Accidentally Failing to Sue

By CHARLES D. RAY

Disagreements among judges are often triggered by real life situations that explore the limits and application of rules of both substance and procedure. The Supreme Court grappled with an oddball procedural question in *Laiuppa v. Moritz*, SC 20798. The specific question was whether Mr. Laiuppa could rely on the accidental failure of suit statute to resuscitate a civil action that had been dismissed for insufficient service of process. The Court's majority said no. Two dissenters said yes.

Here's what happened. Mr. Laiuppa and Ms. Moritz were involved in an auto accident on June 21, 2016. On June 14 or 15, 2018, Mr. Laiuppa tried to begin a civil action related to the accident. A marshal left a copy of the summons and complaint at Ms. Moritz's last known address as shown by DMV records. The property appeared to be inhabited and the land records as of June 18, 2018 (the date of purported service) listed Ms. Moritz as the owner. As it turns out, however, Ms. Moritz was not living at the property on June 18th and had, in fact, been hospitalized in 2017 and then moved to a nursing home following that hospital stay. In January 2018 she moved to another facility in Rhode Island. By way of a power of attorney, Ms. Moritz had sold her Connecticut home—the one where the marshal attempted abode service—in early

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June 2018, about a week before the marshal showed up with Mr. Laiuppa's summons and complaint.

But wait, there's more! At some point, Mr. Laiuppa's counsel notified Ms. Moritz's insurance company about the pending action and forwarded to it a copy of the summons and complaint. An attorney appointed by the insurance company entered an appearance for Ms. Moritz on July 3, 2018. Ms. Vinci—who held Ms. Moritz's power of attorney—first learned of the pending lawsuit on July 13, 2018 by way of a letter dated July 5, 2018 and sent by the insurance company in an effort to reserve its rights with respect to one of the claims alleged by Mr. Laiuppa. However, Ms. Vinci did not receive a copy of the summons and complaint until July 17, 2018. Ms. Moritz moved to dismiss, alleging that service of process was not sufficient because the attempted abode service by the marshal on June 18, 2018 was defective, as Ms. Moritz no longer lived there. The trial court granted the motion.

Rather than appeal, Mr. Laiuppa filed a new action, relying on the accidental failure of suit statute. That statute, Conn. Gen. Stat. § 52-592, allows the filing of a new action in several situations, but only where the initial action was "commenced within the time limited by law…." Ms. Moritz's motion for summary judgment was granted, the trial court concluding that neither Ms. Moritz or Ms. Vinci had received effective, timely notice of the original action. The trial court also found that Ms. Moritz did not have actual notice of the writ, summons, and complaint within thirty days of the delivery of those documents to the marshal for service. Having received those documents on June 14 or 15, 2018, the m arshal had, by operation of Conn. Gen. Stat. § 52-593a, until July 15th at the latest to make proper service. The uncontested facts showed that Ms. Vinci did not receive a copy of the summons or complaint until July 17, 2018. Summary judgment granted for Ms. Moritz and the Appellate Court affirmed.

As did the Supreme Court, by way of a majority opinion written by Justice Mullins and joined by Chief Justice Robinson and Justices McDonald, Alexander, and Dannehy. Justice Mullins was not writing on a clean slate. In *Rocco v. Garrison*, 268 Conn. 541 (2004), the Court held that actual, proper service was not required in order to "commence" an action for purposes of invoking the accidental failure of suit statute. Instead, "effective notice" to a defendant is sufficient. Thus, an action can be "commenced" for purposes of the accidental failure of suit statute, even if the original action failed for insufficient service of process. The question then becomes whether the defendant received "effective notice" of the underlying action within the time allotted by the applicable statute of limitations. See *Dorry v. Garden*, 313 Conn. 516 (2014).

In terms of Mr. Laiuppa, the majority rejected his claim that § 52-592 "operates to save an action in which a good faith attempt at service of process has been made within the limitation period." Such a reading, according to Justice Mullins, "would effectively eliminate any requirement that the action be 'commenced'…." And based on a review of prior cases, the majority made clear that "effective notice" mandated that a defendant receive the summons and complaint within the statutory limitations period, "even if they were received through improper means."

Turning to specifics, the majority concluded that Mr. Laiuppa's first action had not been "commenced" within the limitations period. First, the Marshal's attempt at abode service was not sufficient, because it was undisputed that Ms. Moritz no longer owned or lived at the property. Second, Ms. Moritz failed to establish that Ms. Vinci received a copy of the summons and complaint in a timely fashion. Although Ms. Vinci learned of the original action on July 13, 2018—two days prior to the statutory deadline—there was no record evidence of her having received a copy of the summons and complaint prior to July 15th. Without any such evidence, the majority affirmed the award of summary judgment to Ms. Moritz.

The dissent—Justice Ecker, joined by Justice D'Auria—wasn't having it. Justice Ecker begins with "one stubborn fact," the appearance filed on behalf of Ms. Moritz on July 3, 2018 by the lawyer appointed by her insurance company to represent her in the underlying action. For the dissent, there were three reasons why that appearance demonstrated that the initial action had been "commenced" for purposes of the accidental failure of suit statute. First, the attorney owed Ms. Moritz a duty of exclusive loyalty and entered an appearance on her behalf eleven days before the limitations period ran. Second, information learned by an agent, within the scope of the agency, is attributable as notice to the principal—i.e., Ms. Moritz. Third, the accidental failure of suit statute is remedial in nature and should be construed liberally to serve the public policy of having court actions determined on their merits. To the dissent, an appearance by an attorney on her behalf fulfilled the requirement of actual or effective notice to Ms. Moritz. The majority rejects this conclusion, but solely on the basis of its own conclusion that actual receipt of the summons and complaint by the defendant is necessary for an action to have been commenced for purposes of the accidental failure of suit statute.

In the end, *Laiuppa* establishes, without doubt, that there is a lot of play in the word "commence" as used in § 52-592. Without further guidance from the legislature, however, neither the majority nor the dissent can be called out for having wrongly decided the issue. Opinions differ and votes count. ■

■ Any views expressed herein are the personal views of the author.

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