designation of Record on Appeal was mailed on December 10, L981 (R. 101; 187) and was docketed by the clerk on the 16th of December, 1981 (R. 100; 186). The Certificate of Ordering the Transcript was mailed on the 10th of December, 1981 (R. 103; 185) and docketed by the clerk on the 16th of December, 1981 (R. 102; 184). Notice of Furnishing Bond on Appeal was served by mail on the 10th of December, 1981 (R. 105; 189) and docketed by the Clerk on the 16th of December, 1981 (R. 104; 188). The Undertaking of Corporate Surety was docketed by the clerk on December 16, 1981 (R. 106-107; 190-191).

ARGUMENT

POINT I

THE NOTICE OF APPEAL MAILED ON DECEMBER 10, 1981 WAS TIMELY FILED.

Rule 73(a), Utah Rules of Civil Procedure, provides that the time within which an appeal may be taken shall be one month from the date of entry in the register of actions of the

judgment or order from which the appeal is taken. Paragraph 3 of subparagraph (a) of Rule 73, (promulgated by this Court) provides:

> A party may appeal from a judgment by filing with the District Court a Notice of Appeal. . .

Rule 5(e), Utah Rules of Civil Procedure, defines filng with the Court. It provides "The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court. . ."

The rule defines with whom filing is to be made to constitute a filing with the Court but does not define the act which accomplishes the "filing". The Rules of Civil Procedure do not define what act constitutes the filing with the Clerk of the Court as described in Rule 5(e)

The duties imposed upon county clerks as clerks of the district court are listed in the title of the Utah Code concerned with counties, Title 17, under Chapter 20. Section 2 itemizes the duties of the county clerk as a part of the county government. Those duties defined in §17-20-2, Utah Code Annotated, as amended, are also repeated in Rule 79(d), Utah Rules of Civil Procedure, promulgated by this Court.

Article XI of the Constitution of Utah defines counties and county government and in Section 1 defines the county as a legal subdivision of the State of Utah.

Examination of the above quoted sections shows that

the Rules of Civil Procedure provide that the Notice of Appeal must be filed with the Court, that filing with the Clerk of the Court is defined as the means by which a filing with the Court takes place. The sections above quoted show that the filing is with the County Clerk, which is a part of the county government and thus, a political subdivision of the State of Utah.

Section 63-37-1, Utah Code Annotated, as amended, deals with the mailing of reports and other documents to the State or to political subdivisions and reads in pertinent part as follows:

> Any. . . other document. . . required or authorized to be filed. . . to any political subdivision thereof, which is:
>
> > (1) Transmitted through the United States mail, shall be deemed filed or made and received by the . . . political subdivisions on the date shown by the post-office cancellation mark stamped upon the envelope or other appropriate wrapper containing it.

The Affidavit of Shirlene Oleson in opposition to the Motion to Dismiss Appeal in this matter establishes that Sanpete County does not retain the envelope or wrapper showing the cancellation mark. However, subparagraph 2 of §63-37-1 in pertinent part provides as follows:

> (2) Mailed but not received by the . . . political subdivisions [sic] [or] where received and the cancellation mark is . . . omitted shall be deemed filed or made and received on the date it was mailed if the sender establishes by competent evidence that the . . . other document . . . was deposited in the United States mail on or

before the date for filing. . . .

It is obvious that the Courts are a separate branch of government under the separation of powers of the Constitution of the State of Utah and as such, are not controlled by the legislative pronouncements. Nevertheless, this Court has promulgated through the Utah Rules of Civil Procedure a rule defining that the filing of a Notice of Appeal is filed with the Clerk. The clerk is an integral part of the county, a political subdivision of the State of Utah. Thus, the statute 63-37-1, Utah Code Annotated, has direct application to the compliance with the requirement of filing of a Notice of Appeal with the county clerk.

The policy considerations in the promulgation by this Court of the Rules of Civil Procedure are permeated with a recognition and intent that notices and orders shall be served by mail. Following the service of process initiating the jurisdiction of a court, Rule 5, Utah Rules of Civil Procedure, provides that thereafter all orders may be served upon the opposing party or upon counsel for the opposing party by mail and specifically provides.

To adopt respondents' contention that the definition of filing requires a physical depositing of the Notice of Appeal with the Clerk of the Court would be contrary to the policy spelled out numerous places throughout the Rules of Civil Procedure alluding to and requiring the mailing of all

variety of instruments in connection with court process.

