

2004

Voi Aiono and Cheryl Aiono v. Kendall Hogan, State Farm Insurance and Does 1 through 50, inclusive : Brief of Appellee

Utah Court of Appeals

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David Drake; David Drake, PC; Attorney for Plaintiffs.

David N. Mortensen; Jared R. Casper; Ivie & Young; Attorneys for Defendant Hogan.

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IN THE UTAH COURT OF APPEALS

VOI AIONO and CHERYL AIONO, :

Appellant, : Case No. 20040769-CA

vs. :

KENDALL HOGAN, STATE FARM :
INSURANCE, and DOES 1 through 50,
inclusive, :
Appellee. :

BRIEF OF APPELLEE

APPEAL FROM RULING
ENTERED IN THE THIRD DISTRICT COURT,
IN SALT LAKE COUNTY, JUDGE JUDITH S. H. ATHERTON

DAVID DRAKE, #0911
DAVID DRAKE, P.C.
Attorney for Plaintiffs
6905 South 1300 East, #248
Midvale Utah 84047
Phone: (801) 322-5820

DAVID N. MORTENSEN, #6617
JARED R. CASPER, #8160
IVIE & YOUNG
Attorneys for Defendant Hogan
226 West 2230 North
P.O. Box 657
Provo, Utah 84603
Phone: (801) 375-3067
Fax: (801) 375-3067

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DAVID N. MORTENSEN, #6617
JARED R. CASPER, #8160
IVIE & YOUNG
Attorneys for Defendant Hogan
226 West 2230 North
P.O. Box 657
Provo, Utah 84603
Phone: (801) 375-3000
Fax: (801) 375-3067

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STATEMENT OF JURISDICTION

This court has jurisdiction over this matter pursuant to Utah Code Ann. §78-2a-3(2)(j).

ISSUES PRESENTED AND STANDARD OF REVIEW

1. Whether the trial court erred in granting defendant Hogan's motion for summary judgment.

Standard of Review: Summary judgment is reviewed for correctness and no deference is accorded to the district court's legal conclusions. *Brigham Young University v. Tremco Consultants, Inc., a.k.a. Tremco Legal Solutions*, 2005 UT 19 ¶13, 522 Utah Adv. Rep. 18, quoting *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶14, 56 P.3d 524.

2. Whether the trial court erred in denying Aionos' motion to amend their complaint.

Standard of Review: The denial for a motion to amend is viewed for abuse of discretion. *Gary Porter Const. v. Fox Const., Inc.*, 2004 UT App. 354, ¶29, 101 P.3d 371.

3. Whether the trial court erred by denying Aionos' alternative motion for additional time.

Standard of Review: The appellate court presumes the correctness of the

court's decision absent manifest injustice or a clear abuse of discretion. *Hansen v. Hansen*, 736 P.2d 1055 (Utah App. 1987).

4. Whether the trial court erred by dismissing Aionos' complaint which included the unserved party State Farm.

Standard of Review: Summary Judgment is reviewed for correctness with no deference given to the trial court. *Brigham Young University v. Tremco Consultants, Inc., a.k.a. Tremco Legal Solutions*, 2005 UT 19 ¶13, 522 Utah Adv. Rep. 18 (quoting *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶14, 56 P.3d 524).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

No constitutional provisions, statutes, or rules are determinative of this action.

Utah Rule of Civil Procedure 15 is implicated, which provides:

Amended and Supplemental Pleadings

(a) **Amendments.** A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleadings is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

...

(c) **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

STATEMENT OF THE CASE

FACTS

This case arises out of a motor vehicle accident which was alleged to have occurred on July 18, 1996. (R.2, plaintiffs' complaint ¶ 7). Plaintiffs Voi Aiono and Cheryl Aiono brought their action against Kendall Hogan and State Farm Insurance. (R.1 plaintiffs' complaint).

Plaintiffs' complaint claims that Kendall Hogan was operating a motor vehicle in a negligent fashion at the time and place of the accident and that Voi Aiono and Cheryl Aiono suffered injuries as a result of that accident. The Aionos sued State Farm under the theory that they were not treated fairly where State Farm by coincidence was their insurer.

COURSE OF PROCEEDINGS

Plaintiffs' complaint was filed March 10, 2003, almost seven years after the accident. No party was served within 120 days as required by Rule 4 of the Utah Rules of Civil Procedure. Instead, on July 8, 2003, an ex parte motion for the extension of time was filed, which motion was granted on July 9, 2003. (R.11). A return of service on

defendant Kendall Hogan was filed with the trial court September 5, 2003, with an attached affidavit of service by a deputy constable. (R.14-15).

Kendall Hogan answered the complaint, which answer was filed November 10, 2003. In its responsive pleading, defendant Hogan pled: "Further pleading, defendant maintains that plaintiffs' complaint against State Farm is an impermissible direct action. Moreover, it unnecessarily injects the issue of insurance into this lawsuit as it pertains to Mr. Hogan." (R.19). Further, defendant put plaintiffs on notice that it believed an insufficient investigation had been undertaken so as to bring the claim against Mr. Hogan and defendant reserved the right to bring a motion for Rule 11 sanctions to address the issue. (R.20).

A stipulated discovery plan was filed by the parties January 30, 2004. (R.22). No activity whatsoever occurred between the filing of the discovery plan and defendant Hogan's motion for summary judgment. Particularly, plaintiffs undertook no discovery.

State Farm was never served and never appeared as a party to this matter.

Plaintiffs' sole allegation in the complaint against State Farm is as follows:

17. Plaintiffs, at the time of the accident, were insured by State Farm insurance, as was defendant. State Farm insurance has failed and refused to honor its promise, contract, and covenant with plaintiffs in that they have not timely, responsibly, and in good faith attempted to settle this claim. It has also failed to negotiate and bargain in good faith.

18. State Farm Insurance has failed and refused to responsibly respond to the demands of plaintiffs, specifically those related to medical costs and injuries, thereby forcing plaintiffs to file this suit.

(R.4 ¶17 and 18).

The motion for summary judgment brought by defendant Hogan was supported by five statements of fact. Statement number five in the motion asserted that defendant Kendall Hogan was not the driver of the automobile involved in the motor vehicle accident. (R.29 ¶5). The motion also set forth that Teresa R. Peterson, who appears to be the driver in the police report connected with the accident (R.36), did not have Kendall Hogan's permission to drive his vehicle. (R.29 ¶4). Kendall Hogan acknowledged that he was the owner of the vehicle involved in the accident. (R.29 ¶2). Defendant Hogan's motion was short and simple. Hogan's argument was twofold: (1) that he was not the driver of the vehicle and that the cause of action must be directed against the actual tortfeasor; and, (2) that he had not given permission to drive the vehicle to Teresa Peterson. Based upon these assertions, Hogan asked the court to dismiss the complaint. The motion was filed April 5, 2004. (R.26).

In response to the motion, plaintiffs filed a motion to amend or in the alternative a motion for additional time. (R.44). Pursuant to Utah Rule of Judicial Administration 4-501, the statements of fact in defendant's motion were deemed admitted because

plaintiffs did not refute any of those facts in their responsive pleading.¹ Plaintiffs' motion to amend asked the trial court to allow plaintiffs to amend their pleading to name Teresa R. Peterson as a party defendant and acknowledged "it appears that the wrong party was named by prior counsel at the time the complaint was filed." (R.44). Plaintiffs further pled that in the event the motion to amend was denied by the court, counsel should be allowed to conduct discovery prior to responding to the motion for summary judgment. (R.44). The request for discovery prior to responding to the motion for summary judgment did not include an affidavit of counsel pursuant to Rule of Civil Procedure 56(f). Plaintiffs' motion to amend was opposed by defendant Hogan. (R.49). The matter was submitted to the trial court on June 1, 2004. (R.66).

DISPOSITION BY THE TRIAL COURT

In the court's notice regarding the motion for summary judgment the court advised the parties that certain matters outside of the pleadings would be addressed. Specifically, the notice contained a notation: "Also please be prepared to address the court's question concerning jurisdiction." (R.68). It appears from a note in the file that the court had identified the issue of jurisdiction as one regarding the statute of limitations. Particularly,

¹The sum and substance of Utah Rule of Judicial Administration 4-501 now finds its substance in Utah Rule of Civil Procedure 7.

the court notation notes that the accident occurred July 18, 1996 and the complaint was filed March 3, 2003. (R.65a²).

