

1991

# James N. and Sherril Fowler v. Terry R. Seiter : Brief of Appellee

Utah Supreme Court

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Charles W. Hanna; Smith & Hanna; Attorney for Respondent.

John W. Lowe; Attorney for Appellants.

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## Recommended Citation

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BRIEF

39

DOCKET NO. 910698

IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES N. FOWLER AND SHERRIL,	)	Case No. 9
Plaintiffs/Appellants,	)	<b>91-0698-CA</b>
vs.	)	District Court Civil
	)	No. 880906180CV
TERRY R. SEITER,	)	
Defendant/Appellee.	)	

ON APPEAL FROM THE  
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

JUDGE JOHN A. ROKICH

BRIEF OF APPELLEE

Charles W. Hanna #1326  
SMITH & HANNA, P.C.  
311 South State Street  
Suite 450  
Salt Lake City, Utah 84111  
Attorney for Appellee

John W. Lowe #2001  
1624 Orchard Drive  
P.O. Box 520003  
Salt Lake City, Utah 84152  
Attorney for Appellants

UTAH COURT OF APPEALS  
UTAH DOCUMENT  
DOCKET NO. 91-0698-CA

**FILED**

OCT 8 - 1991

CLERK SUPREME COURT  
UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JAMES N. FOWLER AND SHERRIL,	)	Case No. 910360
Plaintiffs/Appellants,	)	
vs.	)	District Court Civil
		No. 880906180CV
TERRY R. SEITER,	)	
Defendant/Appellee.	)	

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ON APPEAL FROM THE  
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**BRIEF OF APPELLEE**

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Charles W. Hanna #1326  
SMITH & HANNA, P.C.  
311 South State Street  
Suite 450  
Salt Lake City, Utah 84111  
Attorney for Appellee

John W. Lowe #2001  
1624 Orchard Drive  
P.O. Box 520003  
Salt Lake City, Utah 84152  
Attorney for Appellants

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## JURISDICTION

The Utah Supreme Court has jurisdiction of this case pursuant to Utah Code Ann. § 78-2-2 (3)(j) (1959, as amended).

## NATURE OF PROCEEDINGS

This is an appeal after a full jury trial conducted before the Honorable Judge John A. Rokich of the Third Judicial District Court of Salt Lake County, State of Utah, in Civil No. 880906180CV. The Order denying Plaintiff's request for treble damages was entered on July 2, 1991. The Notice of Appeal was filed on August 1, 1991.

## STATEMENT OF THE ISSUES

1. Whether a Plaintiff who fails to comply with the requirements of Utah Code Ann. §§ 78-36-1 to -12.6 (1953, as amended), Utah's Forcible Entry and Detainer Statute, is entitled to an award of treble damages.

2. Whether the failure of a Plaintiff to have a Summons endorsed by the court as required by Utah Code Ann. § 78-36-8 (1953, as amended) constitutes insufficiency of process as contemplated by Rule 12(b) of the Utah Rules of Civil Procedure.

## SUMMARY OF ARGUMENT

Appellee's argument is summarized as follows:

1. Utah Code Ann. § 78-36-8 (1953, as amended) requires that the court shall endorse on a Summons, in a forcible entry case, the number of days within which the Defendant is required to appear and defend the action. Failure by the Plaintiff to obtain such an endorsement by the court on the

Summons prevents the Plaintiff from being awarded treble damages.

2. Insufficiency of service of process contemplated by Rule 12(b) of the Utah Rules of Civil Procedure does not include the requirement that a Summons be endorsed by the court as required by Utah Code Ann. § 78-36-8 (1953, as amended).

#### STATEMENT OF FACTS

1. On September 22, 1988, Plaintiff's filed their Complaint in the above entitled matter. The Complaint did not state a cause of action for forcible entry nor did the prayer of the Complaint request that any damages awarded be treble. (Plaintiffs' Complaint)<sup>1</sup>

2. On or about September 29, 1988, Defendant/Appellee, Terry R. Seiter was served with a Summons and Complaint in this matter. The Summons had not been endorsed by the court as to the number of days in which Defendant/Appellee, Terry R. Seiter, would be required to appear and defend the action as required by Utah Code Ann. § 78-36-8 (1953, as amended). (Summons)

3. On or about January 4, 1990, Plaintiffs filed an Amended Complaint which included a cause of action for forcible entry and sought treble damages. (Plaintiffs' Amended Complaint)

#### ARGUMENT

I. PLAINTIFF'S HAVING FAILED TO COMPLY WITH THE REQUIREMENTS OF UTAH" FORCIBLE ENTRY AND DETAINER STATUTE ARE NOT ENTITLED TO AN AWARD OF PUNITIVE DAMAGES.

