1983

Richard A. Isaacson v. Clair Dorius et al : Brief in Support of Petition for Rehearing

Utah Supreme Court

Robert C. Cummings; Gordon A. Madsen; Attorneys for Plaintiffs and Respondents;
M. Dayle Jeffs; Jeffs & Jeffs; Attorney for Defendant and Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD A. ISAACSON,

Plaintiff and
Respondent,

vs.

CLAIR DORIUS,

Defendant and
Appellant,

and

No. 18166

LAWRENCE W. LYNN,

Plaintiff and
Respondent,

vs.

CLAIR DORIUS,

Defendant and
Appellant.

BRIEF IN SUPPORT OF PETITION FOR REHEARING OF THE DECISION OF THE SUPREME COURT OF THE STATE OF UTAH DATED AUGUST 17, 1983

M. DAYLE JEFFS
Jeffs and Jeffs
90 North 100 East
P. O. Box 683
Provo, Utah 84603

Attorneys for Appellant

ROBERT C. CUMMINGS
GORDON M. MADSEN
Romney, Madsen & Cummings
320 South 300 East #2
Salt Lake City, Utah

Attorneys for Respondents

M. DAYLE JEFFS
JEFFS AND JEFFS
Attorneys at Law, P.C.
Attorneys for Defendant/Appellant
90 North 100 East
P. O. Box 683
Provo, Utah 84603
Telephone: 373-8848

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PETITION FOR REHEARING

No. 18166

COME NOW the defendant-appellant in the above entitled action and petition the Supreme Court of Utah for a rehearing of the appeal for the cause and reason that this Court has committed error and states the points as follows:

1. The Court should treat the Notice of Appeal as a Motion to Extend the Time for Filing the Notice of Appeal.

Respectfully submitted this 2nd day of September, 1983.

M. Dayle Jeffs

CERTIFICATE OF MAILING

I hereby certify that eleven copies of the foregoing were hand delivered to the Clerk of the Court, Supreme Court of the State of Utah, and two copies to the below named parties this 6th day of September, 1983:

Gordon M. Madsen
Robert C. Cummings
Romney, Madsen & Cummings
320 South 300 East #2
Salt Lake City, Utah 84111

James M. Jeffs
Secretary

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Provo, Utah 84603

Attorney for Appellant

ROBERT C. CUMMINGS
GORDON M. MADSEN
Romney, Madsen & Cummings
320 South 300 East #2
Salt Lake City, Utah

Attorneys for Respondents

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M. DAYLE JEFFS
JEFFS AND JEFFS
Attorneys at Law, P.C.
Attorneys for Defendant/Appellant
90 North 100 East
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BRIEF IN SUPPORT OF PETITION FOR REHEARING

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 Verdicted on the issue of liability and took the issue of comparative negligence of the plaintiffs-respondents from the jury. The trial court submitted only the issue of damages 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 Petition for Rehearing are

as follows:

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

ARGUMENT

THE COURT SHOULD TREAT THE NOTICE OF APPEAL AS A MOTION TO EXTEND THE TIME FOR FILING THE NOTICE OF APPEAL.

There are no Utah cases bearing on the issue of whether a Notice of Appeal, delayed in the mails, should be deemed timely filed. But the Federal Rules of Appellate Procedure dealing with filing a Notice of Appeal are nearly identical to Utah Rules of Civil Procedure Rule 73(a). Federal Courts have decided several cases on this issue.

In Sanchez v. Board of Regents of Texas Southern University, 625 F.2d 521 (1980) the court held under very similar facts that:

> "[d]eposit of a notice of appeal in the mail is not equivalent to filing it, and appellant's notice was therefore untimely. . . . Nevertheless, reliance on the normal course of delivery of mail is reasonable and may be the basis for a court to excuse otherwise untimley filing.

