

1993

Judy Dahlquist v. Laird Telemedia, INC. : Reply Brief

Utah Court of Appeals

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Andrew B. Berry, Jr.; Attorney for Appellant.

Lynn G. Foster; Attorney for Appellee.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

930292CA

IN THE UTAH COURT OF APPEALS

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93-0292-CA

JUDY DAHLQUIST,

Plaintiff and Appellant,

vs.

LAIRD TELEMEDIA, INC.,
a Utah corporation,

Defendant and Appellee.

Case No. [REDACTED]

Priority No. ~~26~~
15

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REPLY BRIEF OF APPELLANT

APPEAL FROM THE ORDERS GRANTING SUMMARY JUDGMENT
OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE ANNE M. STIRBA PRESIDING

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FILED

Utah Court of Appeals

MAY 18 1993


Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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JUDY DAHLQUIST, :
Plaintiff and Appellant, : Case No. 920508
vs. :
LAIRD TELEMEDIA, INC., : Priority No. 16
a Utah corporation, :
Defendant and Appellee. :
: :
-----oo0oo-----

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APPEAL FROM THE ORDERS GRANTING SUMMARY JUDGMENT
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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented by the Reply Brief of the Appellant are:

1. Should the appellate court exercise it's management power over the appellate process and declare that the Appellant's Notice of Appeal was timely filed or remand the issue to the trial court for a finding upon the question of fact regarding the date of the receipt of the Appellant's Notice of Appeal by the Third Judicial District Court?

2. Did the Appellant move to amend her pleadings in the district court?

STATUTES AND RULES

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STATEMENT OF FACT

1. The Plaintiff, Judy Dahlquist, resides in the County of Salt Lake within the State of Utah. (Record at 344).

2. Judy Dahlquist's attorney lives in and practices law from his office in the City of Moroni in the County of Sanpete within the State of Utah, which is more than one hundred twenty (120), miles from Salt Lake City. (Record at 344 and 345).

3. It is extremely difficult for the Plaintiff, Judy Dahlquist, and her counsel to coordinate a reasonable time to meet and respond to the developments in the case because of the great distances between them and the distance between counsel and the trial court. (Record at 344).

4. It is burdensome and impractical to compel counsel for Judy Dahlquist to drive to courts in areas of the state remote to him to personally review the trial court's file and ensure that legal documents and other papers are properly processed and filed in this case and many others. (Attached is the Appellant's Response to Motion For Summary Disposition and see Exhibit A, thereto).

5. Counsel in remote areas of the state must necessarily rely upon the postal service in order to transmit legal documents

to the courts in various areas of the state. (Attached is the Appellant's Response to Motion For Summary Disposition and see Exhibit A, thereto).

6. On the 25th and the 28th days of September, 1992, the Honorable Anne M. Stirba executed and entered two (2), orders from which the appeal was taken. (Record at 453-458).

7. Approximately three (3), weeks following the receipt from the Appellee's counsel the proposed Order effectuating the trial court's summary judgments counsel for the Appellant telephoned a clerk at the office of the Third Judicial District Court in Salt Lake County. The clerk read the last order in the trial court's file to counsel and stated that the date the Order was executed and entered was the 28th day of September, 1992.

8. The last day for the filing of the Notice of Appeal was the 28th day of October, 1992.

9. On the 26th day of October, 1992, the Postmaster at the Moroni post office assured the Plaintiff's counsel that the Notice of Appeal would be delivered to the trial court by the 28th day of October, 1992. (Attached is the Appellant's Response to Motion For Summary Disposition and see Exhibit B, thereto).

10. On the 26th day of October, 1992, counsel for Judy Dahlquist, mailed her Notice of Appeal to the Third Judicial District Court for Salt Lake County, postage prepaid and by certified mail, return receipt requested. (Record at 463, and attached is Appellant's Response to Motion For Summary Disposition and see Exhibit C, thereto).

11. On the 26th day of October, 1992, counsel for Judy Dahlquist mailed a copy of the Notice of Appeal and other documents to counsel for the attorney for the Appellee, postage prepaid by certified mail, return receipt requested (Record at 463, and Exhibit D, to the Appellant's Response to Motion For Summary Disposition which is attached hereto);

12. On the 28th day of October, 1992, counsel for the Defendant received the copy of the notice of appeal mailed to him by Plaintiff's counsel. (Exhibit E, to the Appellant's Response to Motion For Summary Disposition which is attached);

13. The Notice of Appeal was received by the clerk of the trial court on the 28th day of October, 1992, although it bears a district court filing stamp dated the 29th day of October, 1992. (Record at 462).

14. The mail to the Clerk of the Third Judicial District Court for Salt Lake County is normally delivered to the cashier's window by the postal carrier. The cashiers normally immediately date stamp the legal documents received unless they are directed to the attention of a specific clerk, whereupon the documents will be placed in that clerk's box to be picked up by that clerk. (Exhibit F, to the Appellant's Response to Motion for Summary Disposition attached hereto).

15. In this proceeding the Notice of Appeal and other documents were directed to a specific clerk. (Exhibit B, to the Appellee's motion). The Notice of Appeal was processed through at least three (3), and perhaps more, individuals in the court clerk's

office before it was file stamped. The district court file stamp shows that the Notice of Appeal was docketed by a clerk other than the clerk to whom the document was directed at the cashier's office. (Exhibit F, and record at 462).

16. The Plaintiff, Judy Dahlquist, will be severely prejudiced by the dismissal of her appeal and the loss of her causes before the trial court in the event the Utah Court of Appeals grants the Appellee's motion. (Record at 2-9).