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<sup>1</sup> The record has not been paginated by the court clerk so citations to the page in the record is not possible.

Plaintiffs, James and Sherril Fowler, are not entitled to treble damages as they failed to comply with the requirements of Utah Code Ann. § 78-36-8 (1953, as amended).

The issue before this Court is whether a party who has failed to comply with the requirements of Utah's forcible entry and unlawful detainer statute is entitled to an award of treble damages. This Court, in interpreting Utah's forcible entry and detainer statute, has consistently held that the failure of a Plaintiff to comply with the requirements of the statute prohibits the Plaintiff from obtaining treble damages. In Forrester v. Cook, 292 P. 206 (Utah 1930) this Court stated:

The provision for treble damages is highly penal, and therefore, subject to strict construction. (Id at 214)

In this case the Plaintiffs failed to comply with the requirements of Utah Code Ann. § 78-36-8 (1953, as amended) which provides, in pertinent part, as follows:

The Plaintiff in his Complaint, in addition to setting forth the facts on which he seeks to recover, may set forth any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry, or forcible unlawful detainer, and claim damages therefore or compensation for the occupation of the premises, or both. If the unlawful detainer charged is after default in payment of rent, the Complaint shall state the amount of rent due. The Court shall endorse on the Summons the number of days within which the Defendant is required to appear and defend the action, which shall not be less than three nor more than twenty days from the date of service. The Court may authorize service by publication or mail for cause shown. Service by publication is complete one week after publication. Service by mail is complete three days after mailing. The



Summons shall be changed in form to conform with the time of service as ordered and shall be served as in other cases. (emphasis added)

In this case it is undisputed that the Plaintiff's failed to have the court endorse on the Summons the number of days within which the Defendant was required to appear and defend the action. Further the Summons was not changed to conform to the time of service as ordered by the court.

This Court in the case of Gerard v. Young, 432 P.2d 343 (Utah 1967) dealt with precisely the same issue as is presented in the case at bar. In Gerard, the Plaintiff failed to have the court endorse upon the Summons the number of days within which the Defendant would be required to appear and defend as required by Utah Code Ann. § 78-36-8 (1953, as amended). This Court held that such a failure prevents an award of treble damages. In so ruling, this Court stated as follows:

There are other reasons why the trial court could not grant treble damages. In the first place, for a Plaintiff to bring his cause under the forcible entry and detainer statute, he must have the court endorse upon the Summons the number of days within which the Defendant shall be required to appear and defend the action, which shall not be less than three nor more than twenty days from date of service. (§ 78-36-8 U.C.A. 1953)

The record does not show that the statute was followed in this regard, and if not, then the Plaintiff is in court on a suit to cancel the lease and get actual damages only and can not have the same treble. (Id at 343)

The language of this Court in Gerard indicates that unless the Summons has been endorsed by the court no cause of action under the forcible entry and detainer statute will be

recognized by the court.

**The** position of this Court is that unless the Summons in a forcible entry and detainer case has been endorsed by the court providing the time in which the Defendant must appear and defend that treble damages cannot be awarded was affirmed in the case of Pingree v. Continental Group of Utah, Inc., 558 P.2d 1317 (Utah 1976). In this case, this Court stated as follows:

On March 17, 1975, Defendant was served with Summons and Complaint, for the declaratory Judgment action. The Summons was not in accordance with the mandatory provisions of § 78-36-8, and the Complaint did not include any claim of forfeiture or unlawful detainer. It was not until July 21, 1975, Plaintiff filed an amended Complaint, alleging unlawful detainer.

In Gerard vs. Young this Court held that a Plaintiff, to bring his case under the forcible entry and detainer statute, must comply with the provisions of § 78-36-8. For Plaintiff's failure to comply with this statute, the trial court properly ruled they were not entitled to treble damages. (Pingree, 588 P.2d at 1322) (emphasis added)

This Court went on to hold in Pingree that the Amended Complaint which attempted to state a cause of action for unlawful detainer was only a common law action for ejectment.

It should be noted how close the case at bar procedurally is to Pingree. **The** Plaintiffs/Appellants argue in their brief that contrary to the clear language of this Court in Pingree that the requirements of Utah Code Ann. § 78-36-8 (1953, as amended) are not mandatory. The Plaintiffs/Appellants however, cite no authority for that proposition and merely argue that the purpose of the statute was fulfilled because the

Plaintiffs did not seek a shortening of the normal twenty day period for answering a Summons.

The Plaintiffs/Appellants further argue that when they amended their Complaint to include a cause of action for forcible entry that they were not required to have a second Summons issued. Again the Plaintiffs/Appellants cite no authority and this Court's holding in Pingree is directly to the contrary. In Pingree, as in the case at bar, the claim for forcible entry or unlawful detainer was not stated in an original Complaint but was added in a subsequent Amended Complaint. Notwithstanding that fact, this Court still required that in order to bring an action under the forcible entry and detainer statute that the mandatory provisions of Utah Code Ann. § 78-36-8 (1953, as amended) still apply.

