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Lawrence C. Kay, Joy Kay, Robert L. Kay, and Teresa Kay, Plaintiffs and Appellants, v. Summit Systems, Inc., a corporation, Val E. Southwick, et al., Defendants and Appellees.

No. 930626

SUPREME COURT OF UTAH

924 P.2d 338; 284 Utah Adv. Rep. 3; 1996 Utah LEXIS 8

February 9, 1996, FILED

PRIOR HISTORY: [*1] Third District, Salt Lake County. The Honorable J. Dennis Frederick.

CORE TERMS: notice of appeal, notice of appeal, different construction, post-judgment, premature

COUNSEL: Jackson Howard, Leslie W. Slauch, Provo, for plaintiffs and appellants.

Summit Systems, Inc., and Val E. Southwick, unrepresented on this date.

Scott H. Clark, Dee R. Chambers, Stephen C.

Tingey, Brent D. Wride, Ronald G. Russell, Donald F. Dalton, Scott Daniels, Reed L., Martineau, **Diana J. Huntsman**, Salt Lake City, for other defendants and appellees unnamed in the case heading.

JUDGES: HOWE, Justice, dissenting. Justice Durham, having disqualified herself, does not participate herein; District Judge Steven L. Hansen sat.

OPINION*PER CURIAM:*

Plaintiffs seek to appeal various issues decided by the district court; however, because we are compelled to dismiss the appeal for lack of jurisdiction, we do not reach the merits.

The trial court entered a judgment in favor of plaintiffs, and defendants Val Southwick and Summit Systems filed post-judgment motions that the trial court denied by a minute entry entered November 29, 1993. Later that day, the trial court entered an amended judgment against Southwick and Summit awarding plaintiffs [*2] \$ 654,847. On December 7, 1993, the Kays filed a notice of appeal, contesting the trial court's dismissal of their motion to double the damage award and add prejudgment interest and attorney fees. On December 20, 1993, the trial court entered an order denying defendants' motion for a new trial. No notice of appeal was filed thereafter.

The issue is whether *Rule 4(b) of the Utah Rules of Appellate Procedure* permits the premature filing of a notice of appeal so as to confer jurisdiction on this Court. That rule states:

A notice of appeal filed before the disposition of any of the above motions [including a motion for a new trial under *Rule 59*] shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

Swenson Associates Architects, P.C. v. State, 889 P.2d 415 (Utah 1994), is dispositive of the issue. *Swenson* squarely ruled that a notice of appeal filed before the trial court disposed of those post-judgment motions stated in *Rule 4(b) of the Utah Rules of Appellate Procedure* was premature and not effective to initiate

appeal. Plaintiffs' arguments [*3] for a different construction of *Rule 4(b)* were addressed and rejected in *Swenson*.

Because no timely notice of appeal was filed and plaintiffs' arguments for a different construction of *Rule 4(b)* were addressed and rejected in *Swenson*, the appeal in this case is dismissed.

DISSENT BY: HOWE

DISSENT

HOWE, Justice, dissenting:

I dissent for the reasons stated in my dissenting opinion in *Swenson Associates Architects, P.C. v. State*, 889 P.2d 415, 417 (Utah 1994).

Justice Durham, having disqualified herself, does not participate herein; District Judge Steven L. Hansen sat.