ARGUMENT

THE NOTICE OF APPEAL WAS TIMELY FILED AND THE APPELLATE COURT OTHERWISE HAS JURISDICTION

The Appellee has moved to summarily dismiss the appeal of Judy Dahlquist, the Appellant, upon the basis that this Honorable Court is without jurisdiction to hear the appeal because the Notice of Appeal bears the district court's filing stamp of the 29th day of October, 1992, one (1), day after the thirty (30), day limitation for filing a notice of appeal after the rendering of a judgment in the trial court. (Rule 4(a), of the Utah Rules of Appellate Procedure).

The case authority cited by the Appellee is Isaacson v. Dorius, 669 P.2d 849 (Utah 1983), and it's progeny decided by the Utah Court of Appeals. (See Silva v. Dept. of Employment Security, 786 P.2d 246 (Utah App. 1990); State v. Palmer, 777 P.2d 521 (Utah App. 1989); and Fields v. Mountain States Telephone and Telegraph Co., 754 P.2d 677 (Utah App. 1988)).

The Appellant, Judy Dahlquist, objects to the motion and responds upon the basis that the facts in this proceeding are

materially distinguishable from Isaacson, supra, and that the statutes and rule (former Rule 73(a)), under which that decision was made have been repealed or are inapplicable. Additionally, the Utah Supreme Court has adopted the Utah Rules of Appellate Procedure since the Isaacson, decision.

The power and authority of the appellate court to determine the question of jurisdiction of an appeal is expressly set forth by Section 78-2-4(1), of Utah Code Annotated.

Section 78-2-4(1), of Utah Code Annotated provides:

The Supreme Court shall adopt rules of procedure and evidence for use in the courts of the state and shall by rule manage the appellate process.

An appellant court, by virtue of this statute has the power to manage the appellate process. The determination of the question of when the Notice of Appeal was mailed, filed and whether such filing was timely is part and parcel of the management function conferred upon the appellate court.

The primary purpose of the Utah Rules of Civil Procedure is to, "...secure the just... determination of every action." The Utah Rules of Civil Procedure should be liberally construed to this end.

Rule 1(a), of the Utah Rules of Civil Procedure provides:

Scope of Rules. These rules shall govern the procedure in the Supreme Court,... They shall be liberally construed to secure the just, speedy and inexpensive determination of every action. (Emphasis, added).

Rule 21(a), of the Utah Rules of Appellate Procedure provides in pertinent part:

...Filing may be accomplished by mail addressed to the clerk. Filing shall not be timely unless the papers are received by the clerk within the time fixed for filing,...(Emphasis added).

The Supreme Court's scope of review, in equity cases, is broad and it may weigh the evidence and determine the facts. Bustamante v. Bustamante, 645 P.2d 40 (Utah 1982), and Jensen v. Brown, 639 P.2d 150 (Utah 1981), and Section 78-2-4(1), of Utah Code Annotated.

The Appellant, Judy Dahlquist, asserts that her Notice of Appeal was timely filed on the 29th day of October, 1992. Moreover, a question of fact exists as to when the district court received the Notice of Appeal within the purview of Rule 21(a), of the Utah Rules Of Appellate Procedure.

Approximately three (3), weeks following the receipt from the Appellee's counsel the proposed Order effectuating the trial court's summary judgments counsel for the Appellant telephoned a clerk at the office of the Third Judicial District Court in Salt Lake County. The clerk read the last order in the trial court's file to counsel and stated that the date the Order was executed and entered was the 28th day of September, 1992.

Appellant's counsel did not have the file clerk at the trial court review each document in this voluminous court file but was simply interested in obtaining a judgment date from which he could appeal the improper entry of the summary judgment.

Counsel for the Defendant and Appellee, Laird Telemedia, Inc., submitted two (2), identical orders, which were executed by the trial court three (3), days apart, knowing that the filing clerk would give Appellant's counsel the date of the latest order entered upon the summary judgments.

This type of manipulation of the court system by the Appellee's counsel was demonstrated in the trial court by the numerous filings of frivolous motions.

Thirty (30), days from the 28th day of September, 1992, was Sunday, the 28th day of October, 1992.

The preponderance of the evidence supports the assertion that the district court received the Appellant's Notice of Appeal on the 28th day of October, 1992, but was not file stamped until the 29th day of October, 1992.

Those facts are as follows:

1. The Plaintiff, Judy Dahlquist, resides in the County of Salt Lake within the State of Utah (Record at 344).

2. Judy Dahlquist's attorney lives in and practices law from his office in the City of Moroni in the County of Sanpete within the State of Utah, which is more than one hundred twenty (120), miles from Salt Lake City (Record at 344 and 345).

3. It is extremely difficult for the Plaintiff, Judy Dahlquist, and her counsel to coordinate a reasonable time to meet and respond to the developments in the case because of the great distances between them and the distance between counsel and the trial court. (Record at 344).

4. It is burdensome and impractical to compel counsel for Judy Dahlquist to drive to courts in areas of the state remote to him to ensure that legal documents and other papers are properly processed and filed in this case and many others. (Exhibit A, Affidavit of Counsel for Judy Dahlquist, attached hereto).

5. Counsel in remote areas of the state must necessarily rely upon the postal service in order to transmit legal documents to the courts in various areas of the state. (Exhibit A, Affidavit of Counsel for Judy Dahlquist).

