

1982

# Melvin J. Staker v. Huntington Cleveland Irrigation Co. : Brief of Appellant

Utah Supreme Court

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S. V. Litizzette; Attorney for Defendant-Appellant;

K. L. McIlff; Attorney for Plaintiff-Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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MELVIN J. STAKER,  
Plaintiff-Respondent

vs.

Case No. 18203

HUNTINGTON CLEVELAND  
IRRIGATION COMPANY,  
a Utah corporation,  
Defendant-Appellant

---

BRIEF OF APPELLANT

Appeal from the Judgment of the Seventh District Court

in and for Emery County

Honorable Boyd Bunnell, Judge

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Helper, Utah 84526

Attorney for Defendant-Appellant

K. L. McIff  
JACKSON, McIFF & MOWER  
151 North Main Street  
Richfield, Utah 84701

Attorney for Plaintiff-  
Respondent

FILED

MAY 26 1982

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Clerk, Supreme Court, Utah

MELVIN J. STAKER,  
Plaintiff-Respondent

HUNTINGTON CLEVELAND  
IRRIGATION COMPANY,  
a Utah corporation,  
Defendant-Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

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MELVIN J. STAKER,  
Plaintiff-Respondent

vs.

HUNTINGTON CLEVELAND  
IRRIGATION COMPANY,  
a Utah Corporation,  
Defendant-Appellant

---

)  
)  
) CASE NO. 18203  
)  
)  
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)

BRIEF OF APPELLANT

NATURE OF THE CASE

This is an action commenced by plaintiff on March 27, 1979, against defendant to secure payment of the total sum of \$5,031.50 together with interest from the defendant Irrigation Company on account of alleged overpayments made by plaintiff to defendant of amounts paid on an alleged water subscription from August 1, 1966 through May 1, 1969 for the Joe's Valley Project.

DISPOSITION IN LOWER COURT

Defendant's substitute attorney (TR 3) retained two days earlier filed in open Court a motion to amend the pleadings on the date of trial, November 6, 1981, pursuant to Rule 15(a) (TR 3). Defendant's substitute attorney, the day before trial, informed

plaintiff's attorney he would raise the defense of statute of limitations (TR 4). The Court stated the motion would prejudice the plaintiff (TR 4), took the motion under advisement (TR 8) and proceeded to try the case. Immediately after the case was concluded the Court denied defendant's motion to amend the pleadings to raise the defense of the statute of limitations (TR 142). On December 10, 1981, the Court entered its Findings of Fact and Conclusions of Law and Judgment.

#### RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks dismissal of the trial court's judgment and an Order that defendant's motion to amend to plead the statute of limitations as a defense be granted.

In the alternative, defendant seeks a reversal of the judgment awarding plaintiff interest in the sum of \$3,283.00 reducing said judgment to the sum of \$5,031.50.

#### STATEMENT OF FACTS

Plaintiff brought suit to secure payment of the total sum of \$5,031.50 from the defendant irrigation company on account of alleged overpayments by plaintiff to defendant of amounts due on a water subscription:

|         |                             |            |
|---------|-----------------------------|------------|
| 8/ 1/66 | Overpayment on subscription | \$1,110.00 |
| 1/11/67 | \$1.55 on 1,110 acre feet   | \$1,720.50 |
| 2/29/68 | \$1.55 on 1,110 acre feet   | \$1,720.50 |
| 5/12/69 | \$1.55 on 310 acre feet     | 480.50     |



together with interest on said sum.

On March 1, 1975, more than 5 years after the last payment on the alleged subscriptions, plaintiff filed a written demand with defendant (P. Exh. 17, TR 35).

On March 27, 1979, plaintiff filed his complaint. Defendant's answer was filed on April 11, 1979, by Thomas O. Parker, its attorney of record.

The Notice of Trial Setting of February 18, 1981 and the notice of Trial Setting of May 5, 1981, was sent to E. J. Skeen, 536 E. 4th S., Salt Lake City, Utah, not to Thomas O. Parker, defendant's attorney of record.

On November 5, 1981, the day before trial, defendant's substitute attorney, S. V. Litizzette, notified plaintiff's attorney that he would move to amend the Answer to include the defense of the statute of limitations (TR 3).

