

1984

**Valley Asphalt, Inc. v. Eldon J. Stubbs Construction, Inc., Fashion Cabinets & Mfg., Entrada Industries, Inc., W. Trent Ridd, Tawna Ridd, Geneva Rock Products, Ashrock, Inc., Robert J. Wilson, Dorene Wilson, Provo Land Title Co., United Savings & Loan Assoc., Southam & Warburton Aluminum Corp., Douglas B. Worthen, Cheryl Worthen, Bart J. Weaver, Laurie Weaver, Scott Glenn, Glenn Thornock, Cavalier Enterprises, Inc., Michael L. Carter, Carol Carter, Fts Enterprises, Inc., And Frank T. Santos :  
Brief of Respondent**

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IN THE SUPREME COURT

STATE OF UTAH

VALLEY ASPHALT, INC.,

Plaintiff-Appellant,

vs.

ELDON J. STUBBS CONSTRUCTION,  
INC., FASHION CABINETS & MFG.,  
ENTRADA INDUSTRIES, INC., W.  
TRENT RIDD, TAWNA RIDD, GENEVA  
ROCK PRODUCTS, ASHROCK, INC.,  
ROBERT J. WILSON, DORENE  
WILSON, PROVO LAND TITLE CO.,  
UNITED SAVINGS & LOAN ASSOC.,  
SOUTHAM & WARBURTON ALUMINUM  
CORP., DOUGLAS B. WORTHEN,  
CHERYL WORTHEN, BART J. WEAVER,  
LAURIE WEAVER, SCOTT GLENN  
THORNOCK, SHEILAGH GLENN  
THORNOCK, CAVALIER ENTERPRISES,  
INC., MICHAEL L. CARTER, CAROL  
CARTER, FTS ENTERPRISES, INC.,  
and FRANK T. SANTOS,

Defendants-Respondents.

CASE NO. 19404

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RESPONDENTS' BRIEF

\*\*\*\*\*

APPEAL FROM ORDER OF DISMISSAL OF FOURTH  
JUDICIAL DISTRICT COURT OF UTAH COUNTY

\*\*\*\*\*

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## STATEMENT OF THE NATURE OF THE CASE

This is an action to foreclose a mechanic's lien on various parcels of property.

## DISPOSITION IN LOWER COURT

The Fourth Judicial District Court, the Honorable George J. Ballif presiding, dismissed plaintiff's complaint as to respondents because the summonses served on respondents were not issued within THREE (3) months from the date of filing the complaint, as required by Rule 4(b) of the Utah Rules of Civil Procedure.

## RELIEF SOUGHT ON APPEAL

Respondents request that the Order dismissing plaintiff's complaint for failing to comply with Rule 4(b) be affirmed.

## STATEMENT OF FACTS

Plaintiff filed a complaint to foreclose an alleged mechanic's lien on June 17, 1982. Plaintiff filed an amended complaint on October 11, 1982. Twenty-two defendants were named in the amended complaint. On August 5, 1982, summons was issued as to Wilson J. Stubbs Construction, Inc., one of the 22 named defendants. On March 16, 1982<sup>1983</sup>, the summonses eventually served on respondents were issued. The District Court granted respondents' Motion to dismiss under Rule 4(b) because the summonses served on respondents did not issue within THREE (3) months from the date the complaint was filed.

ARGUMENT

POINT I

RULE 4(b) REQUIRES THAT SUMMONS SHALL ISSUE AS TO EACH DEFENDANT NAMED IN THE COMPLAINT WITHIN THREE MONTHS FROM THE DATE THE COMPLAINT WAS FILED.

Rule 4(b) of the Utah Rules of Civil Procedure states as follows:

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, provided that in any action brought against two or more defendants in which personal service has been obtained upon one of them within the year, the other or others may be served or appear at any time before trial. (emphasis added).

The major issue of this appeal is whether Rule 4(b) requires summons to issue as to each defendant named in the complaint within three months from the date the complaint was filed, or whether it is sufficient if summons issues as to just one of the defendants named in the complaint within three months from the date the complaint was filed.

Rule 4(a) states that " a summons shall be deemed to have been issued when placed in the hands of a qualified person for the purpose of service."