6. On the 25th and 28th days of September, 1992, the Honorable Anne M. Stirba executed and entered the orders from which the appeal was taken. (Record at 456-458).

7. On the 26th day of October, 1992, the Postmaster at the Moroni post office assured the Plaintiff's counsel that the Notice of Appeal would be delivered to the trial court by the 28th day of October, 1992. (Exhibit B, Affidavit of LaMar Beardall). The last day upon which the Notice of Appeal could have been timely received by the trial court was the 28th day of October, 1992.

8. On the 26th day of October, 1992, counsel for Judy Dahlquist, mailed her Notice of Appeal to the Third Judicial District Court for Salt Lake County, postage prepaid and by certified mail. (Record at 463, and Exhibit C, to the Appellant's Response to Motion for Summary Disposition);

9. On the 26th day of October, 1992, counsel for Judy Dahlquist mailed a copy of the Notice of Appeal to counsel for the attorney for the Appellee, postage prepaid by certified mail,

return receipt requested. (Record at 463, and Exhibit D, to the Response to Motion For Summary Dispositon);

10. On the 28th day of October, 1992, counsel for the Defendant received the copy of the notice of appeal mailed to him by Plaintiff's counsel. (Exhibit E, to the Response To Motion for Summary Disposition);

11. When the Third Judicial District Court for Salt Lake County receives mail it is delivered to the cashier's window by the postal carrier. The cashiers normally immediately date stamp the legal documents received unless they are directed to the attention of a specific clerk, whereupon the documents will be placed in that clerk's box to be picked up by that clerk. (Exhibit F, Affidavit of Marlene P. Bills).

12. In this proceeding the Notice of Appeal and other documents were directed to a specific clerk. (Exhibit B, to the Appellee's motion). The Notice of Appeal was processed through at least three (3), and perhaps more, individuals in the court clerk's office before it was file stamped. The district court file stamp shows that the Notice of Appeal was docketed by a clerk other than the clerk to whom the document was directed. The Notice of Appeal went from the cashier's office, to the trial court's clerk processing appeals, and then to the trial court's clerk who file stamped and docketed the appeal. (Exhibit F, Affidavit of Marlene P. Bills and record at 462).

13. The Plaintiff, Judy Dahlquist, will be severely prejudiced by the dismissal of her appeal and the loss of her

causes before the trial court. (Record at 2-9).

That the record in this proceeding is factually distinct from Isaacson, in many respects is indicated by the statement of fact above. The Certificate of Mailing on the Notice of Appeal and the postal service Certified Mail Receipt evidence that it was mailed by certified mail, return receipt requested on the 26th day of October, 1992, whereas in Isaacson, id., there was no indication of mailing to the clerk of the trial court whatsoever. (Exhibit C). This fact is but one of many in the present action but was the controlling fact in Isaacson, id.

Counsel acted prudently when mailing the Notice of Appeal by certified mail on the 26th day of October, 1992. The delay in the file stamping of the Notice of Appeal was either in the delivery of the mails or, as supported by the evidence, a normal delay in the processing of the notice by the court clerk's office. Judy Dahlquist does not suggest fault or delay cause by a particular deputy clerk but, rather, that the process when documents are directed to the attention of a particular deputy clerk added other steps in the filing of the document which may have delayed the date stamping.

Must counsel from remote areas of the state drive hundreds of miles to ensure that notices of appeal and other important documents are properly file stamped and otherwise properly processed? Should not attorneys in remote areas be able to reasonably rely upon the normally timely delivery of the mails especially after assurances of the Postmaster?

The result of dismissal is harsh. Justice should not be simply applying the rule but justice should have latitude and flexibility in application of the rules to the facts of each case to achieve the equitable and just result. Certainly, Isaacson, and the Utah Rules of Appellate Procedure do not demand that the district court's filing stamp be the sole determinative factor used in disposition of the questions of when the Notice of Appeal was received by the court clerk and whether this Honorable Court has acquired jurisdiction of an appeal.

Other factors must also be considered. The relations of the parties, physical distances involved between the court, parties and counsel, and the physical limitations imposed upon attorneys in the remote parts of the state and prior proceedings in the action. The district court filing stamp, normal occurrences in daily functioning of the mails and the various court clerks offices which may cause delays and other variances in processing documents, and the de minimus overall effect of these on the conduct of the appeal are all facts which may have bearing upon or be pivotal in the determination of jurisdiction.

There is no prejudice or injury suffered by the Appellee by the Supreme Court taking jurisdiction of the appeal. This appeal from the trial court's order of summary judgment has proceeded in a routine manner.

The determination of whether the trial court clerk received the Notice of Appeal is factual and within the authority of the Supreme Court by virtue of Section 78-2-4(1), of Utah Code

Annotated and Rule 21(a), of the Utah Rules Of Appellate Procedure, to manage the appellate process. Factual determinations regarding the process are, necessarily, an aspect of the management function of the appellate process.

The preponderance of the evidence in the record in this case supports the fact that the notice was received by the court clerk's office, that any neglect is excusable and that this case is of the nature that the Utah Court of Appeals should exercise it's fact finding and appellate management authority and find the Notice of Appeal of Judy Dahlquist timely received and filed.