Id. at 522

The federal rule provides that an appellant may be

granted an extension of time by the district court for an additional 30 days to file his notice of appeal upon a showing of excusable neglect. In Sanchez the Court held that the notice of appeal would be treated as a Motion to Extend the Time for Filing a Notice of Appeal and remanded the case to the district court for a determination of whether there was excusable neglect justifying an extension of time.

Rule 73(a), Utah Rules of Civil Procedure provides tht "upon a showing of excusable neglect the district court may extend the time for filing the notice of appeal not exceeding one month from the expiration of the original time herein prescribed." That rule further provides that such extension of time for filing the Notice of Appeal "may be granted by the district court before or after the expiration of the original time."

Therefore, there will be no prejudice to respondent by the Court treating the untimely Notice of Appeal as a motion for an extension of time since appellant could have moved the district court for an extension of time upon learning of the delay in the mail. Furthermore, respondent received a copy of the Notice of Appeal within the one (1) month period and was never led to believe that appellant would not pursue his right of appeal.

The Court in its majority opinion expresses a concern over the chaos that would result if "mailing" were held to

constitute "filing" where a notice became "lost in the mail" or is inordinately detained. But treating a notice of appeal delayed in the mails as a motion for an extension of time does not create that perceived chaos.

Rule 73(a), Utah Rules of Civil Procedure by its very terms limits the period of time when the appeal of an action would be uncertain. The rule allows an extension of time for only one additional month. Therefore, a notice of appeal "lost in the mail" for a greater period of time, absent a formal motion for an extension of time filed within the one (1) month period, would be insufficient to allow relief to the appellant.

Federal Courts have taken the same position in interpreting Federal Rules of Civil Procedure Rule 73(a). In Evans v. Jones, 366 F.2d 772 (1955) the Court held that a notice of appeal received after the expiration of 30 days after the original 30 days had run would not allow the Court to excuse the delay.

If the Court holds that a Notice of Appeal delayed by the mail is completely ineffective, the result will be overly harsh and burdensome for attorneys. Attorneys will be required to hand deliver all notices of appeal for fear of a delay in the mailing process. By the time an appellant could learn of the delay the time to appeal would have expired. This ruling would be contrary to the fundamental policy of the

rules of procedure found in Rule 1(a), Utah Rules of Civil Procedure which states the rules "shall be liberally construed to secure the just, speddy and inexpensive determination of every action."

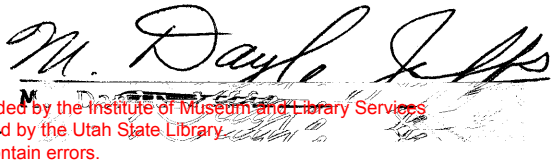
In contrast to the harshness of the position taken by the majority opinion, if the Court adopts the position advocated by appellant, an appellant can transmit his notice of appeal by mail. It is reasonable to assume that the appellant will learn of any failure of the district court to receive his notice of appeal within the month following the expiration of the original one month period and could then make a formal motion for extension of time.

The resulting short time period of uncertainty that a respondent would face is miniscule in relation to the complete termination of appellant's right to appeal caused by the delay in the mailing process over which appellant had no control.

CONCLUSION

Appellant asks the Court to remand this case to the District Court for a determination of whether appellant's actions constituted excusable neglect justifying an extension of time for filing its Notice of Appeal or to hold that the facts should be construed as a motion to extend the time for filing the Notice of Appeal.

Respectfully submitted this 2nd day of September, 1983.



M. Dayle Jeffs

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Robert C. Cummings
Romney, Madsen & Cummings
320 South 300 East #2
Salt Lake City, Utah 84111

James H. Jeffs
Secretary

MADSEN & CUMMINGS
ATTORNEYS AT LAW
320 SOUTH THIRD EAST
SALT LAKE CITY, UTAH 84111

GORDON A. MADSEN
ROBERT C. CUMMINGS

TELEPHONE
(801) 322-1141

September 7, 1983

To the Honorable Justices
of the Supreme Court of the State of Utah
332 State Capitol Building
Salt Lake City, Utah 84114

Re: Richard A. Isaacson, Plaintiff and Respondent,
vs. Clair Dorius, Defendant and Appellant;
Lawrence W. Lynn, Plaintiff and Respondent,
vs. Clair Dorius, Defendant and Appellant;
No. 18166.