Rule 6(b), Utah Rules of Civil Procedure, defines the methodology and terms under which a court may give an enlargement of the time computations for rules of procedure. Rule 6(b), Utah Rules of Civil Procedure, defers to Rule 73(a) the granting of an extending of time for the time for appeal.

Rule 73(a), Utah Rules of Civil Procedure, provides the circumstances under which the trial court has the authority to extend the time for filing a notice of appeal, but does not deal with the computation of the time within which the appeal must be taken. Neither does Rule 73(a) exclude or abrogate the provisions of Rule 6, Utah Rules of Civil Procedure. Rule 73(a) gives to the trial court authority to extend the time for filing notice of appeal not to exceed one additional month from the expiration of the original time for appeal. However, neither of those rules deal with or abrogate the provisions of Rule 6(e). Rule 6(e) provides that:

> Whenever a party has a right or is required to do some act or take some proceedings within a prescribed period after service of. . . other paper upon him and the. . . paper is served upon him by mail, 3 days shall be added to the prescribed period.

This matter appears to be one of first impression. Neither the Rules of Civil Procedure nor the statutes define the physical act necessary to constitute filing. The statute cited, 63-37-1, Utah Code Annotated, providing that the filing

of "other documents" with county clerks or other political subdivisions of the state are deemed to have been filed upon mailing. It is appellant's contention that the certificate of mailing in this matter on the Notice of Appeal dated the 10th of December shows that it was well within any time frame which might be computed for the time for appeal.

The Order denying appellant's Motion for a New Trial (R. 95, 179) shows that the Order was mailed by plaintiff-respondents' counsel on the 12th of November, 1981 and executed by the court on the 13th of November, 1981 (R. 95-96, 179-180). Thus, the record in this proceeding shows that the very Order triggering the appeal process was mailed from Salt Lake City and was executed one day later by the court. It was reasonable for defendant-appellant's counsel to expect that the Notice of Appeal mailed in the 10th of December (R. 97-98, 181-182) accompanied by the Designation of Record on Appeal (R. 100-101, 186-187), the Certificate of Ordering Transcript (R. 102-103, 184-185), the Notice of Furnishing Bond on Appeal (R. 104-105, 188-189) and the Undertaking of Corporate Surety (R. 106-107, 190-191) would be received and docketed by the clerk well before any appeal deadline.

Referring again to the Order denying the Motion for a New Trial which triggered this appeal (R. 95, 179), this Court's attention is further cited to Rule 77(d), Utah Rules of Civil Procedure, promulgated by this Court, which provides in part:

> Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party. . .[emphasis added]

Thus, under the rules of this Court, upon the entry of the Order denying the Motion for New Trial, defendant-appellant was entitled to, and the rules make mandatory upon the clerk, a service of such order by mail upon the defendant-appellant. Therefore, we must again look to Rule 6(e) which provides in pertinent part:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

Since the Order denying the Motion for New Trial was docketed by the Court on the 13th day of November and because of the mandatory requirement on the clerk to serve a notice by mail upon the defendant-appellant pursuant to Rule 77(d), such mailing triggers the provisions of Rule 6(e) adding three days to the one month requirement for taking an appeal as set forth in Rule 73(a). By such computations the deadline for filing the Notice of Appeal was not until December 16, 1981, the day on which it was docketed.

This writer has not discovered any cases by this Court ruling upon the specific facts in this case, making it appear to be a case of first impression with this Court on the

facts of this case. There are, however, decisions of the federal court system under Rule 6 of the Federal Rules of Civil Procedure which is substantially identical to the Rule 6 of the Utah Rules of Civil Procedure.

In the case of Sanchez v. Board of Regents, (1980 CA5 Tex) 625 F.2d 521, the Court held that reliance on the normal course of delivery of mail is reasonable and may be the basis for the Court to excuse an otherwise untimely filing of a notice of appeal under the Federal Rules of Appellate Procedure. In the case now at bar, the filing of the Notice of Appeal was initiated prior to the expiration of the initial appeal period and did not necessitate an application for an enlargement of time pursuant to Rule 6(b). It was within the time frame prescribed by Rule 73 (a) as enlarged by Rule 6(e) as above described.