THE HEARING

Hogan's motion was heard July 12, 2004. *See* Transcript of Hearing (R.84), attached hereto as Addendum A.³ The first issue addressed by the court was whether the statute of limitations had run.⁴ It was related to the court that a previous case had been filed against Mr. Hogan, case number 000206066, which was dismissed for failure to prosecute on March 12, 2002. That case was filed July 14, 2000, four days before the statute of limitations would have run. Argument transcript pg 4, ln 8. Plaintiffs' counsel indicated that as far as the statute of limitations would apply, plaintiffs would be relying on the savings statute. (Hearing transcript pg. 6, ln. 2).

At that point, the trial court moved on to other issues. First, the issue was addressed that the insurance company is not a proper party to this case. (Transcript page

² The trial court mispaginated the appellate record and this note is not numbered in the record.

³The entire hearing transcript is given the single designation of (R.84). Therefore, all references will be made to the page number of the transcript.

⁴The statute of limitations was an affirmative defense preserved by the defendant in its answer. (R.19).

6, ln 16). After arguing the issue whether an amendment would relate back, the court discussed the fact that an action must be brought against the actual tort feisor and not an insurance company. Whereupon the court indicated to plaintiffs' counsel: "I want everything discussed so that when a ruling comes down nobody claims I didn't hear it all and it is important that I can hear it all and you can respond after, of course." (Transcript pg 17, ln 20-23). Plaintiffs' counsel addressed whether there would be a unity of interest between Teresa Peterson and State Farm. (Transcript pg. 18). The court specifically addressed whether a unity of interest could be found between Ms. Peterson and State Farm whereupon the court concluded:

And the question of whether we can stretch that enough, that there is a unity of interest between State Farm and Ms. Peterson, and that there really isn't any prejudice because State Farm was somehow put on notice that this suit was being pursued, and therefore, it would go to Ms. Peterson, I think is just pushing it too far past the point of where there really is a prejudice.

The court concluded there was an insufficient unity of interest between any of the defendants and Teresa Peterson so as apply the relation back rule. (Transcript pg 19).

The court concluded:

Clearly, the wrong parties in the suit have been named. The suit named the wrong parties here. I have made the ruling that Mr. Hogan is not the tort feisor, he is dismissed out of the case and I do not find that it is saved and allow for the amended information to include Ms. Peterson.

(Transcript pg 21).

The order granting summary judgment bears a mailing certificate indicating that it was mailed to plaintiffs' counsel July 13, 2004. *See* Order attached hereto as Addendum B. No objection to the order was made. The order was entered August 3, 2004 granting summary judgment and dismissing the entire complaint. (R.71). Plaintiffs' notice of appeal followed filed September 1, 2004. (R.74).

SUMMARY OF THE ARGUMENTS

Kendall Hogan had no liability under the record before the trial court. Accordingly, summary judgment was appropriately granted. At no time did plaintiffs file any pleading in opposition to the motion, nor did plaintiffs argue against the motion on its merits. Indeed, plaintiffs' sole response to the motion for summary judgment was a motion to amend with an alternative request for additional discovery unsupported, as required, by a Rule 56(f) affidavit.

The only allegation of plaintiffs' complaint was that Mr. Hogan was negligent in his operation of a motor vehicle. Mr. Hogan's affidavit, which was wholly unopposed, is completely dispositive. Mr. Hogan's affidavit conclusively indicates he was not driving the vehicle. With no other theory of liability having been proffered by plaintiffs' complaint, or sought to be part of the amendment, the trial court could only reach one

conclusion, that of dismissal and entry of summary judgment. This conclusion must be affirmed.

The entire case was properly dismissed. The trial court made a conclusion that the improper parties had been named in this lawsuit. Plaintiffs have asserted that because State Farm is *their* insurance carrier, it owed them a duty of good faith, since State Farm also insured the tort feason vehicle. This exact theory has been rejected by the Utah Supreme Court in *Sperry v. Sperry*, 1999 UT 101, 990 P.2d 381.

Plaintiffs' great reliance on the recent decision of *Speros v. Fricke*, 2004 UT 69, 98 P.3d 28 is misplaced. The *Speros* decision has no relevance whatsoever to the present matter. *Speros* discusses neither amendments to pleadings nor tort liability. Instead, *Speros* solely addresses the issue of insurance coverage under mandatory insurance requirements of the motor vehicle insurance code liability section. No coverage issues are presented in this case, and therefore the *Speros* decision is simply irrelevant.

Plaintiffs' motion for additional time was properly denied. The Rules of Civil Procedure as well as the case law of the Utah Appellate Courts is clear that in the absence of the affidavit filed pursuant to Utah Rule of Civil Procedure 56(f), additional time for discovery should not be granted. Plaintiffs themselves in their brief even cite Rule 56(f) without recognizing that the rule itself is fatal to their argument. There was no affidavit

filed. Nor was there anything in the pleadings which states what discovery plaintiffs wanted to be undertaken.

The trial court properly denied the motion to amend. Defendant argued that the amendment should not be allowed because the amendment had nothing to do with Kendall Hogan, the amendment should not be allowed because there is no unity of interest and the amendment would be a futility. The trial court correctly held that there was no unity of interest between the defendants and Teresa Peterson.

The trial court was compelled to reach this conclusion based upon *Penrose v. Ross*, 2003 UT App. 157, 71 P.3d 631. Plaintiffs' complete lack of citation of the *Penrose* decision is curious given the fact that plaintiffs themselves attached a copy of the case to the reply memorandum on the issue of amendment before the trial court. (R.59).

In *Penrose*, the allegations of the complaint were that a father operated his vehicle negligently causing damage to the plaintiff. 2003 UT App. 157 at ¶2. After the statute of limitation had run, the plaintiff attempted to amend her complaint to name the driver of the vehicle, a newly named defendant, the father's son. *Id.* at ¶3 Both father and son subsequently filed motions for summary judgment on separate grounds. *Id.* at ¶¶ 4, 5. The basis for the father's motion was that he was not the driver of the vehicle and the evidence supporting the motion was submitted through the father's affidavit, just as Mr.

Hogan did in this case. *Id.* at ¶4. This court in *Penrose* held that the father and son did not have the same legal interest and therefore an amendment naming the son would not relate back to the original filing of the complaint. *Id.* at ¶19.

The same result should obtain here. Since there is no identity of interest, the amendment would clearly fail as violative of the statute of limitations. As such, the court was well within its discretion to simply deny to motion to amend. Since there was no identity of interest, amending the complaint would have no effect on this lawsuit, and more importantly, the pending motion for summary judgment. In an attempt to bring the facts to the present case close to the facts of case law from other jurisdictions, plaintiffs rely on facts not found in the record but rather on facts that are simply fiction. Most astonishingly, plaintiffs claim State Farm received notice of the filing of the suit prior to expiration of the statute of limitations by service upon Mr. Hogan. As is clear in the record, the opposite is true. Mr. Hogan was not served until seven years after the accident, and therefore more than three years after the statute of limitations had expired.

Because the motion for summary judgment was basically unopposed, this court should sustain the entry of summary judgment as it pertains to Mr. Hogan. Further, because the trial court did not abuse its discretion in denying the motion to amend and all remaining claims were obviously without basis, the court's refusal to amend and dismiss

the remainder of the suit must be sustained.

ARGUMENT

Although the standard of review of a trial court's grant of summary judgment is for correctness, because the manner in which plaintiffs responded to defendant's motion, the only standards applicable are abuse of discretion as it relates to the motion to amend and clear abuse of discretion as it relates to the denial of the request for additional discovery. Before the trial court, no substantive opposition was made to defendant's motion. Plaintiffs' brief fails to show an abuse of discretion. As to the summary judgment issue, the trial court reached the only conclusion it could. Accordingly, the trial court must be affirmed.

SUMMARY JUDGMENT WAS PROPERLY GRANTED

A granting of summary judgment is reviewed for correctness. *Brigham Young University v. Tremco Consultants, Inc., a.k.a. Tremco Legal Solutions*, 2005 UT 19, 522 Utah Adv. Rep. 18 This court may affirm a grant of summary judgment on any grounds, even those not relied upon by the trial court. *Straub v. Fisher*, 1999 Utah 102, ¶6, 990 P.2d 384.

