2001

State of Utah v. Marie S. McKinnon : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
Plaintiff/Appellant,	)	Case No. 20010790-CA
v.	)	Priority No. 15
MARIE S. McKINNON,	)	
Defendant/Appellee.	)	

BRIEF OF APPELLEE

APPEAL FROM THE DISMISSAL OF A CHARGE OF FALSE NOTARIAL CERTIFICATION, A CLASS B MISDEMEANOR, IN THE FIRST JUDICIAL DISTRICT COURT, BOX ELDER COUNTY, THE HONORABLE BEN H. HADFIELD PRESIDING

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STATEMENT REGARDING JURISDICTION

This Court has jurisdiction under Utah Code Ann. 78-2a-3(2)(e)(Supp.2001).

STATEMENT OF ISSUES

The issue in this case is variously described as follows:

Where a statute regarding discovery operates to extend a two-year statute of limitations only "if the period [of limitations] . . . has expired," does that mean: (1) when the period has expired as a result of the offense having not been discovered, or (2) when the period has expired as a result of the State knowingly allowing it to expire in spite of actual knowledge of the commission of the alleged offense well within time to file a Complaint?

When the State has fully discovered the alleged commission of a class B misdemeanor months prior to the expiration of the regular two-year statute of limitations, may the State disregard that statute of limitations and file the complaint after the statute has expired, but within one year of the discovery of the offense?

Does the statute which extends a statute of limitations until after discovery, apply in circumstances where discovery has occurred well within the original limitations period?

Standard of Review: The standard of review for the issue(s) is de novo; the lower court acted as a matter of law in granting summary judgment.

STATUTE WHOSE INTERPRETATION IS DETERMINATIVE

Utah Code Ann. 76-1-302(1). See FACTS, below at paras. 15-16 for the complete text.

STATEMENT OF THE CASE

Nature of Case: This is an appeal by the State from the dismissal of a class B misdemeanor for failure of the State to file the complaint within the statute of limitations period, in spite of actual discovery of the crime well within time to file.

Course of Proceedings and Determination Below: The State filed a class B misdemeanor after the statute of limitations had expired. The defendant moved to dismiss, based on untimely filing. The district court dismissed the case.

Statement of Facts:

1. The defendant, Marie S. McKinnon, is a long-time resident of Box Elder County and a long-time employee in the Office of the Box Elder County Recorder/Clerk. R. 74, affidavit of Defendant Marie S. McKinnon.

2. As a courtesy, outside of her regular work duties, Marie S. McKinnon notarized the signature of certain persons on deeds. R. 75, affidavit of Marie S. McKinnon.

3. The deeds were signed between February 12, 1999 and March 30, 1999. R.2, the Information charging plaintiff.

4. Sometime between March 30, 1999 and June 30, 2000, the alleged crime was discovered by allegedly aggrieved parties who purported that the defendant was not present when those deeds were signed, or that they did not sign the deeds. R.29, an investigative report by the Utah Department of Commerce, wherein the investigator states, "I met with Paul and Ted Hansen at their farm in Bear River City, Utah, on June

30, 2000." In that report, the Hansen's, the alleged victims or aggrieved parties said, "the notary public, Marie S. McKinnon, was not present when they signed the document . . ." R.29.

5. On August 1, 2000, the investigator spoke to an additional alleged victim or aggrieved party, Doreen A. Bateman. R32.

6. On August 3, 2000, the fourth alleged victim was personally spoken to by the investigator. R.36.

7. On August 17, 2000, the investigator spoke with the defendant, Marie McKinnon, who vehemently denied that she had notarized any documents without having the people be personally present and identify themselves to her. R.39.

8. Although the alleged crimes had been discovered on June 30, 2000, or shortly thereafter, (See paras. 4, 5 and 6, above) and an alleged crime was discovered at that time, the State determined to do further investigation and have some deeds reviewed by a document examiner, who came to his conclusions on September 23, 2000, R. 18.

9. The statute of limitations with respect to Class B Misdemeanors is two years. Utah Code Ann. 76-1-302(1) states:

> "(1) Except as otherwise provided, a prosecution for:
> (a) . . .
> (b) . . . a misdemeanor, other than negligent homicide, shall be commenced within two years after it is committed; . . ."

