

1982

Mavor Jean Carnes v. Cliff Carnes : Appellant's Reply Brief

Utah Supreme Court

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Edward K. Brass; Attorney for Appellant;

Paul H. Proctor; Dart & Stegall; Attorneys for Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

MAVOR JEAN CARNES, :
Plaintiff-Respondent, :
vs. : Case No. 18370
CLIFF CARNES, :
Defendant-Appellant. :

APPELLANT'S REPLY BRIEF

Appeal from a summary judgment granted in the Third District Court in and for Salt Lake County, Utah, by the Honorable David B. Dee.

EDWARD K. BRASS
Attorney for Appellant
321 South Sixth East
Salt Lake City, Utah 84102
Telephone: 322-5678

JOHN D. PARKEN
PAUL H. PROCTOR
Attorneys for Plaintiff-Respondent
430 Ten Broadway Building
10 West Third South
Salt Lake City, Utah 84101

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JOHN D. PARKEN
PAUL H. PROCTOR
Attorneys for Plaintiff-Respondent
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APPELLANT'S REPLY BRIEF

INTRODUCTION

The appellant files this brief in response to the brief filed by the respondent.

STATEMENT OF FACTS

Ordinarily resort to the record is the best method to resolve disputes as to the facts of a case and ultimately that will prove to be the case with this appeal. However, the respondent's statement of facts contains one glaring inaccuracy or omission which must be spotlighted because it may affect the Court's decision.

The respondent contends that in an early hearing in this matter Judge Taylor of the Third Judicial District ruled that the respondent could have judgment upon filing "a proof of service," from the Florida court file, (respondent's brief, p.4). She then recites that some five months later she did file a

return and after another month she filed a supplemental affidavit from the same deputy which again purported to show service upon the appellant. She concludes by stating that after the filing of these returns Judge Dee, having no other alternative under Judge Taylor's order, entered judgment for her. Respondent has apparently forgotten a crucial state in these proceedings.

After the respondent filed her return, but before filing her supplemental affidavit, she again renewed her motion for judgment. The Court reviewed the return which was first prepared six months after the Florida hearing, one month after the action on the resulting judgment was filed in Utah, was not filed in Florida until one year after the hearing held there and some two months after Judge Taylor ruled such proof to be necessary. The Court concluded at this hearing, which is not mentioned by respondent, that it would not grant judgment on the basis of the return alone but would require additional proof. This is precisely the reason why respondent found it necessary to file a "supplemental" affidavit, why another hearing was held, and why appellant was given leave by the Court to file his own memorandum and affidavit denying he was served. Thus the issue framed before the lower court is not merely technical defects in the return of service but whether, when all the facts are considered, the appellant was served at all.

ARGUMENT

Three claims made by the respondent warrant a response.

First, it is contended that the appellant's affidavit was untimely and therefore the lower court did not consider it and entered judgment accordingly. Second, if the affidavit was considered it was legally insufficient. Finally, it is claimed that the case is now somehow moot in light of a subsequent decision by the trial court. Each of these arguments is wholly without merit.

The claim is made that the appellant's affidavit denying service was untimely because it was filed six months after respondent made her motion for judgment on the pleadings. The claim is destroyed, however, by three fatal defects. First, the respondent never raised the claim of untimeliness in the lower court. This Court has frequently ruled that defenses not raised in the trial court cannot be considered for the first time on appeal, In Re Jones' Estate, 104 P.2d 210 (Utah 1940); Shayne v. Stanley & Sons, 604 P.2d 775 (Utah 1980). The Court has extended the rule to the issue of "timeliness," refusing to consider the statutes of limitations or laches when first raised on appeal, Westerfield v. Coop, 311 P.2d 787 (Utah 1957); Utah Assets Corporation v. Dooley Bros., 70 P.2d 738 (1937); and In Re Jones' Estate, supra. The same rules must be adhered to in the present case since respondent never raised the issue.

The next defect in the respondent's timeliness claim is that it ignores the form of her own motion. Respondent's motion began as one for judgment on the pleadings pursuant to Rule 12

U.R.C.P. A counter-affidavit filed at that time would have been irrelevant since the only issue before the court was the contents of the pleadings. An affidavit from the appellant became appropriate only after the respondent filed an affidavit in support of her own claims on February 16, 1982, thus converting the motion to one for summary judgment. Within ten days thereafter the appellant filed his own affidavit.

The final reason the timeliness claim must fail is that after the respondent "short-noticed" the appellant by giving him three less days than the mandated ten to respond to her motion, the lower court specifically gave appellant leave to file such affidavits as he desired.

The next claim made by respondent is that the appellant's affidavit is insufficient because it contains the "legal conclusion" he was never served. This claim is ludicrous. It is obvious that the appellant meant "never served" to be synonymous with "never received." Appellant clearly stated he never resided at the home the deputy claimed to have served him and when the deputy changed his story to claim he served him at work, appellant submitted proof he was not at work that entire week.