Summary judgment was appropriately granted in this case as the motion itself was in no way opposed by the plaintiffs. At no time did plaintiffs file any pleading in

opposition to the motion, nor did plaintiffs argue against the motion on the merits.

Indeed, plaintiffs' sole response to the motion for summary judgment was a motion to amend with an alternative request for additional discovery. Plaintiffs admit that Kendall Hogan was not the driver of the vehicle. Further, they admit that no basis exists upon which to claim a negligent entrustment theory. The motion, having been essentially unopposed as to Mr. Hogan, was properly granted.

Plaintiffs' complaint only alleged that Mr. Hogan was negligent as a result of his operation of a motor vehicle. (R.2 ¶ 7 and 8). There exists no allegation in the complaint of negligent entrustment. Nevertheless, in the event that such an issue came to the court's mind, the affidavit of Kendall Hogan rebutted this assertion as well. Thus, Mr. Hogan's affidavit, which was wholly unopposed, is completely dispositive. His affidavit provides (1) that Hogan was not driving and (2) that he did not entrust the vehicle to the person who apparently was the driver. With no other theory of liability having been proffered by plaintiffs' complaint, or sought to be part of the amendment, the trial court could only reach one conclusion, that of dismissal and entry of summary judgment. This conclusion must be affirmed.

The entire case was properly dismissed. The trial court correctly dismissed the entire case as State Farm was an improper party. State Farm was never served in the

lawsuit. It is important for this court to note the actual cause of action brought against State Farm. Plaintiffs did not bring a cause of action against State Farm as the insurer of the vehicle involved in the accident. Instead, plaintiffs asserted that because State Farm was *their* insurance carrier, it owed them a duty of good faith. This exact theory has been rejected by the Utah Supreme Court.

In *Sperry v. Sperry*, 1999 UT 101, 990 P.2d 381, the Utah Supreme Court held that a named insured bringing a personal injury action as a plaintiff occupied the position of a third party, rather than a first party, with respect to an insurer and thus could not sue the insurer for bad faith, or for anything else concerning claim handling. In *Sperry*, Mrs. Sperry was suing Mr. Sperry for negligence and not upon her own coverage under her policy. *Id.* at ¶10. The *Sperry* court recognized that the insurer had a contractual duty to defend Mr. Sperry. Thus, the Utah Supreme Court affirmed the trial court's dismissal of Mrs. Sperry's complaint against the carrier. *Id.* at ¶11.

While the trial court here may not have so clearly articulated the reasons that plaintiffs could not maintain their action against State Farm, the issue was nonetheless discussed in the hearing of this matter. In the court's parlance, the plaintiffs had sued the wrong parties. Accordingly, it was correct for the trial court to dismiss the entire action as there was no basis of liability as a matter of law to any of the named defendants under

the theory pled in plaintiffs' complaint.

The plaintiffs place great reliance on the recently handed down decision of *Speros v. Fricke*, 2004 UT 69, 98 P.3d 28. The *Speros* decision is cited in nine different places in plaintiffs' brief and plaintiffs argue that the *Speros* decision is dispositive. However, the *Speros* decision has no relevance whatsoever to the present matter. Plaintiffs' reliance can only be described as curious, and the development of the theory in plaintiffs' brief can best be explained as misguided. *Speros* discusses neither amendments of pleadings nor tort liability. Instead, *Speros* solely addresses the issue of insurance coverage under mandatory insurance requirements of the Motor Vehicle Insurance Code's liability sections and the relevant policy. Plaintiffs' complaint in the present matter raises no issues regarding coverage. Kendall Hogan's affidavit and the motion for summary judgment do not address coverage either. The *Speros* decision is simply irrelevant.

State Farm was not a movant in this case because State Farm had never been served. Nevertheless, trial courts possess the inherent ability to rule on obvious matters *sua sponte*. In *Panos v. Smith's Food & Drug Centers, Inc.*, 913 P.2d 363 (Utah App. 1996), this court recognized that although Utah Rule of Civil Procedure 41(b) states that a defendant must bring a motion to dismiss, "We have ruled that a court may dismiss a claim *sua sponte* without a motion by the defendant." *Id.* at 364. Just as Rule 41(b) was

read as merely permitting a motion, but not requiring a motion by a defendant, similarly, Rule 56(a) and (b) merely permit parties to bring motions, but clearly do not diminish a trial court's inherent ability to rule on obvious issues.

Further, Rule 56(d) admonishes the trial court that if a motion under Rule 56 does not render the whole case final that the trial court "at the hearing on the motion" may examine the pleadings and interrogate counsel to see what issues remained. Certainly, the fact that the court holds a hearing and examines the pleadings and puts issues towards counsel indicates that should the court find only meritless claims remain, those claims may be summarily dismissed. Otherwise, the true purposes of the Rules of Civil Procedure would be obliterated. All of the rules of Civil Procedure "[s]hall be liberally construed to secure the just, speedy, and inexpensive determination of every action." Utah Rule of Civil Procedure 1(a). The position advocated by the Aionos in this matter is the opposite. The plaintiffs would have the court, when confronted with a clearly meritless claim stated against an unserved party, allow the claim to stand as an obstacle to complete resolution.

The Utah Supreme Court has noted that a trial court may properly raise *sua sponte* issues of mootness. *Shipman v. Evans*, 2004 UT 44, 100 P.3d 1151 ¶ 36, citing *Society of Professional Journalists v. Bullock*, 743 P.2d 1166, 1169 (Utah 1987). The *Shipman*

court noted: “By doing so, the court acts in furtherance of a core judicial policy to limit the scope of its power to issues in controversy.” Likewise, when a court is confronted with facially meritless claims, it remains within the inherent powers of that court to dismiss the entire action. In *Shipman*, unlike the present case, when a court *sua sponte* dismissed an issue, the plaintiff asked for review of the issue. *Id.* at ¶ 20. In the present case, plaintiffs asked for no such review. As previously stated, the order on summary judgment dismissing the entire action was entered without objection from plaintiffs. The determination of the trial court is correct as a matter of law. Even if it was not, by failure to object to the order, plaintiffs have waived the issue.

This case is similar to an argument made in *Pett v. Fleet Mortgage Corporation*, 2004 UT App. 150, 91 P.3d 854, where a party claimed that a court improperly converted a Rule 12(d)(6) motion to dismiss into a motion for summary judgment under Rule 56. In finding a lack of err, this court stated:

Second, a summary judgment in this case would ultimately have been appropriate for the same reason that a Rule 12 dismissal was appropriate: regardless of what facts were or were not alleged, Ted’s claim that Washington Mutual was required to reconvey the property to her simply fails as a matter of law. Thus, even were we to hold that the trial court’s Rule 12 dismissal should be converted to Rule 56 summary judgment ruling, we would still affirm the dismissal.

Id. at ¶14, footnote 3.

Obviously, the *Pett* decision recognizes the principle that where trial courts are faced with meritless claims, they may be dealt with. More importantly, when a case is on appeal, if the appellate court can clearly see that the result would be the same regardless of the procedural setting, the determination of the trial court should be affirmed.

In the present case, under the *Sperry* analysis, there is no question but that the claim asserted by the plaintiffs is not recognized under Utah law.⁵

PLAINTIFFS' MOTION FOR ADDITIONAL TIME WAS PROPERLY DENIED

In response to defendant's motion for summary judgment, plaintiffs only argued that they should be able to amend their complaint or have additional time to conduct discovery. The court properly denied the request for additional time.

When a motion for summary judgment has been filed, the nonmoving party may present, in the form of affidavit, reasons why he cannot present facts essential to justify his opposition to the motion for summary judgment. Utah Rule of Civil Procedure 56(f). If such facts are presented, the court can order a continuance and allow the parties to

⁵In addition to *Sperry* recognizing the plaintiff's claim was improper, Utah law also holds that direct actions against insurers of tortfeasors are not allowed. *County v. Jensen*, 2003 UT App. 444, ¶11, 83 P.3d 405. Likewise, the Utah Supreme Court has held that automobile insurers cannot be joined as real parties in interest in tort actions. *Green v. Louder*, 2001 UT 62, 29 P.3d 638.

conduct further discovery before entertaining the motion. *Id.*

A request to conduct further discovery must be submitted in the form of an affidavit. *Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 841 (Utah App. 1987). The non-moving party must show through affidavit testimony that any additional time to conduct discovery would enable him to rebut the allegations of the movant's motion for summary judgment. *Culver v. Town of Torrington*, 930 F.2d 1456, 1458-59 (10th Cir. 1991). Additionally, the affidavit requesting the additional time to conduct discovery must show why the nonmovant is unable to proffer evidence in opposition to the motion for summary judgment. *United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880, 893 (Utah 1993). The additional discovery to be conducted by the nonmoving party must address the legal issues presented in the summary judgment proceedings. *Holmes v. American States Ins. Co.*, 2000 UT App. 85, ¶27, 1 P.3d 552 (Utah App. 2000).

