1958

Davis Vincent Ballard by Duane O. Ballard v. Wes Buist and Ronald Baxter : Brief of Appellant

Utah Supreme Court

In the Supreme Court of the State of Utah

DAVIS VINCENT BALLARD,
by DUANE O. BALLARD, his
Guardian and litem,

Plaintiff and Appellant

—vs.—

WES BUIST and RONALD BAXTER,
a/k/a RONY BAXTER

Defendants and Respondents

Case No. 8887

BRIEF OF APPELLANT

LIONEL M. FARR

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BRIEF OF APPELLANT

This action was brought by Davis Vincent Ballard, Appellant; to recover damages suffered from the injuries inflicted upon himself during an alleged assault and battery conflict. The appellant filed his complaint in his own name and had summons and copies of the complaint served personally upon the respondents. The respondents made a special appearance on their motion to stay the proceedings by and through their attorney of record. Prior to the hearing of the respondents' motion, appellant filed his motion to appoint a Guardian ad litem. At the hearing of these two motions, the respondents made an oral motion to quash the summons and

to dismiss the complaint. the appellant at the same time made an oral motion to amend its summons and complaint. The Court granted the motion to appoint a Guardian ad litem and the motion to stay, took under advisement the motion to quash and dismiss and the motion to amend and permitted the parties to file briefs or to orally argue their motions to amend and to quash and dismiss. Thereafter the appellant called up for argument its motion to amend. At the hearing on the motion, the respondents renewed their motion to quash and dismiss. The Court in acting upon the respondents' motion, granted the same and denied the plaintiff's motion to amend. It is from this ruling the appellant appeals and challenges the ruling of the Court that the Court erred in granting the respondents' motion on the following grounds:

That the ruling of the Court is contrary to law.

STATEMENT OF FACTS

Pursuant to the record the facts of this matter are as follows:

Complaint setting forth the real party in interest and enitled "Davis Vincent Ballard v. Wes Buist and Ronald Baxter a/k/a Ronnie Baxter" was filed in the Third District Court on February 21, 1958 (p. 1 & 2).

Summons entitled as set forth in the complaint was personally served on Wes Buist on February 17, 1958. (p. 5). Summons entitled as set forth in the complaint was personally served on Ronnie Baxter on February 21, 1958. (p. 4).

Counsel for defendants appeared specially for the purpose of a motion to stay proceedings. (p 13).

Appellant - plaintiff filed on March 31, 1958, his motion to appoint a Guardian ad litem. (p. 6).

On April 8, 1958, at the hearing to argue the motions, the plaintiff-appellant made an oral motion to amend. (p. 19)

On April 6, 1958 at the hearing to argue the motion to

stay and to appoint a Guardian, the defendant-respondents made an oral motion to quash and dismiss. (p. 13).

The Court took under advisement the oral motion and allowed plaintiff appellant to either file a brief or present oral argument, and granted the motion to appoint a Guardian ad litem and motion to stay. (p. 20).

Plaintiff-appellant argued its motion to amend on May 1, 1958, and defendant-respodents renewed its motion to quash and dismiss. (p. 29).

The same day the Court ruled against the plaintiff-appellant and in favor of the defendant-respondents. (p. 10 and 29).

Evidence was presented to show the fact that the defendants-respondents were in the Navy, out of the State of Utah, and therefore, not available.

ARGUMENT

Point One

THE RULING OF THE COURT GRANTING THE DEFENDANTS' MOTION TO QUASH AND DISMISS AND DENYING THE PLAINTIFF'S MOTION TO AMEND, IS IN ERROR, IN THAT IT IS CONTRARY TO LAW.

Point Two

THE COURT COMMITTED ERROR IN DISMISSING THE COMPLAINT AND DENYING THE PLAINTIFF THE RIGHT TO AMEND AFTER IT APPOINTED A GUARDIAN AD LITEM PRIOR TO GRANTING THE MOTION TO QUASH AND DISMISS, IN THAT SUCH A RULING IS CONTRARY TO LAW.

Appellant will discuss points One and Two together because the evidence in support thereof is the same.