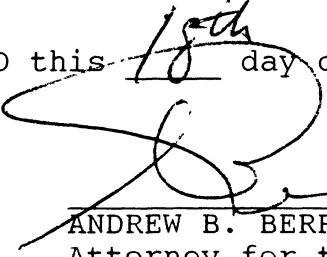
Such a determination will not produce the "chaos of judicial appellate procedure," feared in Isaacson, supra, nor will it delay the customary processing of the appeal or prejudice the Appellee. Rather, the appellate process will have functioned properly, will gain integrity and the overriding goal of accomplishing justice will obtain. This appeal has proceeded in a routine and timely manner. There has been no delay in the processing of the appeal or chaos caused by consideration of the question of compliance with Rule 4 of the Utah Rules of Appellate Procedure. All appellate briefs have been filed and the substantive questions upon the appeal are properly before the appellate court for disposition.

Judy Dahlquist, the Appellant, respectfully requests the Appellee's Motion for Summary Disposition for Lack of Jurisdiction be denied and the substantive merits of the appeal be considered by this Honorable Court.

THE APPELLANT MADE NO MOTION TO AMEND IN THE TRIAL COURT
CONTRARY TO APPELLEE'S ASSERTION THAT A MOTION TO AMEND WAS MADE

Contrary to the assertions of the Appellee the counsel for the Appellant did not implicitly or expressly make a motion to amend the complaint before the trial court. (R. 507). Rather, the Appellant, Judy Dahlquist, relies upon her complaint to state her causes of action against the Defendant and Appellant, Laird Telemedia, Inc. (R. 2-9).

RESPECTFULLY SUBMITTED this 18th day of May, 1993.



ANDREW B. BERRY, JR.,
Attorney for the Appellant,
Judy Dahlquist.

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of May, 1993, I mailed two (2), true and correct copies of the foregoing Reply Brief of Appellant, postage prepaid and by first class mail, to Lynn G. Foster, attorney for the Defendant and Appellee, at 602 East 300 South, Salt Lake City, Utah 84102.

ADDENDUM

- A. RESPONSE TO MOTION FOR SUMMARY DISPOSITION
AND THE ATTACHMENTS THERETO

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IN THE SUPREME COURT OF UTAH

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:
JUDY DAHLQUIST,
:
Plaintiff and Appellant, : RESPONSE TO MOTION
:
vs. : FOR SUMMARY DISPOSITION
:
 : Case No. 920508
LAIRD TELEMEDIA, INC., : 900900399 CN
a Utah corporation, :
:
Defendant and Appellee. :
-----oo0oo-----

COMES NOW the Appellant, Judy Dahlquist, responding in opposition to the Motion for Summary Disposition for Lack of Jurisdiction of the Appellee, Laird Telemedia, Inc., and respectfully requesting that the disposition thereof be deferred for consideration upon the factual merits of this appeal or otherwise be denied.

STATEMENT OF FACT

1. The Plaintiff, Judy Dahlquist, resides in the County of Salt Lake within the State of Utah. (Record at 344).

2. Judy Dahlquist's attorney lives in and practices law from his office in the City of Moroni in the County of Sanpete within the State of Utah, which is more than one hundred twenty (120), miles from Salt Lake City. (Record at 344 and 345).

3. It is extremely difficult for the Plaintiff, Judy Dahlquist, and her counsel to coordinate a reasonable time to meet

and respond to the developments in the case because of the great distances between them and the distance between counsel and the trial court. (Record at 344).

4. It is burdensome and impractical to compel counsel for Judy Dahlquist to drive to courts in areas of the state remote to him to ensure that legal documents and other papers are properly processed and filed in this case and many others. (Exhibit A, hereto).

5. Counsel in remote areas of the state must necessarily rely upon the postal service in order to transmit legal documents to the courts in various areas of the state. (Exhibit A, hereto).

6. On the 28th day of September, 1992, the Honorable Anne M. Stirba executed and entered the order from which the appeal was taken. (Record at 456-458).

7. On the 26th day of October, 1992, the Postmaster at the Moroni post office assured the Plaintiff's counsel that the Notice of Appeal would be delivered to the trial court by the 28th day of October, 1992. (Exhibit B, hereto).

8. On the 26th day of October, 1992, counsel for Judy Dahlquist, mailed her Notice of Appeal to the Third Judicial District Court for Salt Lake County, postage prepaid and by certified mail, return receipt requested. (Record at 463, and Exhibit C, hereto).

9. On the 26th day of October, 1992, counsel for Judy Dahlquist mailed a copy of the Notice of Appeal and other documents to counsel for the attorney for the Appellee, postage prepaid by certified mail, return receipt requested (Record at 463, and

Exhibit D, hereto);

10. On the 28th day of October, 1992, counsel for the Defendant received the copy of the notice of appeal mailed to him by Plaintiff's counsel. (Exhibit E, hereto);

11. The Notice of Appeal was received by the clerk of the trial court on the 28th day of October, 1992, although it bears a district court filing stamp dated the 29th day of October, 1992. (Record at 462).

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13. In this proceeding the Notice of Appeal and other documents were directed to a specific clerk. (Exhibit B, to the Appellee's motion). The Notice of Appeal was processed through at least three (3), and perhaps more, individuals in the court clerk's office before it was file stamped. The district court file stamp shows that the Notice of Appeal was docketed by a clerk other than the clerk to whom the document was directed at the cashier's office. (Exhibit F, and record at 462).

14. The Plaintiff, Judy Dahlquist, will be severely prejudiced by the dismissal of her appeal and the loss of her causes before the trial court in the event the Utah Supreme Court grants the Appellee's motion. (Record at 2-9).