Plaintiffs' argument regarding additional time makes no sense. First, plaintiffs cite Rule 56(f) without even recognizing that the rule provides that reasons must be stated "by affidavit" in order to support a request for additional time. There is no affidavit. Nor is there anything in the pleadings which states what discovery plaintiffs want to be undertaken. The entire argument regarding further time is found once in the motion itself and once in the memorandum. The motion states: "In the event that this motion is denied

by this court, counsel requests time to conduct discovery prior to responding to defendant Hogan's motion for summary judgment." (R.44). The memorandum as to discovery only states: "In the event this court denies plaintiffs' motion, plaintiffs request that they be given leave to conduct discovery on the issue of potential liability of defendant Hogan." No particular activities are outlined. No statement is made why in the months following the filing of the complaint plaintiffs did not attempt to undertake any discovery whatsoever. Instead, now on appeal, plaintiffs reach back to a 1997 decision which does not even address the need to file a Rule 56(f) affidavit. In the absence of this affidavit, and because under Utah Rule of Judicial Administration 4-501 no statement of opposition was made to the fact, any further discovery could not dispute the facts anyway.

In the case at bar, plaintiffs only made a naked request for additional time. The sum and substance of plaintiffs' pleadings are an acknowledgment that plaintiffs sued the wrong parties and was simply asking the court to piggyback on wrongfully filed pleadings. The denial of the request for additional time was not a clear abuse of discretion. The decision of the trial court should be affirmed.

THE TRIAL COURT PROPERLY DENIED THE MOTION TO AMEND

Defendant Hogan argued that the amendment should not be allowed because (1) the amendment had nothing to do with Kendall Hogan, (2) the amendment would be

wrong since there was no unity of interest, and (3) since the amendment would be a futility it should not occur in this lawsuit. The trial court correctly held that there was no unity of interest between the defendants and Teresa Peterson.

The trial court was compelled to reach a conclusion based upon the case of *Penrose v. Ross*, 2003 UT App. 157, 71 P.3d 631. Plaintiffs' complete lack of citation of the *Penrose* decision is curious given the fact that plaintiffs themselves attached a copy of the decision to their reply memorandum on the issue of the amendment before the trial court. (R.59). This court addressed similar issues to this case in *Penrose*. In *Penrose*, the plaintiff filed a complaint in negligence originally naming the father of a tortfeasor as the defendant. *Id.* at ¶2. The allegations of the *Penrose* complaint were that the father operated his vehicle negligently thereby causing damage to the plaintiff. After the statute of limitations had run, the plaintiff attempted to amend her complaint to name the driver of the vehicle, a newly named defendant, the father's son. *Id.* at ¶3. Both father and son subsequently filed motions for summary judgment on separate grounds. The basis for the father's motion was that he was not the driver of the vehicle and the evidence supporting the motion was submitted through the father's affidavit. *Id.* at ¶4. The trial court granted the father's motion for summary judgment and denied the amendment.

In affirming the award of summary judgment in favor of the father, the court of

appeals relied upon *Doxey-Layton Co. v. Clark*, 548 P.2d 902, 906 (Utah 1976) and its progeny which hold that an amendment substituting or adding a new party does not relate back to the original filing of the complaint. *Id.* at 634. This court held that unless two parties have the same legal interest, there is not an identity of interest sufficient to allow substitution of a new party to amend back the original filing of the complaint. This court held that the father and son did not have the same legal interest and therefore any amendment naming the son would not relate back to the original filing of the complaint.

Just as in the *Penrose* case, there is no identity of interest between Kendall Hogan and the proposed substitute defendant, Teresa R. Peterson. The interests in the present matter are even further apart than one can find in *Penrose*. Indeed, the plaintiffs in the present matter have failed to establish any identity of interest between Kendall Hogan and Teresa Peterson. Since there is no identity of interest, the amendment would clearly fail as violative of the statute of limitations. As such, the court was well within its discretion to simply deny the motion to amend. Since there was no identity of interest, amending the complaint would have no effect on this lawsuit and more importantly the pending motion for summary judgment.

Absent from the plaintiffs' memoranda before the trial court, and absent in plaintiffs' brief, is any indication that a relation back would also relate back to the prior

filing in the year 2000. Even if the amendment had been allowed by the trial court, the amendment would only relate back to the filing of 2003. There is nothing in the savings statute or any other case law in Utah which would hold that a motion to amend eight years after an accident would relate back to a previously filed complaint filed years before.

It is pure sophistry to argue that the lawsuit filed in 2000 gave notice to anyone. As the attachment to plaintiffs' brief in Addendum 1 highlights, that case was dismissed for lack of prosecution, no party having been served with that lawsuit. The first time that Kendall Hogan or any defendant was aware of any lawsuit was when Hogan was served in the latter part of 2003, seven years after the accident.

Accordingly, as there was no good reason to allow the amendment in this case, particularly where the statute of limitations would have already run against Teresa Peterson. Therefore, the court was well within its discretion to disallow the amendment.

In addressing Rule 15, Utah court's recognize the doctrine of futility.

Although leave to amend is "freely given when justice so requires," Utah Rule of Civil procedure 15(a), justice does not require that leave be given "if doing so would be futile."

Jensen v. IHC Hospitals, Inc., 2003 UT 51, ¶ 139, 82 P.3d 1076, citing *Benton v. Adams*, 56 P.3d 81, 87 (Colo. 2002). (Citing 3 James Wm. Moore et al., *Moore's Federal Practice* §15-15[3] (3rd Ed. 1997). In making this statement, the *Jensen* court also cited *Andalex*

Res., Inc. v. Myers, 871 P.2d 1041, 1046 (Utah App. 1994) which held that leave to amend should not be given if a newly asserted claim is legally insufficient or futile.

In the present case, any claim against Teresa Peterson would be futile. The complaint in this action was filed in 2003. Although a previous complaint had been filed, it had not been served on anyone, and accordingly, no notice could possibly be argued by the filing of this pleading. Instead, seven years after the accident, and three years after the statute had run, plaintiffs sought to bring a new party into the action. Since the trial court could find under the *Penrose* precedent that there was no identity of interest, the denial of the motion to amend was not an abuse of discretion.

In an attempt to prevail on this appeal, plaintiffs have resorted to pure fiction or at least matters which are not in the record. In addition to claiming that State Farm was aware of the pending suit, although it had not been served,⁶ the record before this court does not exhibit notice to any defendant within the statute of limitations.

Plaintiffs also claim:

[State Farm] also had correspondence with Aionos' attorney. State Farm had the right to investigate the claim, the right and duty to defend the suit, and the right to settle any claim or suit, which it did not. State Farm was

⁶It is conceded that State Farm was aware of Kendall Hogan's being served and was probably aware that they had been named in a lawsuit. However, such notice only came when Kendall Hogan was served on August 3, 2003, seven years after the accident.

heavily involved in the defense of this suit. At the least, State Farm received notice of the filing of the suit prior to the expiration of the statute of limitations when Kendall was served with (*sic*) summons and complaint.

Appellant's brief at 25.

Not only are these facts not found in the record, they are in fact a misrepresentation of the record. There is no evidence in the record of any correspondence between State Farm and the Aionos' attorneys. There is no correspondence or other evidence in the record showing any ongoing relationship between the plaintiffs or their counsel and State Farm as an insurer. There is no evidence that State Farm has been "heavily involved" in the defense of this suit. Most astonishingly, plaintiffs claim State Farm received notice of the filing of the suit prior to the expiration of the statute of limitations by service upon Mr. Hogan. As is clear in the record, the opposite is true.

None of plaintiffs' arguments are supported by the cases cited. The cases cited in support of plaintiffs' argument regarding the relation back of amendments only further bolster defendant's position. A review of these cases and their factual underpinnings and holdings shows the futility of plaintiffs' argument.