In the case at bar the Plaintiffs/Appellants have failed to have the Summons endorsed by the Court as required by the mandatory provisions of § 78-36-8 U.C.A. This failure absolutely precludes them from obtaining treble damages.

**II. THE FAILURE OF THE PLAINTIFF'S TO HAVE THE SUMMONS ENDORSED AS REQUIRED BY UTAH CODE ANN. § 78-36-8 DOES NOT CONSTITUTE INSUFFICIENCY OF PROCESS AS DEFINED BY RULE 12(b) the UTAH RULES OF CIVIL PROCEDURE.**

Plaintiffs/Appellants in their brief, claim that their failure to have the Summons endorsed as required by Utah Code Ann. § 78-36-8 (1953, as amended) constitutes insufficiency of process within the meaning of Rule (b)(4) of the Utah Rules of

Civil Procedure. And that having failed to raise the defense of insufficiency of process that defense is waived. Again, the Plaintiffs/Appellants fail to cite any authority for this position. Defendant/Appellee has failed to find any Utah cases which define insufficiency of process as used in Rule 12(b) of the Utah Rules of Civil Procedure. However, as this Court and the Utah Court of Appeals has noted on many occasions since the Utah Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure cases interpreting the Federal Rules of Civil Procedure are persuasive. See Seftel v. Capital City Bank, 767 P.2d 941 (Utah, App. 1989).

Federal Courts interpreting Rule 12(b) of the Federal Rules of Civil Procedure distinguish between Motions under Rule 12(b)(4) from those under Rule 12(b)(5). An objection under Rule 12(b)(4) concerns the form of the process rather than the manner of service. "Technically, therefore, a Rule 12(b)(4) motion is proper only to challenge noncompliance with the provisions of Rule 4(b) or any applicable provision incorporated by Rule 4(b) that deals specifically with the content of the Summons." 5A Wright and Miller Federal Practice and Procedure 2d § 1353 p. 276.

The fact that insufficiency of process as defined by Rule 12(b) deals with the form of the process was recognized by the United States District Court for the Northern District of Indiana in the case of Heise v. Olympus Optical Company Ltd., 111 F.R.D. 1 (N.D. Ind. 1986) where the United States District Court

stated as follows:

Insufficiency of process. Olympus Optical Company Ltd. raised Rule 12(b) defense of insufficiency of process in its original Motion to Dismiss. The defense of insufficiency of process differs from insufficiency of service of process; the former challenges the content of a Summons; the latter challenges the manner of service Northland Paper Company v. Mohawk Tablet Company, 271 F.Supp. 763 (S.D. N.Y. 1967) (Id at 5)  
Also see Crane v. Battelle, 127 F.R.D. 174 (S.D. Cal. 1989)

The federal cases and treatise's on the Federal Rules of Civil Procedure make it clear that the insufficiency of process contemplated under Rule 12(b)(4) of the Federal Rules of Civil Procedure and the Utah Rules of Civil Procedure contemplates a defect caused by the Summon's failure to comply with the requirements of Rule 4(c) of the Utah Rules of Civil Procedure. Under no interpretation of the cases and treatise's interpreting Rule 12(b)(4) can the insufficiency of process be interrupted to include the failure of the Plaintiffs/Appellants to have the Summons endorsed as required by Utah Code Ann. § 78-36-8 (1953, as amended).

**III. SINCE PLAINTIFF'S FAILED TO BRING THEIR CASE UNDER THE FORCIBLE ENTRY AND DETAINER STATUTE KNOW DEFENSE PERTAINING TO THAT STATUTE WAS REQUIRED TO BE RAISED.**

Even if the failure to have the Summons endorsed as to the time in which the Defendant was required to appear and defend as required by Utah Code Ann. § 78-36-8 (1953, as amended) does not constitute insufficiency of process under Rule 12(b)(4) of the Utah Rules of Civil Procedure. The question remains whether

such failure is a defense required to be pled pursuant to Rule 12(b) of the Utah Rules of Civil Procedure or is consequently waived pursuant to Rule 12(h) of the Utah Rules of Civil Procedure. This question is admittedly more difficult. However, the position of the Defendant/Appellee is grounded in the language of this Court in the Pingree and Gerard cases.

In Gerard v. Young, specifically held that where the Plaintiffs/Appellants failed to have the Summons endorsed pursuant to the requirements of § 78-36-A that the Plaintiffs/Appellants did not bring his cause of action under the forcible entry and detainer statute.