The appellant asserts that the Trial Court should have sustained his motion to amend in accordance with the Utah rules of Civil Procedure, by permitting the amendment of both the summons and the complaint; the summons on the basis that it was not void, but merely irregular and voidable and therefore subject to amendment under Rule 4 (h), which provides that "any time in its discretion and upon such terms as it deems just, the Court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process is issued;" and the complaint on the basis that justice required it as authorized by Rule 15.

In regard to the summons, the appellant therefore considers first the question of whether or not the process was void or merely voidable, and from this point of view, the discussion begins as follows:

The case which the appellant uses to illustrate his position that the summons was merely voidable and therefore subject to amendment is found at 98 Pac. d2 593 and is entitled, "Texas Title Guaranty Co. vs. Mardis, et al" (okla.). In this case the appeal involved the validity of a summons which the defendant had requested that the Court quash and to vacate the judgment previously rendered upon the default of the defendant in failing to answer the said summons. The plaintiff made a motion to amend the summons and the Court, upon the hearing, granted the defendant's motion to quash and vacate and denied the plaintiff's motion to amend and the case was then appealed and in this case the Court discusses the question of whether or not the said summons was void or voidable and it is in this case that the Court decided that the summons was only voidable and therefore it could be amended and the Court set forth the basic elements of a summons, which were as follows: (1) a summons must be

sufficient to advise a defendant of the nature of the action; (2) a summons must contain the name of the Court wherein the action is pending; so that the defendant has good notice of where he should go to defend himself: (3) that the defendant's interest should appear clearly in the process as to what his interest in the action amounts to.

The Court, then, in commenting, in substance, set forth the rule somewhat as follows:

> Process is adequate to confer jurisdiction when it is sufficiently regular to inform the defendant of the nature of the proceedings against him, of the interest he has in them, and the court in which the hearing would take place.

The Court observed that a summons or a process which may have some defect in it, such as the date or the signature of the clerk, or the name of one of the parties, would be considered voidable and irregular, but not void, and therefore subject to amendment. In fact, the same Court held, in the case of **Chaney v. National Bank of Commerce of Tulsa,** found at 66 Pac. 2d 917, that a summons in which the name of the plaintiff was not correctly given was not void, but irregular and voidable. Furthermore, in the case of **Springfield Fire & Marine Insurance Co. vs. Gish Book & Co.,** found at 102 Pac. 708, the Court, in reviewing the numerous authorities on the same question, quoted with approval that almost every possible defect in the form of a summons was amendable, the only limit being the discretionary power of the Court to protect the substantial rights of the adverse party.

Pertaining to the question of rights, it is the position of the appellant that the substantial rights of the defendants would not be adversely affected in amending the summons by adding thereto the name of the guardian, that in all respects it does not change the summons, since the parties have been properly informed of the Court in which the hearing was to be heard, the nature of the action and the interest of the defendants, and in fact, it states who is the real party in interest. To add

to the summons the name of the guardian would be merely a matter of form which would correct any irregularity in the designation of the party plaintiff in the summons and the complaint.

The discussion above raises, then, the question of whether or not any substantial right would be violated in the event that the court permitted the plaintiff to amend its summons and complaint and, therefore, the following information is offered to illustrate the point that the substantial rights of the defendants would not be affected. In the case of **Arizona Eastern, etc., vs. Carillo** (Ariz.), found at 149 Pac 313, a minor filed a petition wherein he designated himself as the plaintiff, a minor and the defendant as the Arizona Eastern Railroad Company, a corporation. The Court, in discussing the appointment of the guardian commented: "Thus, though the steps taken in the appointment of the guardian may have been erroneous, the error was fully corrected before the verdict and judgment. That the defect in proceeding is not jurisdictional seems to be well settled" The Court then referred to the **Johnson vs. Southern Pacific** case, a California case found at 89 Pac. 348, and several others. In further answer to the defendant's objections to the appointment of the guardian, the Court said: "The irregularities complained of in the appointment of the guardian could not possibly have prejudiced the rights of the appellant, inasmuch as they did not bear upon or relate to the merits of the case and only involved the status of plaintiff as a party before the court."

Thus it is the position of the appellant that in regard to permitting the appellant to amend his summons and complaint, it would not prejudice the rights of the defendants, in that it would not bear upon or relate to any of the merits of the case whatsoever in that it involves only the status of the plaintiff as a party before the court.