On the day of trial, November 6, 1981, by motion to amend, defendant's substitute attorney raised the defense of the statute of limitations pursuant to Rule 15(a) U.R.C.P. (TR 3)

Plaintiff's attorney resisted the motion to amend claiming prejudice (TR 5).

The Court took the matter under advisement and allowed the plaintiff to proceed to try the case (TR 8).

At the conclusion, after both sides had rested, the Court

denied defendant's motion to raise the defense of the statute of limitations (TR 142) and took the matter under advisement (TR 145).

On December 10, 1981, the court entered judgment against the defendant in the sum of \$5,031.50 together with interest in the sum of \$3,283.00 making a total judgment of \$8,344.25.

#### ARGUMENT

##### POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S SUBSTITUTE ATTORNEY'S MOTION MADE ON THE DAY OF TRIAL TO AMEND THE ANSWER TO SET UP THE BAR OF THE STATUTE OF LIMITATION:

The applicable statute of limitations in this case is Section 78-12-25 U.C.A. which provides that an action upon a contract, obligation or liability not founded upon an instrument must be commenced within 4 years... Pursuant to this Section the plaintiff's right of action was barred on May 12, 1973, 4 years from the date of the last alleged overpayment.

The applicable rule concerning the pleading of the statute of limitations as an affirmative defense is Rule 8(c) U.R.C.P.

The applicable rule governing when pleadings can be amended is Rule 15(a) U.R.C.P., which provides that a party may amend his pleadings only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

The issue is whether under Rule 15(a) the lower court abused its discretion in denying a substitute attorney's motion to amend to plead the bar of the statute of limitations on the day of trial.

Plaintiff's counsel argued that to allow the amendment would be prejudicial to plaintiff (TR 5) citing Goeltz v. Continental Bank and Trust, 5 Utah 2d 204, 299 P.2d 832, in support.

In Goeltz, supra, the Utah Supreme Court stated:

"Statutes of limitations as statutes of repose have a useful function in our law system. Sometimes they prevent the prosecution of a stale claim after proof of the facts are unavailable, and in such a case the interests of justice would require that leave to amend be freely granted. In other cases such defense merely prevents a recovery of a just claim. Except against the estate of a deceased person such defense may always be waived. Here defendant seeks leave to amend after all the evidence is in, (emphasis added)..."

Preliminarily the court observed that on p. 206 of the Goeltz decision the defendant asked leave to amend after all of the evidence was in (TR p. 6 L. 7-8).

Plaintiff's counsel and the court made the following statements:

"MR. McIFF: That is correct.

THE COURT: So that is not our case here today. (Emphasis added)

MR. McIFF: No, it is not. I agree with that your Honor. But the basic thrust of what the Court said here was that the statute of limitations is a technical defense and prevents the matter being adjudicated on the merits." (TR p. 6, L. 9-14)

The court took defendant's motion under advisement and proceeded to try the case (TR 8).

At the conclusion of the trial the court denied defendant's motion to amend (TR 142) and stated:

"THE COURT: Well, gentlemen, first of all, just let me state that during the noon recess I had an opportunity to go through the Goeltz versus Continental Bank and Trust case relative to the question of filing this motion to amend to include the defense of statute of limitations -- to review that case and the couple of cases that Mr. McIff presented to the Court. And I have concluded that within the reasoning of that case, that the amendment should not be allowed at this late date; in that if there were some substantial rights that the defendant wanted at this time to bring in because of the statute of limitations, then we would allow it. But where it is upon purely as a technical defense, and where it seems that most of the material issues in this case have been brought before the Court, it just doesn't appear that that technical defense should be imposed because it is strictly in the nature of a technical defense. So the Court in accordance with the ruling of that case, we'll deny the motion to file the amended answer at this late date. This case has been set, I believe, twice before..." (TR 142)

Apparently, the court concluded Goeltz controlled and was authority for the proposition that on the day of trial defendant's substitute attorney of 2 days could not move to amend to plead the bar of the statute of limitations.

The facts in this case fall into the category of cases wherein the fact that failure to plead the statute of limitations in the original pleadings was due to oversight, negligence or ignorance of counsel. The following cases are cited in 59 A.L.R. 2d §6 p. 194 et seq. as representative of fact situations which were held to justify or require a trial court's allowance of an amendment asserting the defense of the statute of limitations.