Similarly, in Pingree v. Continental Group of Utah, Inc., this Court specifically held that the attempt of the Plaintiffs/Appellants to plead an action under the forcible entry and detainer statute in the amended Complaint amounted to nothing more than a common law action for ejectment where the Plaintiffs/Appellants had failed to comply with the mandatory requirements of Utah Code Ann. § 78-36-8 (1953, as amended).

Since the effect of the Plaintiffs/Appellants failure to have the Summons endorsed as required by Utah Code Ann. § 78-36-8 (1953, as amended) was to convert their attempt to plead a cause of action under the forcible entry and detainer statute into a common law action for trespass and for damages that is the cause of action that the Defendants were required to meet and plead their defenses pursuant to Rule 12(b) of the Utah Rules of Civil Procedure.

Finally, it should be noted that the position of the Defendant/Appellee in this case, is even stronger than the position of the Defendant's in Gerard and Pingree. As the Plaintiffs/Appellants states in their brief "in neither of those cases was the issue raised by the parties in either lower court or the Supreme Court of whether or not there must be such an endorsement". In this case the issue of the requirement of an endorsement was raised in the trial court and the Plaintiffs/Appellants were given notice and opportunity to meet the issue. After the jury trial was completed the motion to treble the damages awarded was briefed by both sides. The issue of the failure of the Plaintiffs/Appellants to have the Summons endorsed as required by Utah Code Ann. § 78-36-8 (1953, as amended) was raised and the Plaintiffs/Appellants were given an opportunity to meet that issue.

In interpreting Rule 12(h) of the Utah Rules of Civil Procedure this Court has consistently held that where the Defendant/Appellee has failed to raise a defense which is required to be pleaded, the defense is waived. However, there are some exceptions. In Olpin v. Grove Finance Company, 521 P.2d 1221 those exceptions were listed by this Court as follows:

It is true, as the Plaintiff contends, that it is an affirmative defense which is required to be pleaded, and unless it is, it ordinarily should not be allowed as a defense, unless there is a motion to amend, or the parties acquiesce in the trial of that issue, or the Plaintiff was otherwise given notice and an opportunity to meet it, . . . (Id at 1223)

There is no argument, let alone a showing in the Plaintiffs/Appellants brief that the Plaintiff was misled or prevented from presenting any of there evidence or in any way prejudiced by the time or manner in which the issue of the failure of the Plaintiffs/Appellants to have the Summons endorsed as required by Utah Code Ann. § 78-36-8 (1953, as amended) was raised and presented to the court. See Taylor v. E.M. Royle Corp., 264 P.2d 279 (Utah 1953).

The Defendant/Appellee having had notice and a full opportunity to meet the issue in the hearings before the trial court and the trial court having decided in the Defendants' favor, this case clearly fits into one of the exceptions to the waiver provisions of Rule 12(h) of the Utah Rules of Civil Procedure identified in Olpin.

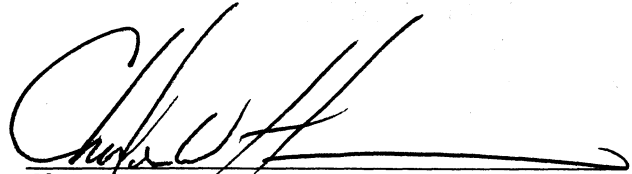
#### CONCLUSION

The Plaintiffs/Appellants are not entitled to an award of treble damages because of their failure to comply with the mandatory requirements of Utah Code Ann. § 78-36-8 (1953, as amended). Because of the penal nature of treble damages, the statutes concerning forcible entry and detainer are subject to strict construction and the failure to comply with the requirements of the statute prohibits an award of treble damages.

Respectfully submitted this \_\_\_\_ day of October, 1991.



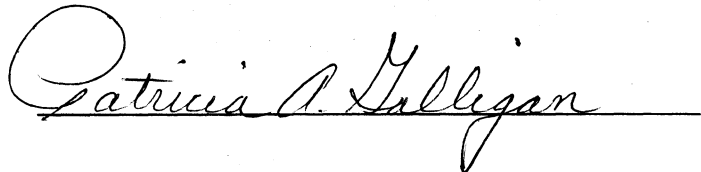
SMITH & HANNA



Charles W. Hanna  
Attorney for Defendant/Appellee  
Smith & Hanna  
311 South State Street  
Suite 450  
Salt Lake City, Utah 84111

MAILING CERTIFICATE

I hereby declare that I caused to be mailed, postage prepaid, first class, a true and correct copy of the foregoing BRIEF OF APPELLEE to John W. Lowe, 1624 Orchard Drive, P.O. Box 520003, Salt Lake City, Utah 84152, this 9<sup>th</sup> day of October, 1991.



CWH\TERYBRIEF.SE3