1960

William K. Howard et al v. Mildred M. Howard et al : Reply Brief of Appellants

Utah Supreme Court

Perris S. Jensen; Attorney for Plaintiffs and Appellants;

IN THE SUPREME COURT

of the

STATE OF UTAH

WILLIAM K. HOWARD, et al,
Plaintiffs, and Appellants,

vs.

MILDRED M. HOWARD, et al,
Defendants and Respondents.

CASE NO.
9223

REPLY BRIEF OF APPELLANTS

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REPLY TO DEFENDANT'S CLAIM OF NO NOTICE OF ENTRY OF JUDGMENT

Appellants deem a Reply Brief to be in order for the reason that Respondent, in her brief, as the main point on which she relies, makes the statement:

> "No notice of entry of the judgment has ever been given in the original case, therefore the judgment in

> this case is not final and operative." (Brief of Respondent, page 5)

This is not a correct statement of law. The appeal period for appeals from the district court runs "from the entry of the judgment appealed from" Rule 73(a). Further:

> "A judgment is complete and is deemed entered for all purposes when the same is signed and filed, not when notice is received by the parties." In Re Bundy's Estate, 241 P2d 462, 467, 121 Utah 299.

Respondent cites and relies upon Bullen v. Anderson, 81 U 151, 155, 17 P2d 213 (shown in brief as 27 P2d 213). Bullen v. Anderson was an action in the City Court appealed to the District Court. The rules pertaining to appeals from the City Court (Rule 73(h)) are entirely different from the rules pertaining to appeals from a District Court to the Supreme Court, (Rule 73 (a)

Respondent further cites Everett v Jones, 32 Utah 489, 91 P 360 as further authority that a party intending to move for new trial may wait until notice of the decision before giving notice of intention. This case was based on a 1898 statute, which provided for a motion for new trial to be filed within five days after notice of the decision. This statute was carried down to the 1943 Compiled Statutes as Sec. 104-40-4, but it was repealed by the Laws of Utah, 1951, Chapter 58, Sec. 3. The new rules are entirely different. Since they became effective it is not the notice, but the entry of judgment that starts the time to run, and Everett v. Jones, supra, as quoted by respondent, is not now the law.

REPLY TO DEFENDANT'S CLAIM OF COMPLIANCE WITH RULES

On page 7 respondent states that her "Notice of Intention to Move for New Trial" follows the suggested form of motion. Form 20 of the Appendix of Forms sets forth the proper form for a motion. The document filed by respondent does not in any particular follow this form, nor does it follow Rule 7 setting forth the required contents of a motion. It does not "state with particularity the grounds" nor does it contain the notice which is an integral part of Form 20. This matter is set forth in Appellants' Brief and respondent, in her brief, sets forth neither argument nor statement of law, justifying her failure to set forth "with particularity the grounds," as required by the rules.

Respondent's argument as to the required notice of the hearing of motion (Rule 6 d) illustrates the weakness of respondent's position. On pages 8, 9 and 10 of Respondent's Brief are set forth arguments and cases to show that the title of a pleading, is immaterial; yet, on page 7, respondent would have the court believe that because the word "Notice" appeared in the title of the pleading "Notice of Intention to Move for a New Trial," such insertion of the word "Notice" constituted compliance with Rule 6 (d) requiring the inclusion in the motion of "notice of the hearing thereof." A "Notice of Intention" is not "Notice of Hearing."

Appellants do not dispute the argument on pages 8, 9 and 10 of Respondents' Brief to the effect that the title of a pleading is not determinative of its meaning or effect. Appellants do, however, call attention of the court to the statement from 71 CJS page 161 quoted by respondent:

> "The introductory paragraph in the body of the petition itself is not a part of the caption or title";

and the introductory paragraph of the *body* of the defective pleading reads:

> "You and each of you will please take notice that the defendant Mildred M. Howard *intends* to move the above entitled court," etc.

Because the appellant thus relies upon the *body* of the instrument filed by respondent, and not upon the title, the cases sited by respondent on pages 8, 9, 10, and 11 have no bearing on the matter now before the court. The cases merely hold that the body and not the title of a pleading determines what it is. The Lund case, quoted by respondent, 90 Utah 433, 62 P 2nd 278 supports Appellants' position by sustaining the ruling in Blue Creek Land & Live Stock Co., v. Anderson, 35 Utah 61, 99 P 444, to the effect that "the court is without authority, after the expiration of such time (the time fixed by statute for moving for a new trial) to even permit an amendment of a notice of motion for new trial by adding thereto a new and independent ground therefor."

The attention of the Supreme Court is respectfully invited to the fact that respondent does not, in her brief, discuss nor attempt in any manner to answer Point 3 of Appellants' Statement of Points. No reason is shown why respondent did not comply with the provisions of Rules 6, 7, and 59 of the Rules of Civil Procedure; nor is any law cited to show that compliance therewith is not required in order to stay the running of the period for appeal. This is the main point of appellants' claim. If compliance with

these rules is required to stay the running of the period of appeal, and if respondent did not comply, then the judgment entered in Civil 108689 became and is a final judgment and decree. Respondents' failure to meet this point in her brief is an admission of the correctness of appellants' position.

RULES OF CIVIL PROCEDURE TO BE COMPLIED WITH

That the Rules of Civil Procedure are intended to be followed the Supreme Court has already determined. In Holton v. Holton, 243 P 2 438, 439 the court said:

> "Although the New Rules of Civil Procedure were intended to provide liberality in procedure, it is nevertheless expected that they will be followed, and unless reasons satisfactory to the court are advanced as a basis for relief from complying with them, parties will not be excused from so doing."

This statement was quoted with approval and followed in Anderson v. Anderson, 3 Utah 2d 277, 282 P 2nd 845.

FAILURE TO CALL UP MOTION CONSTITUTES ABANDONMENT

Respondent attempts to meet Appellants' Brief by stating that we have no rule prescribing a time within which a motion must be acted upon. That is true. We have

no rule, but we do have a decision by the Supreme Court of Utah, Darke v. Ireland, 4 Utah 192, 196, 7 P 714, which holds that failure by the moving party to call a motion up for hearing within 13 months, constitutes abandonment, and this decision is as binding as if it were embodied in the Rules of Civil Procedure. Respondent let her motion, if it was a motion, lie dormant for 15 months, and never did call it up, and she is therefore bound by the decision in Darke v. Ireland, supra.

PURPOSE OF SUMMARY JUDGMENT

Pertaining to Summary Judgment the Supreme Court said, on December 3, 1959, in Aetna Loan Company vs. Fidelity and Deposit Company, 346 P2d 1078, 9 Utah 2d 412:

> "Summary judgment rules are designed toward effectuating an inexpensive and expeditious determination of litigation, and, therefore, summary judgment should be granted where there is no genuine issue as to any material fact. Rules of Civil Procedure; rule 56(c)."

Respondent, having failed to controvert the points set forth in Appellants' Brief, and having failed to show any reason why the provisions of Rules 6, 7, and 59 of the Rules of Civil Procedure were not complied with, it follows that the decision of the lower court in Civil No. 123132 should be reversed and the District Court should be instructed to grant

plaintiffs' Motion for Summary Judgment, affirming the validity and finality of the judgment of July 9, 1958 in Civil No. 108689.

Respectfully submitted,

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