

1963

Gertrude H. Snyder v. Robert James Clune and Roy M. Stokes : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
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GERTRUDE H. SNYDER,

Plaintiff and Respondent, Clerk, Supreme Court, Utah

vs.

Case No. 9936

ROBERT JAMES CLUNE and
ROY M. STOKES,

Defendants and Appellants.

APPELLANTS' BRIEF

APPEAL FROM THE ORDER OF THE
DISTRICT COURT FOR UTAH COUNTY
HONORABLE JOSEPH E. NELSON, JUDGE

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IN THE SUPREME COURT
of the
STATE OF UTAH

GERTRUDE H. SNYDER,

Plaintiff and Respondent,

vs.

ROBERT JAMES CLUNE and
ROY M. STOKES,

Defendants and Appellants.

} Case No. 9936

APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for personal injuries alleged to have been received in an automobile accident on a public highway in Utah County, Utah.

DISPOSITION IN LOWER COURT

Defendants moved the lower court to dismiss the action on the grounds that the Complaint of plaintiff was barred by the Statute of Limitations. The lower court denied the motion. Appellants then petitioned this court for an Intermediate appeal which was granted.

RELIEF SOUGHT ON APPEAL

Appellants ask that the Order of the lower court denying their motion to dismiss be reversed and that the action be dismissed.

STATEMENT OF FACTS

The following facts are apparent from the record or were agreed to by counsel at the hearing on appellants' motion to dismiss.

1. This is an action for personal injuries alleged to have occurred in an automobile accident on a public highway in Utah County, Utah, on December 14, 1958.

2. Defendants and Appellants are not residents of the State of Utah, but reside in the State of California, and as far as is known have not been in the State of Utah since the happening of this accident.

3. It is conceded by plaintiff that defendants and appellants, Robert James Clune and Roy M. Stokes, could have been served with process at any time since the happening of this accident on December 14, 1958, by serving the Secretary of State of Utah, under the provisions of the Utah Non-Resident Motor Vehicle Act (41-12-8 UCA 1943).

4. Plaintiff filed the Complaint in question (Civil No. 24751) in the office of the Utah County Clerk on December 17, 1962 — four years and three days after the happening of the accident.

5. Plaintiff filed an earlier complaint in the office of the Utah County Clerk (Civil No. 24555) on December 13, 1961. Summons was not issued on this complaint and, in fact, no action whatever was taken by plaintiff after filing the complaint.

Based on the obvious failure to file timely, defendants and appellants moved the court to dismiss the complaint upon the grounds that the four years Statute of Limitations had expired. At the hearing on the argument plaintiff raised three points which she alleges are a complete answer to her failure to file within the period limited by statute. These are:

1. That the filing on December 17, 1962 was timely because of an intervening weekend during which time the office of the Utah County Clerk was legally closed.

2. That plaintiff filed an action arising out of this accident for these injuries on December 13, 1961 in Utah County (Civil No. 24555) on which no action was taken, but which plaintiff claims had the effect of extending the time for filing for one year from December 13, 1962.

3. That the absence of defendants from the State of Utah tolled the running of the Statute of Limitations and, therefore, plaintiff's action is timely.

Defendants urge that neither of plaintiff's arguments are sufficient and that the lower court erred in denying defendants' motion to dismiss and show this by further consideration of the points raised by plaintiff.

ARGUMENT

POINT I.

PLAINTIFF'S COMPLAINT OF DECEMBER 17, 1962 (SECOND ACTION) WAS NOT FILED TIMELY. THE FOUR-YEAR STATUTE OF LIMITATIONS HAD RUN.

The plaintiff argues that at all events the filing of the second cause of action on December 17, 1962 was timely and within the Four-Year Statute of Limitations because December 14, 1962 was a Friday and that she, therefore, could file on the following Monday (December 17, 1962) and still be within the Four-Year Statute.

Time properly computed under our statute will show that plaintiff's contention is not sound. Computation of time is codified by our statute, Title 68-2-7 UCA 1953. The statute reads:

"Time, how computed. — The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then it also is excluded."