Rule 4(c) states that:

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 answer the complaint in writing, and shall notify him that in case of his failure to do so, judgment by default will be rendered against him. (emphasis added).

Plaintiff argues that because a summons was issued within THREE (3) month period as to one of the 22 defendants named in the complaint, that Rule 4(b) has been satisfied. However, Rule 4(b)

expressly states that a proper summons must "be directed to the defendant". The summons served on Eldon J. Stubbs Construction, Inc., which was issued on August 5, 1982, was not directed to the respondents as required by Rule 4(c). Therefore, the issuance of that summons cannot qualify as an issuance of summons for respondents.

The issuance of summons within the THREE (3) month period of Rule 4(b) is required to obtain jurisdiction over the defendants. The Utah Supreme Court explained this rule in Fibreboard Paper Products Corporation v. Dietrich, 475 P2d 1005, 1006, (Utah 1970) as follows:

It is quite apparent from the examination of the file that the Court failed to obtain jurisdiction over the defendants. While the summons was dated by plaintiff's counsel on April 1, 1969, the same was not in fact issued for more than six months thereafter. Rule 4(a), Utah Rules of Civil Procedure, provides that a summons shall be deemed to have issued when placed in the hands of a qualified person for the purpose of service. It is quite apparent that the summons served upon the defendant, Ronald W. Dietrich, was not timely issued.

The proper issuance of summons is therefore a jurisdictional matter. Jurisdiction over Eldon J. Stubbs Construction, Inc., or over any other defendant does not confer jurisdiction over respondents. Under plaintiff's argument, jurisdiction over one party would confer jurisdiction over all other party defendants.

Plaintiff's reliance on Redman Warehousing Corp. v. Clearfield City Corp., Utah Supreme Court No. 15159, filed January 4, 1978 (not in reporter) is also without merit. In Redman, supra, summonses were timely served on two of the defendants. Freeport Center Associates, an additional defendant, was not served until

almost three years after the complaint was filed. Freeport was granted summary judgment because, among other things, it was not served with summons within one year following the filing of the complaint. This Court ruled that the trial court erred in granting summary judgment. The Court relied on the second part of Rule 4(b) which provides that if personal service is had upon one of several defendants within the year following the filing of the complaint the other named defendants may be served or appear at any time before trial. The question of whether the summons was timely issued was not even before the Court. Redman can also be distinguished because Freeport made a general appearance by filing an answer and a counterclaim.

Plaintiff cannot rely on the second part of Rule 4(b) which permits untimely service on additional defendants when service on one defendant has been made within the one year period. That exception relates solely to service of summons. The first sentence of Rule 4(b), which relates to issuance of summons, states that summons must issue within three months from the date of filing the complaint. There is no exception for untimely issuance of summonses on other defendants when summons has been timely issued to one defendant.

It is often said that it should be assumed that all of the words used in a statute were used advisedly and were intended to be given meaning and effect. For the same reasons, the omissions should likewise be taken note of and given effect.

Kennecott Copper Corp. v. Anderson, 30 Utah 2d 102, 104, 514 P2d 219, (1973). Therefore, an exception to allow late issuance of summons should not be read into Rule 4(b) just because such an



exception exists as to the service of summons.

Plaintiff's argument that respondents were not prejudiced because summonses were served on respondents within the one year period is also without merit. Under that rationale, the provisions relating to issuance of summons can be totally disregarded if service is completed within the one year period. The draftsmen of the rules obviously felt that it was important that summons issue within three months from the date of filing the complaint.

The apparent policy behind this rule is to assure that plaintiffs will diligently prosecute their causes of action and to provide each defendant notice of the proceeding without undue delay. Issuance of summons shows that the plaintiff is serious about the cause of action and that he is at least trying to attempt service upon each of the defendants. An extended period of time is allowed for the service of summons because it is often difficult to locate defendants. In the present case, plaintiff has failed to show any justifiable reason for the untimely issuance of summons. Plaintiff's failure to comply with the requirements of Rule 4(b) entitled respondents to dismissal.