MEMORANDUM OF POINTS AND AUTHORITIES

The Appellee has moved to summarily dismiss the appeal of Judy Dahlquist, the Appellant, upon the basis that this Honorable Court is without jurisdiction to hear the appeal because the Notice of Appeal bears the district court's filing stamp of the 29th day of October, 1992, one (1), day after the thirty (30), day limitation for filing a notice of appeal after the rendering of a judgment in the trial court. (Rule 4(a), of the Utah Rules of Appellate Procedure).

The case authority cited by the Appellee is Isaacson v. Dorius, 669 P.2d 849 (Utah 1983), and it's progeny decided by the Utah Court of Appeals. (See Silva v. Dept. of Employment Security, 786 P.2d 246 (Utah App. 1990); State v. Palmer, 777 P.2d 521 (Utah App. 1989); and Fields v. Mountain States Telephone and Telegraph Co., 754 P.2d 677 (Utah App. 1988)).

The Appellant, Judy Dahlquist, objects to the motion and responds upon the basis that the facts in this proceeding are materially distinguishable from Isaacson, supra, and that the statutes and rule (former Rule 73(a)), under which that decision was made have been repealed or are inapplicable. Additionally, the Utah Supreme Court has adopted the Utah Rules of Appellate Procedure since the Isaacson, decision.

Section 78-2-4(1), of Utah Code Annotated provides:

The Supreme Court shall adopt rules of procedure and evidence for use in the courts of the state and shall by rule manage the appellate process.

Rule 1(a), of the Utah Rules of Civil Procedure provides: **Scope of Rules.** These rules shall govern the procedure in the Supreme Court,... They shall be liberally construed to secure the just, speedy and inexpensive determination of every action. (Emphasis added).

Rule 6(b)(2), of the Utah Rules of Civil Procedure provides in pertinent part:

Enlargement. When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion... (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect;

Rule 21(a), of the Utah Rules of Appellate Procedure provides in pertinent part:

...Filing may be accomplished by mail addressed to the clerk. Filing shall not be timely unless the papers are received by the clerk within the time fixed for filing,...(Emphasis added).

The Supreme Court's scope of review, in equity cases, is broad and it may weigh the evidence and determine the facts. Bustamante v. Bustamante, 645 P.2d 40 (Utah 1982), and Jensen v. Brown, 639 P.2d 150 (Utah 1981), and Section 78-2-4(1), of Utah Code Annotated.

The Appellant, Judy Dahlquist, asserts that a question of fact exists as to when the district court received the Notice of Appeal within the purview of Rule 21(a), of the Utah Rules Of Appellate Procedure.

The preponderance of the evidence supports the assertion that the district court received the Appellant's Notice of Appeal

on the 28th day of October, 1992, but was not file stamped until the 29th day of October, 1992.

Those facts are as follows:

1. The Plaintiff, Judy Dahlquist, resides in the County of Salt Lake within the State of Utah (Record at 344).

2. Judy Dahlquist's attorney lives in and practices law from his office in the City of Moroni in the County of Sanpete within the State of Utah, which is more than one hundred twenty (120), miles from Salt Lake City (Record at 344 and 345).

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4. It is burdensome and impractical to compel counsel for Judy Dahlquist to drive to courts in areas of the state remote to him to ensure that legal documents and other papers are properly processed and filed in this case and many others. (Exhibit A, hereto).

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Notice of Appeal would be delivered to the trial court by the 28th day of October, 1992. (Exhibit B, hereto).

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9. On the 26th day of October, 1992, counsel for Judy Dahlquist mailed a copy of the Notice of Appeal to counsel for the attorney for the Appellee, postage prepaid by certified mail, return receipt requested. (Record at 463, and Exhibit D, hereto);

10. On the 28th day of October, 1992, counsel for the Defendant received the copy of the notice of appeal mailed to him by Plaintiff's counsel. (Exhibit E, hereto);

11. When the Third Judicial District Court for Salt Lake County receives mail it is delivered to the cashier's window by the postal carrier. The cashiers normally immediately date stamp the legal documents received unless they are directed to the attention of a specific clerk, whereupon the documents will be placed in that clerk's box to be picked up by that clerk. (Exhibit F, hereto).

12. In this proceeding the Notice of Appeal and other documents were directed to a specific clerk. (Exhibit B, to the Appellee's motion). The Notice of Appeal was processed through at least three (3), and perhaps more, individuals in the court clerk's office before it was file stamped. The district court file stamp shows that the Notice of Appeal was docketed by a clerk other than the clerk to whom the document was directed. The Notice of Appeal went from the cashier's office, to the trial court's clerk

processing appeals, and then to the trial court's clerk who file stamped and docketed the appeal. (Exhibit F, and record at 462).

13. The Plaintiff, Judy Dahlquist, will be severely prejudiced by the dismissal of her appeal and the loss of her causes before the trial court. (Record at 2-9).

That the record in this proceeding is factually distinct from Isaacson, in many respects is indicated by the statement of fact. The Certificate of Mailing on the Notice of Appeal and the postal service Certified Mail Receipt evidence that the notice was mailed by certified mail, return receipt requested on the 26th day of October, 1992, whereas in Isaacson, id., there was no indication of mailing to the clerk of the trial court. (Exhibit C). This fact is but one of many in the present action but was the controlling fact in Isaacson, id.

Counsel acted prudently when mailing the Notice of Appeal by certified mail on the 26th day of October, 1992. The delay in the file stamping of the Notice of Appeal was either in the delivery of the mails or, as supported by the evidence, a normal delay in the processing of the notice by the court clerk's office. Judy Dahlquist does not suggest fault or delay cause by a particular deputy clerk but, rather, that the process when documents are directed to the attention of a particular deputy clerk added other steps in the filing of the document which may have delayed the date stamping.