Unlike the situation in *Gary Porter Construction v. Fox Construction, Inc.*, 2004 UT App. 354, 101 P.3d 371, where a party to be brought in by an amended pleading was

informally involved, Teresa Peterson is in no way involved in this action. There is no evidence that Teresa Peterson resided in the same household as Mr. Hogan. There is no evidence that Teresa Peterson at any time, even up to the present, has received any notice of these proceedings, nor is there evidence of a shared interest between Teresa Peterson and Kendall Hogan. As the mailing certificates show, plaintiffs did not even serve Teresa Peterson with their motion to amend and bring her into the lawsuit. Thus, there is no evidence that Teresa Peterson has ever been apprised of the pendency of this litigation.

Plaintiffs attempt to also rely on *Herbertson v. Bank 1, Utah N.A.*, 1999 U1 App. 342, 995 P.2d 7 where this court held that a bank had sufficient notice to bring a new complaint within the savings statute as a matter of law. The most determinative factor in *Herbertson* was that the new party had actual notice. *Id.* at ¶19, footnote 9. This is, of course, the opposite situation as the present matter. As stated above, there is no evidence of Teresa Peterson ever having notice of this matter. The court in *Herbertson* also found it significant that the new party was represented by the same attorney as the previous defendant. *Id.* at ¶3, footnote 1. Again, plaintiffs rely on fiction and matters completely outside the record to argue that the parties in the present matter have the same attorney. Plaintiffs argue in this case: “Teresa was insured by State Farm as well Kendall and had the same attorney as Kendall and State Farm, i.e., as a result of the *Speros* opinion.”

Appellants' Brief at 18.

The Defendant remains at a loss after numerous readings of the *Speros* opinion to find that the *Speros* opinion has any bearing on the representation of parties by attorneys. Nevertheless, with emphasis (both italicized and in bold) plaintiffs argue on page 19 of their brief that the parties share counsel. Such an assertion is not supported by the record, and more importantly, does not represent reality. The only party represented by Mr. Hogan's counsel is Mr. Hogan.

Plaintiffs walk on shaky ground where they rely on cases allowing amendments in part on the basis that parties had actual notice of the original pleadings prior to the statute of limitations running and they shared the same attorney. These facts are simply not present in this matter and highlight the weakness of plaintiffs' position. The notice to any parties in this matter only came years after the statute of limitations had run.

Plaintiffs' citation to *Korn v. Royal Caribbean Cruise Line, Inc.*, 724 F.2d 1397 (9th Cir. 1984) is likewise unavailing. First, *Korn* is a misnomer case, and plaintiff has admitted on the record that this is not a misnomer case. Transcript of hearing pg. 10, ln. 23 thru pg. 11, ln. 3. Further, the *Korn* decision relied on ongoing negotiations prior to the statute of limitations expiring between the insurer for Royal Caribbean and the plaintiff. First, such an exception is not recognized in Utah law. Second, and even more

dispositively, such facts are not present in this case. The *Korn* decisions specifically relied upon the fact that the correct defendant receive sufficient notice within the limitation period. The opposite is true here.

Plaintiffs further highlight distinctions showing even more weakness in their position. Plaintiffs argue that there is no prejudice in an amendment in the present case under the reasoning of *Hamilton v. Blackman*, 915 P.2d 1210 (Alaska 1996) highlighting that in *Hamilton* the court allowed a relation back of a filing in part because the insurance carrier was the “only entity with exposure for damages liability as a result of [plaintiff’s] action.” 915 P.2d at 1218, fn. 12, cited in Appellant’s Brief at 23. This is not the case in the present suit. First, there is no evidence in the record that the insurance carrier here is the only entity with exposure. Second, and more importantly, plaintiffs’ complaint states damages for a sum which is not certain. (R.4). Both as to special damages and general damages plaintiffs’ request for damages has no ceiling. Thus, it is unreasonable to argue that the insurance carrier is the only entity with exposure. If the amendment were allowed as to Teresa Peterson, the complaint as pled clearly goes to her assets as well.

The *Red Arrows Stables, Ltd. v. Velasquez*⁷ case also shows the unfairness inherent in plaintiff’s request. In *Red Stables*, the insurance carrier asked that all information

⁷725 N.E. 2d 110 (Ind. App. 2000)

should come through them and thus the court held that notice to the carrier constituted notice to the insured.. Nothing of the sort happened in the present case. Further, the *Red Stables* case showed that within days of filing the complaint and days before the original statute of limitations ran, plaintiffs' counsel sent the suit directly to the insurance carrier. 725 N.E.2d at 112. No such evidence exists here. Further, in *Red Arrows* the motion to amend to add the correct party occurred two months after the original statute ran and the correct party had notice only two months after the original statute ran. In the present case, no notice was given for more than seven years after the car accident, and three years after the statute of limitations had run.

Collectively, the case law cited by the plaintiffs only highlights the inequity of allowing the amendment as the plaintiffs have sought.⁸ The cases cited by plaintiffs focus on actual notice being given to the parties before the original statute ran, or that the parties had the same attorneys, or that there was no exposure except for insurance proceeds. None of these facts exist here. Accordingly, the case law cited by the plaintiffs is inapposite and unhelpful.

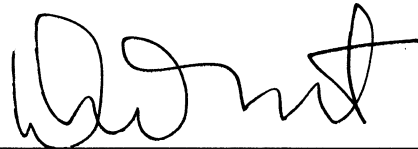
⁸Plaintiffs even cite cases with entirely different rules than Utah's rules. Both *Hamilton* and *Red Arrows* construe versions of Rule 15 which, unlike Utah's rule, allow for the relation back based upon actual notice. *Hamilton*, 915 P.2d at 1216, fn. 10; *Red Arrows*, 725 N.E.2d at 113. This is true of the majority of the cases cited from jurisdictions other than Utah.

In the end, plaintiffs have failed to show an abuse of discretion. The trial court correctly followed Utah precedent requiring an identity of interest. Accordingly, the trial court's denial of the motion to amend must be affirmed.

CONCLUSION

For the foregoing reasons, the trial court's entry of summary judgment in this matter and the denial of the motion to amend should be affirmed.

DATED AND SIGNED this 13th day of May, 2005.

A handwritten signature in black ink, appearing to read 'DMort', is written above a horizontal line.

DAVID N. MORTENSEN
JARED R. CASPER
IVIE & YOUNG
Attorneys for Appellee Hogan

MAILING CERTIFICATE

I hereby certify that a true and correct two (2) copies of the foregoing Appellee's Brief was mailed, postage prepaid, this 13th day of May, 2005, to the following:

David O. Drake
6905 South 1300 East, #248
Midvale, Utah 84047



DAVID N. MORTENSEN
JARED R. CASPER
IVIE & YOUNG
Attorneys for Appellee Hogan

sf1594aMarch05

ADDENDUM

CERTIFIED COPY

IN THE THIRD DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

VOI AIONO and CHERYL AIONO,]	
]	
Plaintiff,]	
]	Third District Court
]	Case No. 030905421
Vs.]	Judge Ann Boyden
]	
KENDALL HOGAN, STATE FARM]	Court of Appeals
INSURANCE and DOES 1 through]	Case No. 20040769-CA
]	
Defendants.]	

July 12, 2004, 2:00 p.m.

MOTION FOR SUMMARY JUDGMENT

Third District Court
450 South State
Salt Lake City, Utah

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A P P E A R A N C E S

FOR THE PLAINTIFF:

DAVID C. CUNDICK, ESQ.
47 South Main Street
Tooele, Utah 84074
Phone (435) 843-3120

FOR THE DEFENDANTS:

Jared R. Casper, Esq.
IVIE & YOUNG
226 West 2230 North, Suite 110
P. O. Box 657
Provo, Utah 84603
Phone (801) 375-3000

P R O C E E D I N G S

THE COURT: We'll go on the record in the matter of Aiona versus Kendall Hogan and the State Farm Insurance as well. For the record, for appearances we have, Mr. Cundick, David Cundick for the plaintiff and--

MR. CASPER: Jared Casper.

THE COURT: Casper?

MR. CASPER: Casper.

THE COURT: Thank you. Mr. Casper for the defendant in this case.