The next succeeding section, 68-3-8, makes provisions for acts that must be done on a particular day which falls upon a holiday. This section of the statute reads.

"When a day appointed is a holiday. — Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next

succeeding business day with the same effect as if it had been performed upon the day appointed.”

To the same effect is Rule 6(a) of the Utah Rules of Civil Procedure. The Rule provides:

“Rule 6 Time (a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When the period of time prescribed or allowed is less than seven days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.”

Plaintiff’s cause of action accrued on December 14, 1958. That is the date of the accident as set forth in plaintiff’s complaint. That is the date on which plaintiff’s right to commence an action came into existence. The Four-Year Statute of Limitations applicable to tort actions would run against the claim of plaintiff on December 14, 1962, at the end of that day.

Computing the Four-Year Statute of Limitations under the time statute and the Rules of Civil Procedure, we see that December 14, 1958, the day the action accrued, is excluded and December 14,

1962, a full four years thereafter, is included.

Plaintiff's action had to be commenced on or before December 14, 1962 in order to toll the Statute of Limitations. Filing thereafter was too late. Plaintiff argues, however, that she had until the following day in which to file her complaint and that the following day was a Saturday and that the office of the Utah County Clerk was legally closed on that day and the next day was also a legal holiday and, therefore, she had until December 17, 1962 in which to file timely.

Since the Statute of Limitations expired on December 14, 1962, a Friday and not a holiday, plaintiff's argument is without merit.

Two Utah cases will illustrate these principles. In the case of *Nelson vs. Jorgenson*, 242 P. 945 (Utah) an action was filed on a judgment, which judgment had been entered on October 15, 1914. The complaint in this case was filed October 16, 1922. It would appear that the complaint of October 16, 1922 was filed one day after the Statute had run. However, the court held:

“It is conceded that October 15, 1922 was a Sunday. The complaint alleges that the original judgment was obtained and entered in the District Court of Salt Lake County on October 15, 1914. Section 5843 of Comp. Laws Utah 1917 provides that the time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded. Was the action

barred by the foregoing provisions of our Statute on the fifteenth day of October, 1922? The language of the statute would seem to answer the question in the negative.

This case illustrates two points. First, the Eight-Year Statute would have run eight years to the day after the entry of judgment. In the case at bar, the statute would run four years to the day after the happening of the accident; namely, December 14, 1962. Second, that since the last day, or October 15, 1922, was a holiday, the complaint was timely filed on the following day. In the case at bar, December 14, 1962, was a Friday; and, hence, our case and the Jorgenson case are distinguishable. In the case of: In Re Lynch's Estate, 254 P. 2d 454 (Utah), a motion to amend the judgment was denied on November 22, 1952. Notice of Appeal was not filed until December 23, 1952. The Court stated and held:

"Appellant contends that by excluding November 22, the day of the act or event from which the period of one month commences to run, her time commenced to run on November 23, and that one month after November 23 gives her all day of December 23, the day when the Notice of Appeal was filed. With this reasoning, we do not agree.

"In the present case, we exclude from our calculations the day of the act or event after which the designated period of time begins to run, which is November 22, the day on which the motion was overruled, and start counting from the beginning of the twenty-third of that month; from that time, one month would end

at the expiration of the 22nd day of December, or just before the 23rd commenced, which marked the beginning of another month. To hold in accordance with appellant's argument would require an overlapping of one day into the next month and a longer period or greater number of days than the month in question contains."

Following the reasoning of *In Re Lynch*, to permit plaintiff to file on November 17, 1962 would require an overlapping of one day into the next year, which is a period longer than that permitted by the Statute of Limitations.

POINT II.

PLAINTIFF'S ACTION FILED DECEMBER 13, 1961, DID NOT EXTEND THE TIME FOR FILING HER SECOND ACTION.

Plaintiff filed an earlier Complaint in the District Court (Civil No. 24555) for identical injuries arising out of the identical accident of December 14, 1958. That Complaint was filed December 13, 1961. No action whatever was taken after the Complaint was filed. This action failed other than on the merits by the provisions of Rule 4. (b). This rule reads:

"Time of issuance of service. If an action is commenced by the filing of a Complaint, Summons must issue thereon within three months from the date of such filing. The Summons must be served within one year after the filing of the Complaint or the action will be deemed dismissed, . . ."