Illinois Steel v. Budzisz, (1900) 106 Wis. 499 NW, where 3 days after the substitution of a new attorney, on the day of trial there was no abuse of discretion in granting amendment to plead the bar of the statute of limitations.

Santiago v. Amangua, (1914) 7 Puerto Rico F 308, where defendant's motion for leave to amend to plead the statute of limitations was made 2 days before the case was set for trial.

Maryland Casualty Co. v. Denver, (1931) 90 Colo 20, 6 P2d 6, where defendant's motion to plead the statute of limitations was made 5 days before trial, particularly see

Emich Motors Corp. v. General Motors Corp., (1956) 229 F2d 714, where defendant's motion for leave to amend to plead the statute of limitations was allowed at the second trial after reversal of the first trial. In Emich the Court stated:

"In the instant case defendants pleaded the statute of limitations below after the case was remanded for a new trial, a remand made necessary by prejudicial errors which occurred in the first trial, errors for which the plaintiffs must bear at least part of the responsibility. Rule 15(a) does not distinguish between amendments after appeal and remand and those before appeal. Nor do the decisions make such a distinction. Bowles v. Biberman Bros., 3 Cir., 152 F.2d 700; Guth v. Texas Co., 7 Cir. 155 F.2d 563.

Emich followed in Groninger v. Davison, 364 F.2d 638 (1966)

Similarly in Romo v. Reyes, (1976) 26 Ariz App. 374, 548 P.2d 1186, where the Court held an answer may be amended at any time



before trial. In this case the court stated:

"[4,5] Respondent maintains, of course, that he will indeed be prejudiced by allowing an amendment since his claim will be barred by the two-year statute of limitations. We have said that even where a party is prejudiced, the prejudice must be balanced against the hardship to the moving party if leave to amend is denied. Green Reservoir Flood Control Dist. v. Willmoth, 15 Ariz App. 406, 489 P.2d 69 (1971)."

Romo followed in Trujillo v. Brasfield, (1978) Ariz App. 579

P.2d 46. In Trujillo the Court stated:

"The respondents argue that even though Rule 15(a), Arizona Rules of Civil Procedure, 16 A.R.S., states that 'Leave to amend shall be freely given when justice requires.' to do so in this case would burden them with undue prejudice and cause the action to be decided on a technicality, rather than on the merits. The respondents have failed to deal with the case of Romo v. Reyes, 26 Ariz App. 374, 548 P.2d 1186 (1976), cited by the petitioners, which effectively destroys their argument."

For the foregoing reasons, it is submitted that, the trial court abused its discretion and should have allowed defendant's substitute attorney to plead the bar of the statute of limitations. Goeltz does not apply since defendant's motion to amend was timely made before any evidence had been introduced. Pursuant to Rule 15(a) defendant's motion to amend should have been freely granted.

The judgment of the trial court is therefore erroneous and must be reversed.

## ARGUMENT

### POINT II

THE JUDGMENT OF THE TRIAL COURT IS CONTRARY TO LAW IN THAT COURT DID NOT PROPERLY NOTICE DEFENDANT'S ATTORNEY OF RECORD OF THE DATE OF TRIAL.

The applicable rule governing Notice of Trial is Rule 4.1 of the Rules of Practice in the District Courts and Circuit Courts of the state of Utah.

Rule 4.1(a) states:

"Upon oral or written stipulation or order of the court, a trial date may be obtained at any time and shall be set at a date that the convenience of the calendar may allow. Notice of the trial date shall be mailed by the clerk of the court to all counsel of record (emphasis added) or the parties who are not represented by counsel of record, advising them of said date and a copy of the notice shall be filed. Once cases have been set for trial, continuances will be granted only in accordance with these rules."

In the instant case two notices of trial setting were not sent to Thomas O. Parker, the attorney of record. The failure of the Court to give proper notice of trial was discovered by defendant's substitute attorney in preparing the Docketing Statement required by this appeal.

75 Am Jur 2d §6 p. 123 states:

"While practice statutes, rules of practice, or rules of court frequently require the giving of notice of trial, in the absence of the statute or rule, it is not necessary to give a party litigant notice, since it is up to the litigant to keep himself apprised of the time the case is set for trial. When such notice is required by statute or rule, defendants who have entered a general appearance are entitled to be notified, in person or through their counsel, of any hearing where evidence will be taken on the merits of the case." (Emphasis added)

Hawkins v. Aldridge, 211 Ind. 332 7 NE 2d 34.

