

1958

Molen Rees v. Edward B. Scott : Brief of Appellant

Utah Supreme Court

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George E. Bridwell; Attorney for Appellant;

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the Supreme Court
of the State of Utah

FILED

MAY 7 - 1958

MOLEN REES,

Clerk, Supreme Court, Utah

Plaintiff and Appellant,

vs.

Case No.
8860

EDWARD B. SCOTT,

Defendant and Respondent.

BRIEF OF APPELLANT

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RECEIVED two true copies hereof this.....day of

....., 1958.

Attorneys for Respondent

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In the Supreme Court of the State of Utah

MOLEN REES,

Plaintiff and Appellant,

vs.

EDWARD B. SCOTT,

Defendant and Respondent.

Case No.
8860

BRIEF OF APPELLANT

STATEMENT OF POINTS RELIED UPON

POINT I

THE FAILURE OF A DEPUTY SHERIFF TO ENDORSE THE DAY OF SERVICE AND HIS TITLE UPON THE COPY OF A TEN-DAY SUMMONS SERVED UPON A DEFENDANT SHOULD BE CONSTRUED AS HARMLESS ERROR UNDER THE PROVISIONS OF RULE 61, U.R.C.P., WHEN ATTORNEYS FOR DEFENDANT TAKE DELIV-

ERY OF COMPLAINT TIMELY FILED WITH THE CLERK OF THE COURT PRIOR TO TIME OF MAKING SPECIAL APPEARANCE FOR PURPOSES OF QUASHING SERVICE OF PROCESS.

STATEMENT OF FACTS

Defendant-Respondent, Edward B. Scott, left the State of Utah in the month of June of 1957 for the reason that it came to his attention that Plaintiff-Appellant was about to serve the said Edward B. Scott with process in an action claiming that Defendant-Respondent had maliciously alienated the affections of Plaintiff's wife, and since that occasion and until the date of service of process in this matter, on February 9, 1958, Defendant-Respondent had upon several occasions come to the State of Utah under an alias for the purpose of avoiding service of process (Plaintiff's unopposed Affidavit).

Plaintiff-Appellant received information on the 9th day of February, 1958, that Respondent was again in the State of Utah and requested Salt Lake County Deputy Sheriff C. W. Brady, Jr., to serve a ten-day Summons upon said Respondent (Tr. 2).

On the 9th day of February at approximately the hour of 8:15 P.M., Deputy Sheriff C. W. Brady, Jr., apprehended the said Edward B. Scott, Respondent, and served him with a copy of the ten-day Summons in this matter (Defendant's Exhibit 1).

At that time, the Deputy Sheriff identified himself and asked Respondent if he desired the Deputy Sheriff to read the

contents of the Summons to him. Respondent read the Summons himself and stated to the Deputy Sheriff that he had been expecting service and that he was glad that he was finally served, because he had been coming in and out of town with his head down and Respondent said that he was glad the paper had finally been served upon him (Tr. 5, Lines 1 to 13).

On the 17th day of February, 1958, an original and one copy of the complaint in the above entitled cause was filed by Plaintiff in the Clerk's office of the Third Judicial District Court.

On the 19th day of February, 1958, Thomas C. Cuthbert, an attorney for Respondent, receipted for the copy of said Complaint filed by Plaintiff, signing his name in the register of actions.

Later, on the 19th day of February, 1958, Respondent's attorneys, by Thomas C. Cuthbert, filed a Motion to quash service of process in this matter and said Motion was argued on the 26th day of February, 1958. Plaintiff-Appellant at said time argued to the Court its Motion on file herein that because of the circumstances involved, the positive provisions of Rule 61, Utah Rules of Civil Procedure, should be invoked by the Court to deny to Respondent the relief sought. It is from the Order of the trial Judge, Martin M. Larson, quashing service of process that this appeal is taken.

POINT I

THE FAILURE OF A DEPUTY SHERIFF TO ENDORSE
THE DAY OF SERVICE AND HIS TITLE UPON THE

COPY OF A TEN-DAY SUMMONS SERVED UPON A DEFENDANT SHOULD BE CONSTRUED AS HARMLESS ERROR UNDER THE PROVISIONS OF RULE 61, U.R.C.P., WHEN ATTORNEYS FOR DEFENDANT TAKE DELIVERY OF COMPLAINT TIMELY FILED WITH THE CLERK OF THE COURT PRIOR TO TIME OF MAKING SPECIAL APPEARANCE FOR PURPOSES OF QUASHING SERVICE OF PROCESS.

The precept that an Officer serving process must endorse time of service upon a copy of Summons served upon a defendant together with his name and title has been decided by this Honorable Court in the case of *Thomas vs. District Court*, 171 P.2d 667 (1946). In that case, it appears that Chief Justice Martin M. Larson, writing the majority opinion, held that such question was jurisdictional. Justice Wolfe and Justice McDonough concurred in the result reached by Mr. Justice Larson, but expressed the view that such endorsement was not jurisdictional.

It is Appellant's contention that the concurring opinion in the *Thomas* case should be the one to be adopted by this Honorable Court in this case insofar as said concurring opinion states that failure to endorse time of service is not jurisdictional.

If that precept be adopted by this Court in this case, then it is Appellant's position that the provisions of Rule 61, Utah Rules of Civil Procedure, should be adopted, which provides: " . . . The Court at every stage of the proceedings must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Defendant-Respondent was clearly attempting to avoid

service of process. Respondent was served with process and read it in front of the serving Deputy Sheriff. The original and one copy of the Complaint was timely filed by Plaintiff-Appellant. Two days after filing, Respondent's attorney took and signed for a copy of the Complaint from the office of the Salt Lake County Clerk.

Appellant urges that there are absolutely no substantial rights of Defendant-Respondent that were adversely affected by failure to endorse time of service.

Appellant urges that the facts in this case squarely warrant the application of Rule 61, which mandatorily states that the Court shall disregard harmless error at every stage in the proceedings.

To rule otherwise would in fact be a denial of the substantial right of Plaintiff to have his day in Court against a Defendant exerting every means to avoid service.

The rule authorizes and commands that substantial justice be done and that lawsuits are not games to be disposed of upon unimportant technicalities.

CONCLUSION

Appellant urges this honorable Court that the Order quashing service of process should be reversed upon the application of direct and positive declaration of harmless error.

Respectfully submitted,

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Attorney for Appellant