Since Summons was not issued on this Complaint within the three months provided by the Rule,

the action failed on March 13, 1961, three months after the filing of the Complaint. Thus, the first action of plaintiff failed on March 13, 1962; however, the Statute of Limitations had not run on plaintiff's claim and plaintiff still had until December 14, 1962, in which to file a second action. This was not done, however, until December 17, 1962. Even if the Court were to hold that plaintiff's first action had not failed until one year after it was filed on December 13, 1961, plaintiff still had until December 14, 1962 in which to file the second action before the limitations statute would bar the claim.

Plaintiff argues, however, that the failure of the first action otherwise than on the merits had the effect of extending the time to file a second action for a period of one year. To support this contention, plaintiff relies on the provisions of Title 78-12-40 UCA 1953; we quote this statute,

“If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, *and the time limited either by law or contract for commencing the same shall have expired*, plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.”
(Italics supplied)

The statute is clear in stating that the time limited for the commencement of the action must

have expired before the statute has any application. Plaintiff's first action failed on March 13, 1962, or at the latest on December 13, 1962. After the failure of the first cause of action, plaintiff still had to and including December 14, 1962 to commence the second action. Having failed to do so, her cause of action is barred.

A similar savings statute has been interpreted by the Oklahoma courts in *Birmingham Fire Insurance Company v. Bond*, 301 P. 2d 361 (Okla.). The Court stated and held:

"The filing of said former action of April 8, 1949, did not have the effect of extending the period of limitations by invoking the application of 12 O.S. 1941, Sec. 100. The one-year period in which the action could be filed did not expire until January 26, 1950. Therefore, the filing and dismissal of the first action several months previously in no way extended the time. The Rule was first announced by this Court in the case of *English v. T. H. Rogers Lumber Company*, 68 Okla. 238, 173 P. 1046 1047, wherein it was held that,

"The statute giving to a plaintiff the right to commence a new action within one year after the reversal or failure of his original action was not intended to afford in all cases an additional time in which to bring suit. By its terms the right is conditioned upon the fact that "the time limited for the same shall have expired." That is, but for the statute, plaintiff's action would, at the time of

the failure or reversal be barred by the statute of limitation. Such is not the case when the failure occurs at a time when the plaintiff has full opportunity to commence a new action.' ”

The Utah statute is to the same effect. If the reversal or failure occurs after the statute of limitations has run, then the plaintiff has an additional year in which to file a new action. However, if the statute has not run on the date of the reversal or failure, then the statute has no application. In this case, the Four-Year Statute of Limitations expired December 14, 1962. Plaintiff's first action failed March 13, 1962, for failure to issue Summons; and even if it were held that the action failed December 13, 1962, for failure to serve Summons within one year, still plaintiff had to and including the fourteenth day of December 1962 to file the second action. It must be concluded that the first action failed before the Statute of Limitations had run and, therefore, the extension statute relied upon by plaintiff had no application.

POINT III.

ABSENCE FROM THE STATE DOES NOT TOLL THE RUNNING OF THE STATUTE OF LIMITATIONS IN A NON-RESIDENT MOTORIST CASE.

Plaintiff relies on the provisions of 78-12-35 UCA 1953, which in substance provides that the time a person is absent from the State of Utah is not part of the period of time limited for the commencement of actions. Most jurisdictions have a

statute similar to the Utah statute, the purpose being to prevent a defendant from defeating a claim by absenting himself from the State. Here, however, plaintiff could have obtained jurisdiction over these defendants at anytime after the happening of the accident by serving the Secretary of State of Utah. This identical problem has been decided by a number of jurisdictions, the majority of those holding that the absence statute has no application to a non-resident motorist case and that the running of the Statute of Limitations is not tolled during the absence of defendant where plaintiff could get personal service by serving a statutory agent.

The general rule is stated in 17 A.L.R. 2d 516:

“Where provision is made by statute for substituted service of process upon a state official in cases arising out of motor accidents within the state, the majority of the courts have held that such a provision has the effect of nullifying any statute suspending the period of limitations.”