In regard to the question of the parties to the action, Rule 17 (a) and 17 (b) states the rule about the real party in interest as follows:

"Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the State of Utah."

Now, in this rule it specifically says that every action shall be prosecuted in the name of the party in interest, which in the instant case would be **Davis Vincent Ballard** and not the name of the guardian. The exception, which provides that an executor, administrator or guardian, etc., refers to the fact that if a contract has been made in the name of someone else, then they could use the name of the said executor or administrator, etc. Here it may be noted that the rule says nothing at all to the effect that the party must sue as a guardian ad litem. The only thing or difference is that maybe the more proper way would be to set forth the name of the minor by his guardian ad litem. This in itself would only clarify the situation of any irregularity and not change any material matters

"17 (b)—When an infant or an insane or incompetent person is a party, he must appear either by his general guardian, or by a guardian ad litem appointed in the particular case by the court in which the action is pending. A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted, expedient to represent the infant, insane or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him. In an action in rem it shall not be necessary to appoint a guardian ad litem for any unknown party who might be an infant or an incompetent person."

Now, even as to this rule, there has been compliance made by the guardian ad litem or the plaintiff, in that in order to make his appearance in this action which is pending, petition was made to the court for the appointment of a guardian ad litem and the request of the petitioner was granted, which would seem to be within the spirit and intent of the Utah Rules of Civil Procedure, that then the appearance by the guardian was made after his appointment in which the action is pending.

To summarize the position of the appellant that it would be proper for the apellant to amend both the summons and the complaint, reference is made to 31 C J. 1132, beginning at Par. 280 (b), entitled **"Where Infant Plaintiff"**:

> "It is ordinarily held, even where the statute requires **that a guardian ad litem or next** of friend shall be appointed for an infant plaintiff before the issuance of process that, since the want of a guardian ad litem or next friend is generally regarded as a mere irregularity **and not jurisdictional,** it is not a jurisdictional requirement that there should be a next friend or guardian ad litem for an infant at the time of suing out process. Hence, where during the progress of the trial it appears that plaintiff is an infant, the court may then appoint a next friend or guardian ad litem for him and allow the pleadings to be amended accordingly, and where defendant pleads that plaintiff, an infant, did not commence his action by next friend, the court may allow a responsible person to appear as next friend and qualify, even over the objection of the defendant."

Now, the issuance of the summons, as to its being proper, Rule 4 (a) provides:

> **"Issuance of Summons.** The summons may be signed and issued by the plaintiff or his attorney A summons shall be deemed to have been issued when placed in the

hands of a qualified person for the purpose of service. Separate summons may be issued and served."

In this matter, the plaintiff's father, with permission of the plaintiff, hired the attorney of record, who signed the summons and had it issued in the name of the minor and subsequently moved the court to amend the summons and the complaint after the guardian had been properly appointed by the court. In this, if there were any error at all, it would be purely an irregularity and the matter would not be jurisdictional or it would not affect the substantial rights of the defendants whatsoever to permit the amendment as requested. Now in regard to the question of the summons itself, looking at Rule 4 (c) of Utah Rules of Civil Procedure, entitled "Contents of Summons," we find the following:

> "The summons shall contain the name of the court, the names or designations of the parties to the action, the county in which it is brought, be directed to the defendant, state the time within which the defendant is required to appear and defend, and shall notify him that in case of his failure to do so, judgment by default will be rendered against him. If the summons be served without a copy of the complaint, or by publication, it shall briefly state the sum of money or other relief demanded, and in case of publication of summons such summons as published shall contain a description of the subject matter or res involved in the action."

It will please be noted that in any of the above quoted rules, there is no mention made as to when the guardian ad litem shall be appointed. However, it does say that he must be appointed to appear on behalf of the plaintiff in the action which is pending. Furthermore, the rules do not say that the complaint cannot be filed or brought in the name of the minor infant as the real party in interest and any mention made of the guardian is only as to his appearance for and on behalf of the infant.

The contention raised by the defendants in Court in quoting from American Jurisprudence wherein the defendants cite what they say is the rule that a minor cannot sue, it is interesting to note also in American Jurisprudence the following: 27 Am. Jur 838, par. 117, **"Defect of Want of Next Friend-Irregularity in Appointment."**

> "The court is not without jurisdiction to entertain a suit by an infant in his own name, but the bringing of such suit is merely an irregularity which may be cured by thereafter appointing a next friend to prosecute the action and by amending the pleading accordingly."