Must counsel from remote areas of the state drive hundreds of miles to insure that notices of appeal and other important documents are properly file stamped and otherwise

properly processed? Should not attorneys in remote areas be able to reasonably rely upon the normally timely delivery of the mails especially after assurances of the Postmaster?

The result of dismissal is harsh. Justice should not be simply applying the rule but justice should have latitude and flexibility in application of the rules to the facts of each case to achieve the equitable and just result. Certainly, Isaacson, and the Utah Rules of Appellate Procedure do not demand that the district court's filing stamp be the sole determinative factor used in disposition of the questions of when the Notice of Appeal was received by the court clerk and whether this Honorable Court has acquired jurisdiction of an appeal.

Other factors must also be considered. The relations of the parties, physical distances involved between the court, parties and counsel, and the physical limitations imposed upon attorneys in the remote parts of the state and prior proceedings in the action. The district court filing stamp, normal occurrences in daily functioning of the mails and the various court clerks offices which may cause delays and other variances in processing documents, and the de minimus overall effect of these on the conduct of the appeal are all facts which may have bearing upon or be pivotal in the determination of jurisdiction.

There is no prejudice or injury suffered by the Appellee by the Supreme Court taking jurisdiction of the appeal.

The determination of whether the trial court clerk received the Notice of Appeal is factual and within the authority of the Supreme Court by virtue of Section 78-2-4(1), of Utah Code

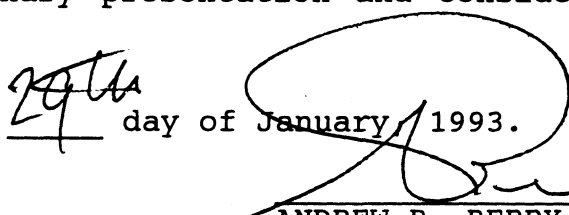
Annotated and Rule 21(a), of the Utah Rules Of Appellate Procedure, to manage the appellate process. Factual determinations regarding the process are, necessarily, an aspect of the management function of the appellate process.

The preponderance of the evidence in the record in this case supports the fact that the notice was received by the court clerk's office, that any neglect is excusable and that this case is of the nature that the Utah Supreme Court should exercise it's fact finding authority and find the Notice of Appeal of Judy Dahlquist timely received and filed.

Such a determination will not produce the "chaos of judicial appellate procedure," feared in Isaacson, supra, nor will it delay the customary processing of the appeal or prejudice the Appellee. Rather, the appellate process will have functioned properly, will gain integrity and the overriding goal of accomplishing justice will obtain.

Judy Dahlquist, the Appellant, respectfully requests the Appellee's Motion for Summary Disposition for Lack of Jurisdiction be denied. Otherwise, the questions presented hereby should be deferred, pursuant to Rule 10(f), of the Utah Rules of Appellate Procedure, until plenary presentation and consideration of this case on appeal.

DATED this 29th day of January, 1993.



ANDREW B. BERRY, JR.,
Attorney for the Appellant,
Judy Dahlquist.

CERTIFICATE OF MAILING

I hereby certify that on this 1st day of February, 1993, I mailed five (5), true and correct copies of the foregoing Response to Motion for Summary Disposition, postage prepaid and by first class mail, to Lynn G. Foster, attorney for the Defendant and Appellee, at 602 East 300 South, Salt Lake City, Utah 84102.

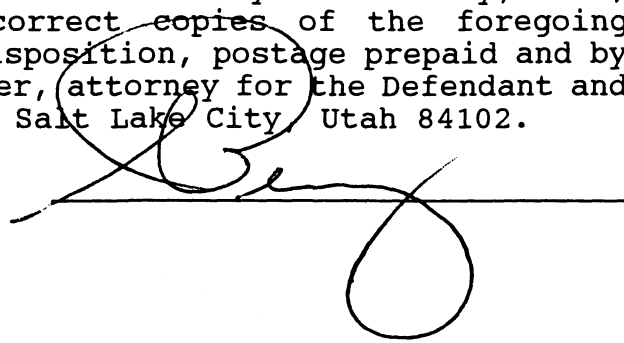

A handwritten signature in black ink, written over a horizontal line. The signature is stylized and appears to be "Lynn G. Foster".

EXHIBIT C

P 765 552 254

 **Certified Mail Receipt**
 Ins. Insurance Coverage Provided
 For use for International Mail
 See Reverse

Sent to: *Chick 34 Jun DIST*

Postage: *246 E 400 E*

Certified Fee: *SLC UT 8411*

Special Delivery Fee: *\$.29*

Restricted Delivery Fee: *1.00*

Return Receipt Showing Location & Date Delivered: *1.00*

Return Receipt Showing to Whom, Date, & Address of Return: *1.00*

TOTAL: *\$2.29*

Postage for Date: *1.00*

PS Form 3800, June 1990

NOV 26 1992
USPS

P 765 552 255



Certified Mail Receipt

No Insurance Coverage Provided

Do not use for international mail

(See Reverse)

[illegible]