Those jurisdictions following the majority rule are:

UNITED STATES. — *Tublitz v. Hirschfeld* (1941, CA2d NY) 118 F2d 29 (under Connecticut statute).

CONNECTICUT.—*Coombs v. Darling* (1933) 116 Conn. 653, 166 A 70.

ILLINOIS. — *Nelson v. Richardson* (1938 295 Ill. App 504, 15 NE2d 17. A2d 286.

TENNESSEE. — Arrowood v. McMinn County (1938) 173 Tenn. 562, 121 SW2d 566, 119 ALR 855.

VERMONT. — Reed v. Rosenfield (1947) 115 Vt. 76, 51 A2d 189.

DEL. — Hurwitch v. Adams (Del.) 151 A.2d 286.

IOWA. — Kokenge v. Holthaus, 243 Iowa 571, 52 NW2d 711.

MO. — Haver v. Bassett, — Mo. App., 287 SW2d 342 (citing annotation); Scorza v. Deatherage (CA8th Mo.) 208 F 2d 660.

N. H. — Bolduc v. Richards (NH) 142 A2d 156.

OKLA. — Moore v. Dunham (CA 10th Okla.) 240 F2d 198 (Applying Oklahoma statute).

MICH. — Hammel v. Bettison, 362 Mich. 396, 107 NW2d 887.

OR. — Whittington v. Davis (Or.) 350 P2d 913.

We have selected the case of *Moore v. Dunham*, 240 F2d 198, (10 CCA. Okla.) as indicative of the persuasive reasoning of the majority view. The Court said:

“Oklahoma courts have not construed Section 98 (absence statute) in connection with the provisions for service of process under the Non-Resident Motorist Act. But the majority, and we think the better reasoned view, holds that provisions for substituted service of process upon a state official arising out of motor accidents within the state has the effect of

nullifying any statute suspending the period of limitations. (citing cases)

“Such view is said to be consistent with the purpose of substituted service, i.e. expeditious adjudication of the rights of parties; that by creating substituted service the legislature obviously intended to provide an exception to this suspension provision; and that a contrary conclusion would permit a plaintiff to defer the institution of his action indefinitely to the prejudice of the defendant.”

Plaintiff cites the Utah case of *Keith O'Brien Company vs. Snyder*, 51 U. 227, 160 P. 954, which held that where a person absent from the state maintains a residence where process could be served in the state, the Statute of Limitations was tolled during his absence.

That case was necessarily decided in part on our service of process statute which then provided,

“The Summons must be served by delivering a copy thereof as follows: . . . (8) In all other cases to the defendant personally, or by leaving such copy at his usual place of abode with some suitable persons of at least the age of 14 years.”

The decision of the Keith O'Brien case necessarily involved that phrase of the statute “usual place of abode”. Service of process at the “usual place of abode” is not always effective. In the case of *Grant v. Lawrence*, 108 P. 931 (decided earlier than the Keith O'Brien case) held, in an action to set aside a judgment on the ground that no Sum-

mons had been served as required by this section, where it appeared that plaintiff, while still married, had taken a plural wife and had gone to England with her as a missionary, during which time his first wife had built a house in Salt Lake City with money furnished by plaintiff who had never seen the house nor lived in it until he returned from England; service on plaintiff while he was in England by leaving a copy of process at the house of the first wife was held insufficient since such house was not plaintiff's "usual place of abode" within the statute.

We thus see that service at the "usual place of abode" can be uncertain and ineffective to determine the rights between parties. A judgment obtained on such service could be set aside for want of jurisdiction many years later after substantial rights of third parties had intervened.

Two important changes have occurred in our law since the decision in the Keith O'Brien case.

The Non-Resident Motorist Vehicle Act (41-12-8) was passed in 1943. This statute provides in part:

"The use and operation by a nonresident or his agent of a motor vehicle upon and over the highways of the state of Utah shall be deemed an appointment by such nonresident of the secretary of state of the State of Utah, to be his true and lawful attorney upon whom may be served all legal processes in any action or proceeding against him growing out of such use or operation of a motor vehicle over the

highways of this state resulting in damages or loss to person or property and said use or operation shall be a signification of his agreement that any such process shall, in any action against him which is so served, be of the same legal force and validity as if served upon him personally."