#### POINT II

DISMISSAL IS PROPER WHEN PLAINTIFF FAILS TO COMPLY WITH RULE 4(b).

In Dennett v. Powers, 536 P2d 135 (Utah 1975), the Utah Supreme Court quoted Rule 4(b) in its entirety. The court then stated that "the rule above quoted pertaining to the issuance and the service of summons must be complied with or the action is deemed dismissed." In Fibreboard Paper Products Corporation v. Dietrich, 25 Utah 2d 65, 475 P2d 1005, 1006 (1970), this Court found that

failure to comply with the issuance of summons provisions of Rule 4(b) means that the Court failed to obtain jurisdiction over the defendants. Dismissal is clearly proper for lack of jurisdiction.

Therefore, it is proper to dismiss an action under Rule 4(b) for failure to issue summons within three months after filing a complaint.

### POINT III

THE DISTRICT COURT'S INTERPRETATION OF RULE 4(b)  
IS NOT INCONSISTENT WITH OTHER RULES.

The District Court's Interpretation of Rule 4(b) would not "severally limit the scope of other rules which allow for later amendment, joinder, naming unknown defendants, and interpleader." Plaintiff assumes that requiring plaintiff to have summons issued as to each of the defendants named in the complaint within three months after filing the complaint would require plaintiffs to file a separate action against newly discovered additional defendants. This is not true.

The present situation can be distinguished from attempts to join additional defendants by procedures such as by amendment more than three months after the complaint is filed. In the present situation, plaintiff knew the identity of each of the defendants named in the complaint at the time the complaint was filed. When a plaintiff amends his complaint to add additional defendants under Rule 15(a), it is generally because the plaintiff has recently discovered the defendants to be added.

The present situation can also be distinguished from attempts to join additional defendants more than three months after the complaint is filed because there are additional procedural safeguards

that protect the defendants in those situations. Amending a complaint to add defendants under Rule 15(a) requires the plaintiff to either have written consent of the adverse parties or leave of court. Unknown defendants listed in the complaint of a quiet title action are at least served by publication while they are still unknown. Section 78-40-12, Utah Code Annotated, as Amended.

Rule 4(b) requires that summons issue as to each of the defendants named in the complaint within three months after the complaint is filed. The apparent policy behind the rule is to insure that plaintiffs will at least attempt to serve and put defendants on notice within three months after the suit is filed. Issuance of summons shows that plaintiff is serious about the suit and that he is at least trying to attempt service upon each of the named defendants. If the plaintiff was only expected to be diligent in issuing summons to one of the defendants, the protection afforded by the first part of Rule 4(b) would be lost to the remaining defendants.

Under plaintiff's interpretation of Rule 4(b), a plaintiff could commence a suit by filing a complaint naming fifty separate defendants. The plaintiff would only be required to issue summons for one of those defendants within the three month period. If that defendant is later served within the one year period, plaintiff would not have to worry about issuing summons for the other 49 defendants until just before trial. So long as the additional summonses were issued and served before trial, jurisdiction would be proper. Meanwhile, the additional defendants would have no way of knowing that a suit had been filed against them, would lose the opportunity to fully participate in discovery, and would

not be able to accumulate and prepare their evidence for trial. The plaintiff would have no responsibility to even attempt to issue these summonses until just before trial. The rule requiring issuance of summons for each defendant is designed to protect defendants from such occurrences.

#### CONCLUSION

The District Court did not err in its interpretation of Rule 4(b). Plaintiff did not comply with the requirements of the Rule because the summonses served on respondents were not issued within three months from the date of filing the complaint.

Based on the foregoing, respondents respectfully submit that the order dismissing plaintiff's complaint be affirmed.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of December, 1983.

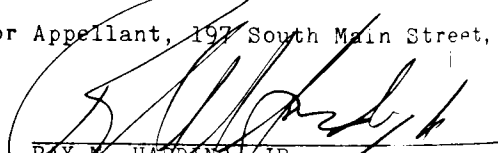
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#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two (2) copies of the foregoing Respondents' Reply Brief were mailed to: Mr. Harold D. Mitchell, Strong & Mitchell, Attorneys for Appellant, 197 South Main Street, Springville, UT 84663.

  
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