0184:0001

EXHIBIT F

<p>SENDER: Complete items 1 and 2 when in-mail services are desired, and complete items 3 and 4.</p> <p>Put your address in this RETURN TO: space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt will be sent to the name of the person delivered to and the date of delivery. For additional information, see the following instructions: (insert postmaster for fees and check boxes) 1. <input type="checkbox"/> Show to whom delivered, date and address of delivery. 2. <input type="checkbox"/> Registered Delivery (Extra charge)</p>		<p>1. Article Number: <u>2762 322 255</u></p> <p>Type of Service: <input type="checkbox"/> Registered <input type="checkbox"/> Insured <input checked="" type="checkbox"/> Certified <input type="checkbox"/> COD <input type="checkbox"/> Express Mail <input type="checkbox"/> Return Receipt for Merchandise</p> <p>Always obtain signature of addressee or agent and DATE DELIVERED.</p>	
<p>3. Article Addressed to: <u>WILLIAM C. H. 10 12</u> <u>6822 2nd St. N.W.</u> <u>SS 1.C. 114019/172.</u></p>		<p>5. Signature - Addressee: <u>[Signature]</u></p> <p>6. Signature - Agent: <u>[Signature]</u></p> <p>7. Date of Delivery: <u>APR 11 1989</u></p>	
<p>8. Addressee's Address (ONLY if requested and fee paid)</p>		<p>PS Form 3811, Apr. 1989</p>	

DOMESTIC RETURN RECEIPT

ANDREW B. BERRY, JR. 0309
Attorney for Appellant
62 West Main Street
P.O. Box 600
Moroni, Utah 84646-0600
Telephone: 801 436-8200

IN THE SUPREME COURT OF UTAH

-----oo0oo-----
JUDY DAHLQUIST, : EXHIBIT A,
Plaintiff and Appellant, : AFFIDAVIT OF COUNSEL
FOR JUDY DAHLQUIST
vs. :
LAIRD TELEMEDIA, INC., : Case No. 920508
a Utah corporation, : 900900399 CN
Defendant and Appellee. :
-----oo0oo-----

ANDREW B. BERRY, JR., after being first duly sworn upon
my oath depose and states:

1. The facts stated herein are based upon my knowledge
and personal observations.

2. I am an attorney at law duly licensed and authorized
to practice law within the State of Utah and am the attorney for
the Plaintiff and Appellant in this proceeding.

3. On the 26th day of October, 1992, I took an envelope
containing the Notice of Appeal, checks and a cover letter
addressed to the attention of Alice Wong of the Third Judicial
District Court which I wanted to have mailed by certified mail.
The Notice of Appeal was docketed by a clerk other than Alice Wong.

4. The envelope was addressed to the Third Judicial
District Court for Salt Lake County. The Certified Mail Receipt
for that mail is attached to the Exhibit F, the Affidavit of the

Postmaster, Lamar Beardall.

5. I asked the postmaster when the letter would be delivered and he responded to me that it should be delivered by the 27th day of October, 1992. When I requested further assurances of timely delivery he assured me that it would be delivered with certainty no later than the 28th day of October, 1992.

6. I practice law from my office in the City of Moroni in the County of Sanpete within the State of Utah, which is more than one hundred twenty (120), miles from Salt Lake City and the Third Judicial District Court.

7. I rely exclusively upon the postal service to deliver documents for filing to the various court clerks of this state. It is burdensome and impractical for me and other counsel practicing in remote areas of this great and expansive state to drive to each of the various court clerks offices to ensure that legal documents and other papers are properly processed and filed in this case and many others.

8. I, and all other counsel in remote areas of the State of Utah, must necessarily rely upon the postal service in order to transmit legal documents to the courts.

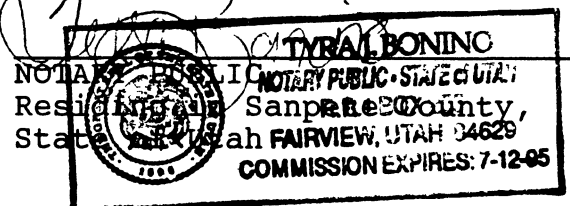
DATED this 30th day of January, 1993.

ANDREW B. BERRY, JR.
Attorney for Judy Dahlquist

SUBSCRIBED AND SWORN TO before me by Andrew B. Berry, Jr., attorney at law, who provided to me satisfactory proof of his identity, on this 30th day of January, 1993.

My Commission Expires:

July 12, 1995



ANDREW B. BERRY, JR. 0309
Attorney for Appellant
62 West Main Street
P.O. Box 600
Moroni, Utah 84646-0600
Telephone: 801 436-8200

IN THE SUPREME COURT OF UTAH

-----oo0oo-----
:
JUDY DAHLQUIST, : EXHIBIT B,
:
Plaintiff and Appellant, : AFFIDAVIT OF
:
vs. : LAMAR BEARDALL
:
LAIRD TELEMEDIA, INC., : Case No. 920508
:
a Utah corporation, : 900900399 CN
:
Defendant and Appellee. :
-----oo0oo-----

LAMAR BEARDALL, after being first duly sworn upon my oath
depose and states:

1. The facts stated herein are based upon my knowledge
and personal observations.

2. I am the Postmaster at the Post Office in the City of
Moroni within the State of Utah.


3. On the 26th day of October, 1992, Andrew B. Berry,
Jr., attorney at law, brought an envelope to me which he wanted to
have mailed by certified mail.

4. The envelope was addressed to the Third Judicial
District Court for Salt Lake County. The Certified Mail Receipt
for that mail is attached hereto.

5. Mr. Berry asked me when the letter would be delivered
and I responded to him that it should be delivered by the 27th day
of October, 1992. When Mr. Berry requested further assurances of

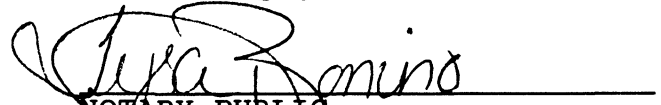
timely delivery I assured him that it would be delivered with certainty no later than the 28th day of October, 1992.