In January of 1950, the Rules of Civil Procedure amended the Service of Process Provisions of the statute and now read as follows:

"Rule 4. (e) Personal service in this State. Personal service within the state shall be as follows:

(1) Upon a natural person of the age of fourteen years or over, by delivering a copy thereof to him personally, or by leaving such copy at his usual place of abode with some person of suitable age and discretion there residing; *or by delivering a copy to an agent, authorized by appointment or by law to receive service of process.*" (Italics supplied)

The Legislature has provided that service upon the Secretary of State is personal service and certainly there can be no uncertainty either in the terms of such service or upon the person served. The Secretary of State is a state office where service can be had at any time. The problem created by the Grant case and recognized by the Keith O'Brien case is not present. Rule 4. (e) Specifically recognizes such personal service "by delivering a copy to an agent authorized by appointment or law to receive service of process."

As in the majority rule respecting the absence statute in nonresident motorist cases, our Legislature and courts intended to nullify the absence statute in non-resident motorist cases. When one considers that the policy of the law in general and the non-resident motorist statute in particular, is to bring about "expeditious adjudication of the rights of parties", the application of the Utah absence statute would work an illogical and unjust result.

To illustrate, we may consider the plight of a Utah motorist who travels in a foreign state for the first and last time and there has an accident. If the absence statute of that state were applied, he would be subject to suit at a time so remote that all memory of the accident would be erased. Clearly, he would be prejudiced thereby.

The situation most nearly resembling the non-resident motorist case is that of a foreign corporation having a process agent in the state of Utah. Such a corporation is a person (legally) and is absent from the state. Does the statute of limitations ever run on a claim against the foreign corporation? This Court said that the Statute did run in the case of *Clawson vs. Boston Acme Mines Development Company* 269 P. 147 (Utah). Quoting the general rule, the Court said:

"The majority of decisions maintain a rule which it is believed is more consonant with justice. The Rule, briefly stated, is that if, under the laws of the domestic state, the corporation has placed itself in such position

that it may be served with process, it may avail itself of the Statute of Limitations when sued. Ability to obtain service of process is the test of the running of the Statute of Limitations."

The test of whether the Statute of Limitations will run is the ability to obtain service of process. That is the Utah Rule applied to qualifying foreign corporations and should be the rule in the case of a non-resident motorist. The foreign corporation and the non-resident motorist stand on the same footing as regards their absence from the state and stand on the same footing as regards service of process. Just as a qualifying foreign corporation must appoint a process agent, the non-resident motorist appoints the Secretary of State his agent for the purpose of service of process by operating a vehicle on the public highways of this state.

To hold that the Absence Statute applies to non-resident motorists on the authority of the Keith O'Brien case (*supra*) on the one hand and then to hold that it does not apply to a foreign corporation on the authority on the Clawson case (*supra*) on the other hand, would reach results diametrically opposed on identical legal principles.

Appellants urge that the rule adopted by the majority of jurisdictions as regards the Absence Statute in non-resident motorists cases, be adopted by this Court. It is a rule founded on logic and reason and is squarely aligned with the Utah Rule on qualifying foreign corporations which the non-resident motorist case is most closely akin.

CONCLUSION

1. Plaintiff's action filed December 17, 1962, for injuries received December 14, 1958, was not timely. The Statute of Limitations had run on December 14, 1962.

2. The action filed by plaintiff (the identical accident and injuries) on December 13, 1961, failed because summons was not issued within three months and did not have the effect of extending the filing period for one year because the time limited for filing had not expired on the date the action failed.

3. The Utah absence statute has no application to a non-resident motorist case where jurisdiction can be obtained at any time by service of process on the Secretary of State.

For the reasons set forth above, the action of plaintiff is barred by the four year Statute of Limitations. The order of the district court must be reversed and the action of plaintiff dismissed.

Respectfully submitted,

HANSON & GARRETT

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