The Court is also cited to Aldabe v. Aldabe, (1980 CA 9 Cal) 616 F.2d 1089, wherein the Court said that since the appellant has no control over the delays between receipt by the Clerk's Office and the filing on the docket, that an appeal initiated within the 30 days after the entry of the order appealed from which was received by the District Court within the 30 days but was not filed until after the 30 days, is a timely filing. See also, United States v. Solly, (1976 CA3 NJ) 545 F.2d 874, in which the Third Circuit Court held that the Notice of Appeal is considered filed when it is received

in the District Court and not when it is noted as filed on the docket sheets.

In this case in view of the mailing of the Order from the respondent to the Court on the 12th and being signed by the Court on the 13th, appellant's filing of the Notice of Appeal on the 10th was well in advance of the filing deadline and appellant was reasonably entitled to expect that it was received in the Clerk's Office prior to the date on which it was entered on the docket.

The Court is also cited to United States v. Nunley, (1973 DC Tenn) 369 F.Supp. 171, wherein even in a criminal case where a Notice of Appeal was mailed on the seventh day of a ten-day appeal period and was received by the Clerk of the Court after the ten-day appeal period had expired the Court ruled it would consider the Notice of Appeal having been filed nunc pro tunc on the date of maling.

Appellant cites in support of his contentions on the issue of timeliness of the filing of the appeal, Anderson v. Anderson, (1954) 3 Utah 2d 277, 282 P.2d 845. However, in the Anderson case the Court was not dealing with the mailing of a notice of appeal, but was dealing with a notice of appeal which was not presented to the Clerk for filing until after the one-month filing period. The issue of §63-37-1 did not have any application because the effect of mailing controlled by §63-37-1 (1) and (2) was not at issue.

The case cited in Re Estate of Lynch, (Brennan v. Lynch Utah) 123 Utah 57,254 P.2d 454 does not deal with the issue of mailing or of a defining of what constitutes a filing with the District Court.

The remaining case cited by defendant-respondent Estate of Ratliff v. Conrad, 19 Utah 2d 346, 431 P.2d 571 dealt with an entirely different issue. It dealt with facts where the notice of appeal was received by the County Clerk but was not accompanied by the filing fee, the Court held that the failure to submit the filing fee with the notice of appeal made the notice of appeal defective and did not deal with either the timeliness of the appeal nor with what constitutes the act necessary to a filing pursuant to the statute, but of incompleteness of the appeal documents.

CONCLUSION

This writer believes that the fair interpretation of the Rules of Civil Procedure and Statutes above cited and of the policies of this Court in not only allowing but requiring the mailing of documents to further the Court processes leads to this conclusion: Rule 73(a), Utah Rules of Civil Procedure, gives a 1-month period for filing of notice of appeal and that notice of appeal must be filed with the county clerk. The Rules and the Statutes do not define what constitutes filing except as 63-37-1, Utah Code Annotated, 1953, as amended provides that when documents required to be filed with

any political subdivision, of which the county clerk is a part, the document mailed to the county shall be deemed filed on the date of mailing.

In the case now before the Court, such a conclusion would show that the Notice of Appeal in this case was filed on the 10th day of December, 1981, well ahead of any filing deadline.

Independent of the conclusion as to the filing by mail is the application of Rule 6(e), Utah Rules of Civil Procedure, in its relationship to Rule 77(d) requiring the clerk to serve a notice of the ruling of the Court entered on the 13th day of November, 1981. It extends the time thereafter for doing any act because of that mailed notification by three days. Thus, the Order of the Court entered on the 13th day of November, 1981, would have a time for appeal of one month plus three days, or would have the initial appeal period expire on December 16, 1981, the date on which the Clerk of the Court docketed the Notice of Appeal.

Appellant urges the Court to rule that the filing of Notice of Appeal by mail was timely in this matter.

Respectfully submitted this 30th day of December, 1982.

M. Dayle Jeffs

CERTIFICATE OF SERVICE

I hereby certify that eleven copies of the foregoing Brief were hand delivered to the Clerk of the Supreme Court of the State of Utah and two copies were mailed to Gordon M. Madsen and Robert C. Cummings of Romney, Madsen & Cummings, 320 South 300 East #2, Salt Lake City, Utah 84111, by placing same in the United States mails, postage prepaid, on this 31st day of December, 1982.

Secretary