All right. I wanted to just put a few things on the record so that we can narrow down what at least I have a concern today as we address the issue. The original complaint that I have in this case was filed and David Drake was the attorney when it was filed in the original complaint.

MR. CUNDICK: Yes, ma'am.

THE COURT: And the file date that I have in the Court's file on this is March 10th of 2003. That's the original filing date that I have. And is that not correct?

MR. CASPER: Judge, if I can address that issue.

THE COURT: Since you know where I'm going.

MR. CASPER: I do. The plaintiff originally

1 filed the complaint. The Case number is 000206066.

2 THE COURT: And what happened in that case?

3 MR. CASPER: That cause of action was
4 dismissed for failure to prosecute on March 12, 2002.

5 THE COURT: And when was the date of the
6 filing? Obviously, it was--

7 MR. CASPER: The date of the filing was July
8 14, 2000, which would be four days--

9 THE COURT: Four days? All right.

10 MR. CASPER: Within the statute of
11 limitations.

12 THE COURT: All right. I thought: Why are we
13 going to deal with the address of whether-- the issue of
14 whether it relates back if it relates back to one.
15 Well, that raises an entirely different issue that
16 hasn't been addressed. Is that new to you, Mr. Cundick?

17 MR. CUNDICK: It is, Your Honor.

18 THE COURT: That this original file, filing
19 had been done?

20 MR. CUNDICK: Yes, Your Honor. We might
21 want to go off the record to protect Mr. Drake.

22 MR. CASPER: I certainly would concur.

23 THE COURT: That's fine. That's fine. I just
24 want to address where we are on that.

25 MR. CUNDICK: He dropped the file off three

1 days before he said that the expiration of service of
2 summons was to be accomplished.

3 THE COURT: Okay.

4 MR. CUNDICK: I grabbed it, got the service
5 accomplished, never got a complete file, and essentially
6 everything that I had was from Mr. Mortensen's office,
7 Mr. Casper's office. They have been very accommodating.
8 So I need to apologize to the Court for something that,
9 of course, I wasn't aware of. If that's an issue that
10 needs to be addressed before we take on this.

11 THE COURT: I just wanted to make sure that
12 whether or not it is an issue. The issue as I see it now
13 that's before me is whether or not the amended complaint
14 would-- the whole purpose of an amended complaint then
15 would be so that it doesn't fall outside of the statute
16 of limitations.

17 MR. CUNDICK: Correct.

18 THE COURT: And that issue if the original
19 complaint was within the statute of limitations, then
20 goes to 15(c) and the relating back issue and the
21 relating back cases. And I am ready to address those
22 with you but if-- I'm still not certain we don't need to
23 resolve the underlying issue of even if the original
24 complaint was filed in time, if it was dismissed, then
25 is there not an issue? But--

1 MR. CUNDICK: Then we would be arguing the
2 savings statute.

3 THE COURT: Oh. All right. But that's not--

4 MR. CASPER: Your Honor--

5 THE COURT: But that's not what has been
6 prepared or argued up to now so I don't have that case.

7 MR. CUNDICK: Your Honor, in fairness to Mr.
8 Casper, is it something that he wants to address?
9 We're--

10 MR. CASPER: I guess the issue Judge, is, I
11 don't represent the insurance company.

12 THE COURT: You represent Mr. Hogan.

13 MR. CASPER: I represent Mr. Hogan. Although
14 I was prepared to make some arguments, I think everybody
15 is probably aware the insurance company is not a proper
16 party to the case, so I would assume they have been
17 dismissed out. Anyway. I represent Mr. Hogan and his
18 interests, with the understanding we certainly argue in
19 our briefs that we don't think it relates back to the
20 original filing and, for what it is worth, I don't know
21 that I would have much standing in that sense to say
22 anything because I don't represent Ms. Peterson or
23 whoever it will be that will be the named defendant and
24 so--

25 THE COURT: So your argument is that it

1 wouldn't relate back, not that it wasn't barred in the
2 first place from the statute of limitations.

3 MR. CASPER: That's right.

4 THE COURT: That was argued in the first
5 answer.

6 MR. CASPER: Right. I don't believe that it
7 would relate back and I guess we are kind of getting
8 into the argument now which will be based upon the
9 Penrose versus Ross case, that there's no-- this isn't a
10 case of it being a misnomer nor is it a case of being a
11 unity of interest. And for the sake of judicial economy
12 and waste of time, I just don't think it would relate
13 back because assuming the Court granted the right to
14 amend I think whoever came in to defend Ms. Peterson or
15 whoever would be the new defendant, the properly named
16 defendant would more certainly argue that it didn't
17 relate back to the original filing and so as it pertains
18 to Ms. Peterson, a finding of the complaint would be
19 obviously well past the expiration of the statute of
20 limitations.

21 THE COURT: Well, it sounds like then everyone
22 wants to at least address the issue of whether or not it
23 relates back and perhaps we can just go from that point
24 then.

25 MR. CASPER: I'm prepared to argue that.

1 THE COURT: Then let's go ahead and do it. I
2 thought: There's no reason to do that if in fact
3 whether it relates back there's nothing timely for it to
4 relate back to, but at least under this theory or under
5 the theory that the savings statute would do it, a
6 complaint on this issue was filed within four years of
7 the accident on July 18th, 1996, everyone is willing to
8 agree that I can at least begin listening to these
9 hearings with that understanding?

10 MR. CASPER: I agree with that.

11 THE COURT: All right. Then if you want to
12 continue, Mr. Casper.

13 MR. CASPER: Okay. Judge, I'll just briefly
14 set that record. The accident in question here-- Let me
15 back up. The real issue as far as my client, Kendall
16 Hogan is concerned, is that he is not the tortfeasor.

17 THE COURT: Okay.

18 MR. CASPER: And I don't think there's any
19 factual dispute as to that. The affidavit that he filed
20 in support of the motion for summary judgment was indeed
21 the fact that on July 18th, 1996, while he was a part
22 owner of the vehicle, he was not driving the vehicle
23 when it was involved in the accident with the plaintiff.
24 And so as far as that issue goes, I think there's-- it's
25 uncontroverted that he wasn't driving. And so on that

1 basis Mr. Hogan should be dismissed out.

2 Dealing with the issues of the relation
3 back of the proposed amended complaint by the plaintiff,
4 the accident occurred on July 18th, 1996, and within a
5 few days of the expiration of the four-year statute of
6 limitations on July 14, 2000, a cause of action was
7 filed naming Mr. Hogan, my client, as the defendant.
8 That cause of action was subsequently dismissed out for
9 failure to prosecute on March 12th, 2002. Again, the
10 Case Number on that is Case No. 000206066. The present
11 cause of action was then filed on March 10th, 2003,
12 which, again would have been two days within the one
13 year savings statute of Utah Code Section 78-12-40. So
14 in our minds based upon that information we are within
15 the one year statute of limitations from the savings
16 statute of 78-12-40.

17 THE COURT: Okay.

18 MR. CASPER: My understanding was from the
19 information that I've been able to gather, is that the
20 service of the complaint summons was completed on
21 September 3, 2003, which, obviously, would not be within
22 120 days, although I think at this point that's sort of
23 a minimal argument that we are concerned with. Insofar
24 as it goes to the relation back, I think we both, Mr.
25 Cundick and I both believe that the controlling case

1 would be Penrose v. Ross, 71P 3d 631 The general facts
2 of that accident are strikingly similar to what we have
3 here, Judge. The accident occurred on November 21,
4 1996. Four days before the expiration of the Statute of
5 Limitations a complaint is filed naming the father of
6 the tortfeasor as the defendant. Some time before a
7 responsive pleading was due, the plaintiff amended the
8 complaint but that was after the four-year statute of
9 limitations had expired. And so-- and the amended
10 complaint actually named the tortfeasor's son as the
11 proper defendant. In dealing with the issue of the
12 relation back under Rule 15 of the Utah Rules of Civil
13 Procedure, the Utah Court of Appeals in Penrose
14 addressed two issues where the relation back would take
15 place. One is if the case is one of what they call a
16 misnomer case and those issues deal with if in the
17 statute, excuse me, that if in the caption or in the
18 body of the complaint the proper party is named but
19 because of typographical errors, or whatever the case
20 may be, there is a misunderstanding at least of who the
21 proper party is, then that would be a misnomer case and
22 indeed the cause of action or--

23 MR. CUNDICK: Your Honor, I hate to
24 interrupt, but just to save counsel, we agree that this
25 is not a--

1 MR. CASPER: Oh, yes.

2 MR. CUNDICK: --misnomer case.

3 THE COURT: This is not a misnomer.

4 MR. CASPER: And I didn't think that there
5 would be much of an argument but I'm just kind of going
6 over what the Court--

7 THE COURT: And I appreciate at least the
8 record being clear and this gives me an idea but thank
9 you with that agreement.