Dear Chief Justice Hall and Justices of the Court:

We have just received a Petition for Rehearing with accompanying brief submitted by defendant, Clair Dorius. We have carefully read the brief and believe that it presents nothing which has not already been fully presented to, and considered by, the court.

In a dissenting opinion in this matter Justice Howe indicated that he would favor sending the case back to the District Court for a determination with respect to excusable neglect. In his Petition for Rehearing with accompanying brief defendant, Dorius, now, in effect, asks the entire court to adopt the dissenting opinion of Justice Howe, and in support of that request cites the same cases and makes the same arguments already asserted by Justice Howe in his opinion.

Since defendant, Dorius, has done no more than repeat the points made by Justice Howe, and since this court has no doubt fully considered the dissenting opinion of Justice Howe, there appears to be no justification for imposing on the court yet another brief from us. We therefore desire to submit this matter to the court with only the following observations:

1. Although excusable neglect was never raised or asserted by the defendant (until now), plaintiffs discussed that matter at some length in their brief entitled "Respondents' Brief in Response to Jurisdictional Issue Contained in Reply Brief of

Appellant." Reference is here made to that discussion, which appears at pages 14 to 17 of said brief.

2. Finally, it should be noted that Rule 73(a), Utah Rules of Civil Procedure, sets forth the procedure to be followed when a claim of excusable neglect is asserted. Plaintiffs and respondents served their Motion to Dismiss this appeal (by reason of the late filing of the Notice of Appeal) on December 31, 1981, which was well before the expiration of the two-month period provided for in Rule 73(a). Defendant and appellant therefore, at the time the jurisdictional issue was raised, still had ample time in which to seek relief by actual motion in the District Court under Rule 73(a) if he claimed excusable neglect. In fact, defendant had until January 14, 1982, to do so. Defendant had no need to rely on the "fiction" that the late notice of appeal is somehow a motion for extension of time in which to file a notice of appeal.

Furthermore, it would appear to be a mistake in any event to adopt as part of the case law of Utah the practice of construing a late-filed notice of appeal as a motion for an extension. In his dissent Justice Howe points out that such procedure has now been eliminated from federal practice in view of amendments to to Rule 4(a), FRAP. In Sanchez v. Board of Regents, 625 F.2d 521 (5th Cir. 1980), a case referred to by Justice Howe, the court at page 523 noted that "confusion" existed under the old federal Rule 4(a). That confusion was no doubt due, at least in part, to the aforesaid practice of calling a late notice of appeal a motion for an extension of time. Had it proved to be a satisfactory approach, it would no doubt have been retained in federal practice.

To contend that the late-filed notice of appeal is a motion for relief by reason of excusable neglect is to force into the mouth of defendant an admission that he was somehow neglectful, whereas in truth defendant has never so asserted. Had defendant claimed excusable neglect, he could have, and should have, promptly followed the procedure outlined in Rule 73(a). In fact, the defendant rested his case on appeal solely on the proposition that he acted advisedly and timely and that there was no neglect involved.

The defendant is required to promptly assert all defenses available to him and is not permitted the luxury of trying them out on the court and opposing counsel one at a time. A party cannot wait to see how the court is going to rule before deciding what to assert.

Having elected to stand on the proposition that he acted advisedly and timely and having deliberately chosen not to assert excusable neglect, we respectfully submit that it is not proper appellate procedure and not in accordance with notions of fair play to allow the defendant to change his position at this late date.

Respectfully submitted,

GORDON A. MADSEN

ROBERT C. CUMMINGS
Attorneys for Plaintiffs
and Respondents

nsh
cc: M. Dayle Jeffs
Box 683
Provo, Utah 84603