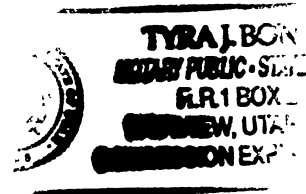
DATED this 30th day of January, 1993.


LAMAR BEARDALL,
Postmaster of Moroni Post Office

SUBSCRIBED AND SWORN TO before me by LaMar Beardall, Postmaster of the Moroni City Post Office, who provided to me satisfactory proof of his identity, on this 30th day of January, 1993.

My Commission Expires:
July 12, 1995


NOTARY PUBLIC
Residing in Sanpete County,
State of Utah



P 765 552 254



Certified Mail Receipt

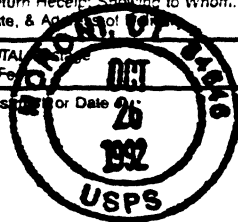
No Insurance Coverage Provided

Do not use for international Mail.

(See Reverse)

Sent to: <i>Mr. 3rd Gen Dist</i>	
Address: <i>240 E 4th St</i>	
City, State & ZIP Code: <i>SLC UT 84111</i>	
Postage:	<i>\$ 29</i>
Certified Fee:	<i>1.00</i>
Special Delivery Fee:	
Registered Delivery Fee:	
Return Receipt Showing to Whom & Date Delivered:	<i>1.00</i>
Return Receipt Showing to Whom, Date, & Address of Origin:	
TOTAL Postage & Fees:	<i>\$2.29</i>
Postage for Date of: <i>OCT 26 1992</i>	

PS Form 3800, June 1990



ANDREW B. BERRY, JR. 0309
Attorney for Appellant
62 West Main Street
P.O. Box 600
Moroni, Utah 84646-0600
Telephone: 801 436-8200

IN THE SUPREME COURT OF UTAH

-----oo0oo-----

JUDY DAHLQUIST,	:	EXHIBIT F,
	:	AFFIDAVIT OF
Plaintiff and Appellant,	:	MARLENE P. BILLS
	:	
vs.	:	
	:	Case No. 920508
LAIRD TELEMEDIA, INC.,	:	900900399 CN
a Utah corporation,	:	
	:	
Defendant and Appellee.	:	

-----oo0oo-----

MARLENE P. BILLS, after being first duly sworn upon my oath depose and states:

1. The facts stated herein are based upon my knowledge and personal observations.
2. I am the Chief Deputy Clerk of the Third Judicial District Court for Salt Lake County within the State of Utah.
3. I have the primary responsibility to supervise the cashiers at the front window.
4. The cashiers, upon receipt of legal documents for filing, normally date stamp the legal documents received unless they are directed to the attention of a specific court clerk whereupon the documents are placed in that clerk's box to be picked up by that clerk. In such a case, where documents are directed to the attention of a specific clerk, the documents are not file stamped by the cashiers.


DATED this 1st day of February, 1993.

Marlene P. Bills
MARLENE P. BILLS,
Chief Deputy Clerk of the
Third Judicial District Court

SUBSCRIBED AND SWORN TO before me by Marlene P. Bills,
Chief Deputy Clerk of the Third Judicial District Court, who
provided to me satisfactory proof of her identity, on this 1st
day of February, 1993.

My Commission Expires:

July 12, 1995

Tyraj Boning
NOTARY PUBLIC
~~Residing in Sanpete County,~~
State of Utah TYRAJ. BONING
 NOTARY PUBLIC • STATE OF UTAH
P.O. BOX 205
FAIRVIEW, UTAH 84626
COMMISSION EXPIRES 7-12-95

ANDREW B. BERRY, JR. 0309
Attorney for Appellant
62 West Main Street
P.O. Box 600
Moroni, Utah 84646-0600
Telephone: 801 436-8200

IN THE SUPREME COURT OF UTAH

-----oo0oo-----
:
JUDY DAHLQUIST, : EXHIBIT F,
:
Plaintiff and Appellant, : AFFIDAVIT OF
:
vs. : MARLENE P. BILLS
:
LAIRD TELEMEDIA, INC., : Case No. 920508
:
a Utah corporation, : 900900399 CN
:
Defendant and Appellee. :
-----oo0oo-----

MARLENE P. BILLS, after being first duly sworn upon my
oath depose and states:

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and personal observations.

2. I am the Chief Deputy Clerk of the Third Judicial
District Court for Salt Lake County within the State of Utah.

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they are directed to the attention of a specific court clerk
whereupon the documents are placed in that clerk's box to be picked
up by that clerk. In such a case, where documents are directed to
the attention of a specific clerk, the documents are not file
stamped by the cashiers.


DATED this 1st day of February, 1993.

Marlene P. Bills
MARLENE P. BILLS,
Chief Deputy Clerk of the
Third Judicial District Court

SUBSCRIBED AND SWORN TO before me by Marlene P. Bills,
Chief Deputy Clerk of the Third Judicial District Court, who
provided to me satisfactory proof of her identity, on this 1st
day of February, 1993.

My Commission Expires:

July 12, 1995

Tyraj Bonino
NOTARY PUBLIC
~~Residing in Sanpete County,~~
State of Utah TYRAJ BONINO
NOTARY PUBLIC - STATE OF UTAH
P.O. BOX 255
FAIRVIEW, UTAH 84629
COMMISSION EXPIRES 7-12-95