In support of this, the case of **Urbach v. Urbach**, 73 Pac. 2d, 953, is cited

It is felt by the appellant that the spirit of our Utah Rules of Civil Procedure is expressed in the statement made by the Court in the case of **Clevenger vs. Grover** (N.C.), found at 193 S. E. 12, wherein the question of amending the complaint and summons to change the party plaintiff was considered, wherein the Court in upholding the right to amend, referred to the case of **Fountain vs Pitt Co.,** 87 S.E. 990. and quoted as follows:

> "The object of our present system of procedure is to try cases upon the merits, regardless of those technicalities, which is not to promote, but defeat justice, at the same time preserving the substantial rights of the parties."

This, I think, states the position of the appellant in regard to this matter, that what the Trial Court has done is to thwart our progress made when the present rules of procedure were adopted by refusing to permit the plaintiff to amend the irregularities in the summons and the complaint and thereby defeats the purpose of the present Utah Rules of Civil Procedure; that it projects us back now to the medevial period of England, when justice was defeated by the Court listening

to complaints in procedure, etc., that were mere irregularities and technicalities, and that the motion to dismiss was poorly taken, merely on the grounds that the guardian had not been appointed and the name of the guardian did not appear, either in the summons or the complaint. Such a failure to appoint the guardian prior to the filing of the complaint and to cause the action to be written, "Davis Vincent Ballard by Duane O. Ballard, guardian ad litem" would certainly not prejudice the defendants in any other substantive rights, because the complaint and the summons do show the fact as to who is the real party in interest, the name of the court, what is involved, it properly apprizes the defendants of their rights and interests in this matter, and that they are to defend themselves on the basis of an assault and battery committed upon the plaintiff. Further authorities on this matter are as follows: ..**Greenfield v Wallace,** 1 Utah 188, **Detroit v. Blauchfield,** 13 Fed. 2d 13, **Child's Estate,** 15 Pac. 364, **Lorden v. Stapp,** 192 Pac. 264, **Foley v. California, etc.,** 47 Pac. 42, **Trask v. Boise King,** 142 Pac. 1075, **Mattice v. Babcock,** 20 Pac. 2d 207.

CONCLUSION

The ruling of the Trial Court is contrary to the law, as had been brought to the attention of the Court in that the appellant has committed an irregularity in failing to have the guardian appointed prior to the service of summons and the issuance and service of the complaint; and that this error is not sufficient to void the summons. It in itself is not prejudicial to the rights of the defendants, nor does it in anyway affect their rights substantially inasmuch as it is not a question of jurisdiction. However, it would be in keeping with the spirit of Utah Rules of Civil Procedure, as well as it would be proper for the Court to grant the plaintiff's request to amend his complaint and his summons. That it is certainly error for the Court to quash the summons and dismiss the complaint purely upon the basis of the fact that the guardian had been appointed after the issuance of the summons and the service of the complaint. What the Trial Court has in effect done

is to actually defeat justice, inasmuch as both defendants are out of state and serving in the Navy and it is impossible to get service upon them at all.

By this ruling the defendants are freed from the jurisdiction of the Court and if they were to permanently remain out of State the effect of the ruling of the Trial Court would be to dismiss the action with prejudice and the plaintiff would not have his day in Court. If anyone has been adversely affected as to his substantive rights, it has certainly been the plaintiff.

The only thing that would be accomplished by serving the defendants again would be to give them a summons in the name of the guardian and it would not change any matter whatsoever as far as the merits of the case are concerned. The case would remain the same, i. e., the parties, a case of assault and battery, and the items of damages as set forth and listed in the complaint would remain the same and in effect nothing substantively would be changed whatsoever.

In closing, the plaintiff cites another authority on this matter, a statement from 25 Am. Jur. 94, Par. 150:

> "It is not error to substitute, by amendment, a guardian for the ward where there is no change in the cause of action, and the party substituted is the proper party to prosecute the action."

To therefore deny the plaintiff the right to amend the summons and the complaint is definitely a miscarriage of justice.

Respectfully submitted,

LIONEL M. FARR,

Attorney For Appellant