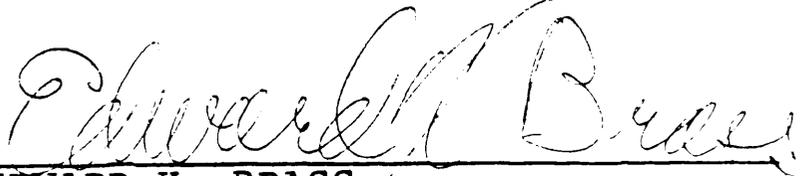
The final claim, and the most offensive, is the claim that this appeal is now moot in some way because the lower court issued a later ruling permitting the respondent to enforce a Florida divorce decree in this state. No authority is cited for this proposition, the respondent merely resorts to character

assassination claiming appellant is a wealthy man who refuses to pay alimony to his wife. These allegations are only an attempt to cloud the issue before the Court, whether service occurred, and gain sympathy for the respondent to divert the Court from the truth. It is sufficient to say that appellant has affirmative defenses to these charges, defenses the lower court correctly ruled could not be asserted to the judgment but could be asserted to the alleged ongoing obligation. The claims regarding the actions of the appellant are offensive because the respondent well knows that owing to the lower court ruling concerning his defenses to the judgment he has no way to defend himself. However, if respondent is correct in her allegations then she should not fear having the judgment reversed and giving appellant his day in court.

CONCLUSION :

It has been claimed by respondent that mere technicalities are involved here and thus the judgment below should be sustained. Those technicalities, service of process and an opportunity to be heard, are the very foundation for our system of justice. The question of service must be returned for a full hearing.

DATED this 9 day of August, 1982.


EDWARD K. BRASS
Attorney for Appellant

DELIVERY CERTIFICATE

I hereby certify that a true and correct copy of Appellant's Brief Reply was delivered via TRS to John D. Parken and Paul H. Proctor, 430 Ten Broadway Building, 10 West Third South, Salt Lake City, Utah 84101, this 10 day of August, 1982.

Edward D. Brass

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
ARGUMENT	3
STATEMENT OF POINT I	3
<p>THE LOWER COURT ERRONEOUSLY GRANTED A SUMMARY JUDGMENT ALTHOUGH THERE WERE MATERIAL FACTS CONCERNING WHICH THERE WAS A GENUINE DISPUTE, SPECIFICALLY WHETHER THE CONTRACT SUED UPON WAS THE CONTRACT THE PARTIES HAD ENTERED INTO SINCE IT HAD NO RELEASE PROVISION AND WHETHER THE RESPONDENTS ACCEPTED THE PAYMENT MADE BY APPELLANTS TO KEEP THEIR OWN CONTRACT CURRENT AND THUS CURED THE BREACH ON WHICH THE JUDGMENT WAS BASED.</p>	
STATEMENT OF POINT II.	4
<p>IT WAS ERROR FOR THE LOWER COURT NOT TO GRANT A TRIAL ON THE BASIS OF NEWLY DISCOVERED EVIDENCE WHICH CAME TO LIGHT AFTER THE ENTRY OF THE SUMMARY JUDGMENT.</p>	
STATEMENT OF POINT III	5
<p>THE LOWER COURT ERRED IN GRANTING JUDGMENT FOR THE BALANCE OF THE PURCHASE PRICE PURSUANT TO PARAGRAPH 16C OF THE UNIFORM REAL ESTATE CONTRACT IN THE ABSENCE OF ANY ALLEGATION AND PROOF BY RESPONDENTS THAT THEY FULFILLED THE TERMS OF SAID CONTRACT BY "PASS TITLE TO BUYER SUBJECT THERETO."</p>	
STATEMENT OF POINT IV	8
<p>THE COURT ERRED IN ENTERING JUDGMENT FOR \$401,464.71 PRIOR TO THE TIME THE SUBJECT PROPERTY IS SOLD AND THE RETURN SHOWS A BALANCE REMAINING DUE.</p>	

CASES CITED

<u>Anderson v. Granite School District</u> , 413 P 2d 596 (1966) . . .	4
<u>First National Bank of Coalville v. Boley</u> , 61 P 2d 623	8
<u>Foster v. Salt Lake County</u> , 632 P 2d 810 (1981).	4
<u>Gillespie & Broas</u> , N. Y., 23 Barb 370, 381	7

CASES CITED - CONTINUED

Langmede v. Weaver, 60 NE 992, 997, 65 Ohio St. 17 7
McBride v. Jones, 615 P 2d 432 (1980) 4
U. S. v. Hunter, 21 F. 615, 617 (1856) 7
Williams, In re Estate, 10 Ut 2d 83, 348 P 2d 683 (1960). 4
Zions Sav. Bank & Trust Co. v. Rouse, 86 Utah, 574 47 P (2d) 617 8

STATUTES CITED

Utah Code Annotated 1953, Sec. 78-31-1 2, 8 ,9 ,10
Utah Code Annotated 1953, Sec. 78-31-2 2, 8, 9

RULES CITED

Utah Rules of Civil Procedure (12h) 6

TEXTS CITED

17 Am. Juris. 2nd 791 5
Words & Phrases - Title to Property 380 7

CONCLUSIONS 10