See also the cases cited in 109 A.L.R. 1205. For the reasons set forth above the judgment should be reversed.

#### ARGUMENT

#### POINT III

ASSUMING ARGUENDO THAT THERE HAS BEEN NO ABUSE OF DISCRETION IN DENYING DEFENDANT'S SUBSTITUTE ATTORNEY'S MOTION TO RAISE THE BAR OF THE STATUTE OF LIMITATIONS THE PLAINTIFF IS NOT AS A MATTER OF LAW ENTITLED TO INTEREST.

There is no statute or rule relating to pre-judgment interest under the facts of this case.

Rule 54(e) governs interest on any verdict or decision from the time it was rendered but here the court awarded plaintiff interest in the sum of \$3,283.00 from and after January 1, 1973 to November 16, 1981. (See paragraph 2 of the Judgment)

There is no evidence whatsoever in the transcript regarding pre-judgment interest.

There being no evidence the only grounds for awarding interest to plaintiff would appear to be that the court concluded plaintiff was entitled to interest as a matter of law. (Emphasis added)

In 22 Am Jur 2d §179 it is stated:

"Interest by way of damages has been defined as interest allowed in actions for breach of contract or tort for the unlawful detention of money found to be due. This type



of interest is frequently called 'moratory interest.' Interest, as a part of damages, is allowed, not by application of arbitrary rules, but as a result of the justice of the individual case and as compensation to the injured party."

See Farnsworth v. Jensen, 117 Utah 494, 217 P.2d 531, where the contract for the purchase of land provided for payment of interest at the rate of 6% per annum.

See also, L & A Drywall, Inc. v. Whitmore Const. Co., Inc., Utah, 608 P.2d 626.

In 22 Am Jur 2d §183 p. 261 it is stated:

"In contract actions a distinction is often drawn between liquidated and unliquidated claims, interest being allowed as of right in the former and either denied or allowed only in the discretion of the court in the latter."

In 22 Am Jur 2d §182 p. 260 it is stated:

"Recent cases, however, approach the problem in a more direct fashion and allow interest on an unliquidated claim when justice and fairness so require."

It is submitted that in the instant case the allowance of interest to plaintiff would not be in the interest of justice and fairness.

Here the amounts allegedly due plaintiff were paid for the period from 8/1/66 through 5/12/69 (P. Exh. 17, TR 35). The Court allowed plaintiff interest from January 1, 1973 to November 16, 1981, a period of 8 years and 11 months, almost 9 years.

In 51 Am Jur 2d §24 p. 608 it is stated:

"If the obligation to pay interest is merely incidental to the principal obligation, forming a part of the contract governing that obligation, the bar of the statute of limitations upon the right to recover the principal also bars the right to recover interest, although the interest claimed accrued within the statutory period."

See Annotation: 115 ALR 728, 729.

For the foregoing reasons, in the alternative, this case should be reversed in part. Plaintiff should be awarded only the principal amount claimed from defendant in the sum of \$5,031.50. (See paragraph 1 of the judgment)

#### CONCLUSION

The trial court abused its discretion in denying defendant's substitute attorney's motion to plead the bar of the statute of limitations.

The court's failure to give proper notice to the attorney of record is an added reason to reverse the judgment of the lower court

In the alternative, however, if the court did not abuse its discretion in denying defendant's substitute attorney's motion to raise the bar of the statute of limitations the plaintiff is not entitled to interest and the lower court's judgment should be entered against defendant only in the sum of \$5,031.50 the principal amount claimed by plaintiff.

Respectfully submitted,

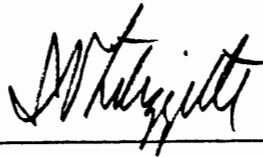
  
\_\_\_\_\_  
S. V. LITIZETTE

MAILING CERTIFICATE

I hereby certify that on the 27<sup>th</sup> day of May, 1982,  
I mailed two (2) copies of the foregoing BRIEF OF APPELLANT,  
postage pre-paid, to the following:

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Richfield, Utah 84701

Attorney for Plaintiff-Respondent



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