

1991

# James N. Fowler, Sherril Fowler v. Terry R. Seiter : Reply Brief

Utah Supreme Court

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## Recommended Citation

Reply Brief, *Fowler v. Seiter*, No. 910698.00 (Utah Supreme Court, 1991).

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BRIEF

IN THE SUPREME COURT

STATE OF UTAH

\* \* \* \* \*

JAMES N. FOWLER and  
SHERRIL FOWLER,

Plaintiffs/Appellants,

vs.

TERRY R. SEITER,

Defendant/Appellee.

:

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:

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:

**91-0698-CA**

District Court No.  
880906180CV

\* \* \* \* \*

**APPELLANTS' REPLY BRIEF**

On Appeal from the Third Judicial District Court  
of Salt Lake County, State of Utah  
The Honorable John A. Rokich Presiding

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**FILED**

OCT 23 1991

CLERK SUPREME COURT

IN THE SUPREME COURT

STATE OF UTAH

\* \* \* \* \*

JAMES N. FOWLER and	:	
SHERRIL FOWLER,	:	
	:	Supreme Court No.
Plaintiffs/Appellants,	:	910360
	:	
vs.	:	
	:	District Court No.
TERRY R. SEITER,	:	880906180CV
	:	
Defendant/Appellee.	:	

\* \* \* \* \*

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## ARGUMENT

1. The court's failure to endorse on the summons the number of days within which the Defendant is required to appear and defend does not bar recovery of treble damages in this instance.

Defendant Seiter relies on two cases in support of his proposition that if the court failed to endorse upon the summons the number of days within which the Defendant should answer, there can be no unlawful detainer action. The first is Gerard v. Young, 432 P.2d 343 (Utah 1967). That case cannot be controlling. There was no allegation of forcible entry and detainer. The complaint was for cancellation of lease and for restitution, not for forcible entry and detainer. The court ruled that there were issues of fact as to damages and therefore a summary judgment for Plaintiff was improper. Since there was no award of damages, the supreme court necessarily ruled that there could be no trebling. Only as an additional reason for its decision did Justice Ellett in his concurring opinion state that there was no endorsement upon the summons. Not only was Gerard not a forcible entry action but also no one raised or considered the rule that a defense of insufficiency of process was waived pursuant to Rule 12 U.R.C.P.

The other case relied upon by appellee Seiter is Pingree v. Continental Group of Utah, Inc., 558 P.2d 1317 (Utah 1976) which relies upon Justice Ellett's language in Gerard.

In neither Gerard nor Pingree was the issue raised by the parties in the lower court or the supreme court of whether or not there must be such an endorsement on the summons. Consequently, in neither case was the waiver of defense provided by Rule 12 discussed nor ruled upon, as disclosed by the briefs on appeal in

the two cases.

A shortening of the time from the standard twenty days was not sought and there therefor is no logical reason to have the court endorse any change on the standard summons which granted Seiter twenty days to answer.

Here, Defendant Seiter answered the amended complaint without raising any issue as to sufficiency of process. When a defendant appears and answers a complaint, no summons at all is necessary, much less a second summons. Consequently, even without the express requirement of Rule 12(b) and (h), by answering without raising an objection as to sufficiency of process, that objection is waived. That general rule is stated in 5 Am Jur 2d Appearance § 7, 16 and 6 CJS Appearances § 41.

**2. Insufficiency of process must be raised affirmatively by Defendant Seiter.**

Defendant Seiter asserts that "under no interpretation of...Rule 12(b)(4) can the insufficiency of process be interrupted (sic) to include the failure of the Plaintiffs/Appellants to have the summons endorsed". Seiter cites authority to the effect that insufficiency of process differs from insufficiency of service of process. We agree that there is a difference between the two. In fact Rule 12(b)(4) and (5) refer to each. However, we disagree with the assumption that insufficiency of process is not covered by Utah Rule 4(c) which refers to contents of summons and states "it shall state the time within which the defendant is required to answer...". That is the very subject that the endorsement provision in the forcible entry and detainer statute refers to. It therefore is a defense which is waived if not presented by

motion or answer under Rule 12(b) and (h) U.R.C.P. The federal cases cited by Defendant Seiter neither hold nor imply that requirements for content of a summons do not include statutory requirements. Furthermore, even if the federal cases did so hold, they would be distinguishable because the comparable federal Rule 4(b) provides the summons shall contain "the time within which these rules require the defendant to appear and defend" (emphasis added) instead of providing "it shall state the time within which the defendant is required to answer" as the Utah rule provides.

**3. Defendant Seiter's contention, that Plaintiffs failed to bring their case under the forcible entry and detainer statute and therefore no defense pertaining to that statute was required to be raised, is untenable.**

Seiter cites Gerard supra as holding "that the Plaintiffs/Appellants did not bring this cause of action under the forcible entry and detainer statute". As discussed above, Gerard never was an action under forcible entry and detainer.

Seiter also cites Pingree supra which relied upon Gerard in stating that it was not an action in forcible entry and detainer and Seiter concludes that there was no forcible entry and detainer action alleged here by the Fowlers. Fowlers' amended complaint clearly sets forth an action in forcible entry and detainer.

Defendant Seiter then argues that Plaintiffs Fowler were given an opportunity to meet the issue of failure to have an endorsement of the time to answer. As Defendant Seiter however concedes, the issue of failure to have an endorsement on the summons was raised after the completion of the jury trial. Plaintiffs Fowler are meeting the issue and did meet the issue in the trial court. Defendant Seiter asserts that Plaintiffs Fowler were not prejudiced



in presenting the issue to the court. Fowlers agree, but can see no relevance to the issue of whether or not Defendant Seiter waived his defense of insufficient process by not asserting it timely. Therefore Olpin v. Grove Financial Company, 521 P.2d 1221 cited by Defendant Seiter is irrelevant.

#### CONCLUSION

Damages must be trebled because:

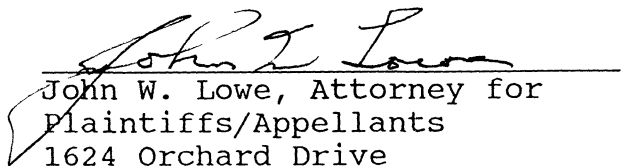
(a) The Defendant entered his appearance and filed his answer to the forcible entry action which does away with the necessity for any summons and any endorsement thereon.

(b) Having the court endorse on the summons that an answer must be filed within twenty days would have been superfluous since that was what it already provided. Shortening of time to answer was neither sought nor obtained.

(c) By not timely raising the issue, pursuant to Rule 12, Defendant has waived the issue of sufficiency of process.

(d) The Gerard and Pingree cases are not controlling, principally because the issue of waiver was neither seen nor raised by the parties nor the courts.

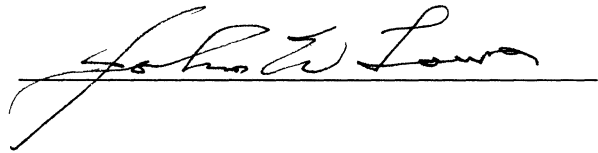
Respectfully submitted this 23 day of October, 1991.

  
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**CERTIFICATE OF SERVICE**

It is hereby certified by the undersigned that four copies of the foregoing **APPELLANTS' REPLY BRIEF** were <sup>*hand delivered*</sup> ~~mailed~~, postage prepaid, on this 23 day of October, 1991 to the following:

Charles W. Hanna  
SMITH & HANNA  
311 South State Street, #450  
Salt Lake City, UT 84111

A handwritten signature in cursive script, reading "John W. Lowe", is written over a horizontal line.