10 MR. CASPER: The other area is whether or not
11 there's a unity of interest between the two parties, the
12 improperly named party and then, of course, the properly
13 named party. In that case we're talking about a father
14 and son who actually lived in the same house and the
15 father was actually served with the complaint and,
16 obviously, the argument, which I probably would have
17 made myself if I was on that case, Judge, is the fact
18 that you've got a father and son living in a house
19 together. The father gets sued. Well, certainly they
20 talked about it and most certainly the son would have
21 known about the cause of action. Notwithstanding that,
22 the Court of Appeals addressed the issue of a unity of
23 interest by citing a case called Nunez v. Albo, which is
24 53P 3d 2. In that case a physician was served for
25 malpractice but the proper party that should have been

1 named was the hospital and because the physician and the
2 hospital enjoyed an employer/employee relationship,
3 their interest would be the same in fact because of the
4 doctrine of respondeat superior which essentially is:
5 Well, if they're going to go and get a judgment against
6 the doctor for his responsibilities as a physician as an
7 employee of the hospital, that in turn would be the same
8 defenses, the same determination that would have been if
9 the hospital had been named the proper party. And so
10 they've got an employer/employee relationship where they
11 have a unity of interest and the Court of Appeals in
12 Nunez said there's a unity of interest and so it would
13 relate back. However, in Penrose with the unity of
14 interest being a father and son living in the same home,
15 and wrongly named the father as the tortfeasor and then
16 trying to amend after the statute of limitations had
17 expired, they said there is no unity of interest. The
18 defenses wouldn't be the same for the father, his
19 defense, much like Mr. Hogan's defense in this case is:
20 I wasn't the driver, I wasn't the tortfeasor here. And
21 so in that sense there was no unity of interest. I think
22 that's the more controlling case here. And so based upon
23 that I don't think that there would-- we've agreed this
24 is not a misnomer case and our argument, obviously, as
25 far as unity of interest goes is that there is not a

1 unity of interest between Mr. Hogan, my client, and the
2 person named on the police report as the driver, a Ms.
3 Teresa Peterson. There is no allegations in the
4 complaint that said Mr. Hogan was negligent in his
5 entrustment of the vehicle to Ms. Peterson, it's a
6 straight negligence, Mr. Hogan was negligent in the
7 operation of the motor vehicle which caused injury to
8 the plaintiff in this case. That being said, I don't
9 think there is a unity of interest here sufficient to
10 relate the filing of any amended complaint back to the
11 March 10th, 2003 date, which would have been two days
12 within the Statute of Limitations. As such a filing
13 would obviously occur after both the four-year statute
14 of limitations of 78-12-25 as well as the one-year
15 savings statute of 78-12-40 and thus would be barred by
16 the Statute of Limitations. Thank you, Judge.

17 THE COURT: Mr. Cundick.

18 MR. CUNDICK: Your Honor, there is absolutely
19 no dispute as to the facts and what has been stated by
20 counsel is accurate as far as the facts of Kendall
21 Peterson and-- or Kendall Hogan and Teresa Peterson.
22 The only difference between this case and the Penrose
23 case is that Mr. Drake named State Farm, who does have a
24 unity of interest with Teresa Peterson, inasmuch as the
25 defenses arguably to State Farm would be the defenses

1 available to Ms. Peterson. And that's similar, that's
2 kind of similar to the Nunez v. Albo; that is, that in
3 the end the physician and then you have the employer,
4 that is if the physician is found to be liable then that
5 brings in the liability of the hospital; whereas you
6 have the same situation here; that is, if Ms. Peterson
7 is found to be liable it brings in the liability of
8 State Farm.. So we think that this is more akin to the
9 Nunez v. Albo case versus the Penrose case. But the
10 Penrose case does a nice job going through the entire
11 law that has been accurately stated by counsel and that
12 is that this is not a misnomer, it's a unity of interest
13 case, and so we have to determine whether there is unity
14 of interest. Clearly there is not unity of interest
15 between Kendall Hogan and Teresa Peterson but because
16 Mr. Drake named State Farm that puts State Farm on
17 notice and put the unity of interest between State Farm
18 and Teresa Peterson. If you look at the Penrose case,
19 if I can find the appropriate language, in paragraph 5
20 it says, the last quote, and it's quoting Vina v.
21 Jefferson Insurance, "When the new and old parties have
22 an identity of interest so it can be assumed or proved
23 that the relation back is not prejudicial." And we're
24 arguing that that is the fact of this case, and that is
25 that because State Farm was named, State Farm was named

1 within the proper time period they cannot claim that
2 they're prejudiced by the amendment of the pleading
3 because they are on notice of the-- their insured being
4 Teresa Peterson. In fact, it's ironic but State Farm is
5 also the carrier for the plaintiff also, which brings
6 another reason why they were on notice and why it would
7 not be prejudicial. So, in summary then, it is not a
8 misnomer, it is a unity of interest. And if you look at
9 the purpose of the unity of interest, it's to insure
10 that there is no prejudice. There is no prejudice in
11 this case and we have unity of interest between State
12 Farm and Teresa Peterson. Admittedly, there is no
13 identity or unity of interest between Kendall Hogan and
14 Teresa Peterson; consequently, we would request that the
15 amendment be made and it relate back.

16 Now, Your Honor, counsel has raised one final
17 issue that I would like to address and that is that he
18 has indicated that because Kendall Hogan should simply
19 just be dismissed. And that may be what the Court
20 ultimately needs to do, however, in the event that the
21 Court denies this motion, I would like to at least give
22 Mr. Drake the opportunity to argue that particular issue
23 of liability of Mr. Hogan if there was some relationship
24 that would give rise to liability between Mr. Hogan and
25 Teresa Peterson. Apparently there was some relationship

1 as far as she was a girlfriend of his son or something
2 like that, and she may have been given permission to be
3 driving it or there may be something. We don't have any
4 of those facts and I didn't submit an affidavit because
5 I don't have any information that would give that, you
6 know, support that type of theory. It is not a theory
7 that I am desirous of pursuing but in fairness to Mr.
8 Drake and his position, if the Court denies my motion,
9 then I think he he has an interest to defend on that
10 point, if that makes sense.

11 THE COURT: Okay. And I will let Mr. Casper
12 respond to that as well.

13 MR. CUNDICK: Thank you very much.

14 THE COURT: Mr. Casper.

15 MR. CASPER: Thanks, Judge. First and
16 foremost, the allegations of the complaint is what
17 interests my client most and there are no allegations
18 that then there was any negligent entrustment. Again,
19 we're talking simply about a straight negligence case
20 alleging that Mr. Hogan was the driver of the vehicle
21 and indeed he wasn't the driver of the vehicle.

22 In regards to the unity of interest through
23 State Farm, I would point the Court to the case of
24 Campbell versus Stagq, 596P 2d 1037. Which I have a copy
25 if the Court wishes to see it, if I may I approach.

1 THE COURT: Thank you.

2 MR. CASPER: That case and every other case in
3 the State of Utah that has dealt with that issue indeed
4 states on page 2, if I may point out to the Court.

5 THE COURT: Uh-huh.

6 MR. CASPER: At the very bottom, it says:
7 "Issued in Utah. Plaintiff must direct his action
8 against the actual tortfeasor, not the insurer." I think
9 it is pretty clear that even though State Farm may be
10 the indemnitor of anyone involved in the accident, the
11 fact remains that they are not the proper party to--
12 they have a contractual obligation once a determination
13 is made that their insured is liable. They don't have a
14 unity of interest, they don't have a connection in
15 everyone such that they can get sued and then their
16 insureds are indeed on the hook or liable for any
17 damages that are caused. Thank you.

18 MR. CONDICK: Your Honor, can I just briefly
19 reply? I know that's out of order but this is--

20 THE COURT: I want everything discussed so
21 that when a ruling finally comes down nobody claims that
22 I didn't hear it all and it's important that I hear it
23 all and you can respond after, of course.

24 MR. CUNDICK: Thank you. If this would have
25 been Aiona versus State Farm and we, you know, had sued

1 them, then we would be in here saying: Judge, let us
2 substitute Teresa Peterson for State Farm because we
3 shouldn't have named State Farm, as per his case that he
4 submitted, his Campbell case he has submitted. At that
5 point it would be the exact same argument and that is:
6 Okay. You want to replace Teresa Peterson with State
7 Farm. Well, we'll allow you to do that and it will
8 relate back if there's a unity of interest between State
9 Farm and Teresa Peterson. So even though counsel is
10 correct in his law, I think it's just another way of
11 stating the same issue: Is there a unity of interest
12 between State Farm and Teresa Peterson?

13 MR. CASPER: I'm not going to be guilty of--
14 (inaudible).

15 THE COURT: All right. I think that I now
16 have the outline here, that it's a little bit clearer
17 and I appreciate everyone working with me in a flexible
18 way so that we really knew what issue we were dealing
19 with. And I think that the issue is clear that it is
20 whether or not there ought to be an amendment allowed at
21 this time and it would need to be based on the relation
22 back and, more specifically on the unity of interest.

23 I do find that there is not a unity of
24 interest, certainly none between Kendall Hogan and Ms.
25 Peterson. And the question of whether we can stretch

1 that enough, that there is a unity of interest between
2 State Farm and Ms. Peterson, and that there really isn't
3 any prejudice because State Farm was somehow put on
4 notice that this suit was being pursued and, therefore,
5 it would go to Ms. Peterson, I think is just pushing it
6 too far past the point of where there really is a
7 prejudice. First of all, State Farm is listed in this
8 one, while it is argued that it was coincidentally the
9 same insurer of Kendall Hogan, he was listed as the
10 insurer, as Kendall Hogan, I assume, and so it is a
11 coincidence that it is the same insurer under, who it
12 would be with Ms. Peterson, and there is too much
13 potential for prejudice there, that there is no reason
14 to assume that that puts them on notice that they're
15 going to sue anyone who might be related in that
16 situation. There is just not a sufficient unity, a
17 sufficient unity of interest there. I think it's clear
18 that Mr. Hogan is not the correct tortfeasor and the
19 arguments to try and stretch this to get to the correct
20 tortfeasor just simply are not-- do not have enough
21 connections to allow the relation, relating back statute
22 to come into place. That's not what it's intended to do.
23 And I find that there is not sufficient unity of
24 interest there as to, I guess, the named defendants here
25 and Ms. Peterson in order to allow that relation back.

1 So I am-- and at this point let's make clear what
2 motions, therefore, are actually being addressed. The
3 motion originally is that Mr. Hogan be dismissed out of
4 this case because he is not the tortfeasor and a summary
5 judgment on that. And that certainly is the effect of
6 this ruling but it also addresses the responses in the
7 plaintiff's motion to amend or change the name of the
8 defendant and that is being denied by virtue of this
9 ruling. Is that clear enough? It is kind of a
10 roundabout way of getting back to it but I want to rule
11 on the actual motions that are before me and that's how
12 I understand them.

13 MR. CUNDICK: Your Honor, as far as the
14 procedure went, I understand the Court's ruling. The
15 response to the motion for summary judgment and the
16 request to allow Mr. Drake to pursue the issue of
17 whether there is any type of, you know, liability that
18 would be derived through the relationship with Mr. Hogan
19 and Ms. Peterson.

20 THE COURT: Okay.

21 MR. CUNDICK: Is he given leave to do that?

22 THE COURT: Do you wish any further response
23 to that other than your-- well--

24 MR. CASPER: I will just say pursuant to the
25 Rules of Civil Procedure he most certainly could file a

1 60(b) motion of some sort and say there's facts that
2 weren't considered by the Court and which could
3 otherwise-- which I would object to that opportunity.
4 I think Mr. Cundick has done a fabulous job of trying
5 to-- I don't want to get myself in trouble with other
6 members of the Bar, but to try and save the case and I
7 just don't think it's warranted.

8 THE COURT: Anything further on that, Mr.
9 Cundick?

10 MR. CUNDICK; No.

11 THE COURT: You have done, made the record
12 very clear. There have been no allegations made
13 originally of negligent entrustment. You know, if Mr.
14 Drake wants to review the law and see that there is some
15 way he can appropriately file it, but I am not going to
16 allow this to be a boot-strapping point. Clearly, the
17 wrong parties have been in the suit have been named. The
18 suit named the wrong parties here. I have made the
19 ruling that Mr. Hogan is not the tortfeasor, he is
20 dismissed out of the case and I do not find that it is
21 saved and allow for the amended information to include
22 Ms. Peterson. Now that is on the relation back theory.
23 And if there is anything further that they can do, then
24 they will need to do that and start again anew. But I do
25 think that there has been a genuine effort to protect

1 the case at every means and I am just not willing to
2 stretch it that far.

3 MR. CUNDICK: Thank you.

4 MR. CASPER: Judge, do you wish that I
5 prepare an order?

6 THE COURT: I would ask that you prepare that
7 order and I appreciate everyone's approach to this so
8 that I could get the understanding here of what we're
9 dealing with. Thank you.

10 MR. CASPER: Thank you.

11 [Proceeding concluded at 2:35 p.m.]

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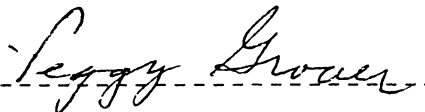
C E R T I F I C A T E

THE STATE OF UTAH]

COUNTY OF SALT LAKE]

I, Peggy Grover, RMR, do hereby certify that the foregoing Motion for Summary Judgment held on July 12, 2004, at the time and place indicated, was transcribed from a videotape recording of said proceedings produced by the Clerk of the Court, and that the foregoing pages, numbered 3 through 22, is a true and correct transcription of said videotape to the best of my ability.

Dated this 9th day of March 2005.

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Peggy Grover, RMR

ADDENDUM B

FILED DISTRICT COURT
Third Judicial District

AUG - 3 2004

SALT LAKE COUNTY

By _____ Deputy Clerk

DAVID N. MORTENSEN, #6617
JARED R. CASPER, #8160
IVIE & YOUNG
Attorneys for Defendant
226 West 2230 North, Suite 110
P.O. Box 657
Provo, Utah 84603
Phone: (801) 375-3000
Fax: (801) 375-3067

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH


VOI AIONO and CHERYL AIONO,	:	ORDER GRANTING SUMMARY
	:	JUDGMENT
Plaintiffs,	:	
vs.	:	
KENDALL HOGAN, STATE FARM	:	
INSURANCE, and DOES 1 through 50,	:	
inclusive,	:	Civil No.: 030905421
Defendants.	:	Judge Boyden

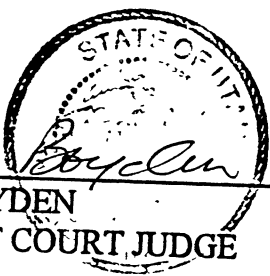
This matter having come before this court on July 12, 2004 on Defendant Kendall Hogan's Motion for Summary Judgment and Plaintiffs' Motion to Amend Complaint, the parties having filed briefs and having had opportunity to be heard by this court,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant Kendall Hogan's Motion for Summary Judgment is granted. Plaintiff's Motion to Amend Complaint is hereby denied as there is not a unity of interest between Defendant Kendall Hogan

and the actual tortfeasor which would allow the relation back of the Amended Complaint to the previous filings of the Complaint. Accordingly, any amended complaint that would be filed by Plaintiff would be time barred by the statute of limitations set forth pursuant to UCA §78-12-25 and §78-12-40, respectively. Accordingly, Plaintiffs' Complaint is hereby dismissed.

DATED AND SIGNED this 2nd day of Aug, 2004.


JUDGE ANN BOYDEN
THIRD DISTRICT COURT, JUDGE




Approved as to Form:

DAVID CUNDICK
Attorney for Plaintiff

Submitted by:


IVIE & YOUNG


JARED R. CASPER
Attorney for Defendant Hogan

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Order Granting Summary
Judgment was mailed, postage prepaid, this 13th day of July, 2004, to the following:

David Cundick
47 South Main Street
Tooele. Utah 84074


Secretary