(Emphasis added)

10. Two years from the date of the first alleged misdemeanor, that is, two years

from February 12, 1999, would be February 12, 2001. See para. 3, above.

11. Two years from the later of the alleged misdemeanor violations would be two years from March 30, 1999, or March 30, 2001. See para. 3, above.

12. In spite of actual knowledge of the alleged offense, the State did not file a complaint against defendant, Marie S. McKinnon, within the two-year statute of limitations on misdemeanors.

13. On April 16, 2001, the State filed a criminal information, charging the defendant with violation of Utah Code Ann. 46-1-19 et seq., a class B misdemeanor as follows:

> "That MARIE S. McKINNON, between February 12, 1999 and March 30, 1999, within Box Elder County, State of Utah: executed one or more notarial certificates known by her to be false; or performed a notarial act with intent to deceive or defraud."

R.2.

14. Marie S. McKinnon filed a Motion to Dismiss based upon the fact that the State had actual knowledge of the alleged crime, but did not file the information, allowing the statute of limitations to expire.

15. The State relied upon Utah Code Ann. 76-1-303 to justify the late filing. Utah Code Ann. 76-1-303, only partially quoted by the State in its Brief at page 7, is quoted in full, below. The underlined portion of the statute below, is the part omitted by the State in its Brief at page 7. No ellipsis or other indication appears in the State's Brief to indicate that a part from the statute is missing. The statute reads:

> "(1) <u>If the period prescribed in Section 76-1-302 has expired</u>, a

> prosecution may be commenced for any offense a material element of which is either fraud or a breach of fiduciary obligation within one year after the discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved party, and who is himself not a party to the defense.
>
> (2) Subsection (1) may not extend the period of limitations as provided in Section 76-1-302 by more than three years.

(Emphasis added.)

16. The statute further reads:

> (3) If the period prescribed in Section 76-1-301.5 or 76-1-302 has expired, the prosecution may be commenced for:
>
> > (a) any offense based upon misconduct in office by a public officer or public employee:
> >
> > > (i) at any time during which the defendant holds a public office or during the period of his public employment; . . ."

(Emphasis added.)

17. The "period prescribed in Section 76-1-302 . . .", mentioned above, is the two-year statute of limitations on class B misdemeanors."

SUMMARY OF ARGUMENT

The statute at issue, which can operate to extend the regular two-year statue of limitations for class B misdemeanors involving fraud, plainly states that it applies only, "if the [regular two-year statute of limitations] . . . has expired." The State was well aware of the alleged crime months before the regular two-year period expired. Yet the State sat on the case, allowing the regular period to expire. The State then tried to take advantage of the extension statute at issue. By its plain terms, the statute only applies if

the discovery of the crime is not in time for the State to file withing the regular two-year statute of limitations.

The Utah Supreme Court has declared a strong policy that statutes which extend regular statutes of limitation based on discovery (1) should be narrowly construed to limit the application of such extensions, and (2) should not be applied where the plaintiff is aware of the cause of action in time to file during the regular limitations period. The broad interpretation of the statute sought by the State would allow the State discretion to ignore the regular limitations period in all cases discovered in the last year of the regular statutory period, even though the State has actual knowledge of the crime well within time to file, as it did in this case. The narrow construction sought by the defendant, would follow sound policy mentioned above and below. The State's interpretation is contrary to every other application of the discovery rule in Utah case after Utah case.

The above policy also fosters other policies such as (1) minimizing stale cases brought to the courts, (2) forcing prosecutors to bring cases when known while evidence, memories, defenses, etc., are fresh, (3) not allowing prosecutors the discretion to sit on cases until stale, (4) allowing prosecutors to file cases after the two-year period has expired, but where fraud by the defendant may have resulted in a lack of timely discovery.

There is only one discovery rule applied in three circumstances in Utah, two of which are judicially recognized, and the third legislatively. The Utah Supreme Court has clearly stated that a necessary pre-requisite to the application of that discovery rule, in

any of the three circumstances, is the lack of discovery of the cause within the regular statute of limitations period.

The State's description of an allegedly absurd result if the statute is appropriately, narrowly interpreted does not really obtain. The narrow interpretation might only limit the State's ability to prosecute if an isolated case were discovered after the court clerk's office closed on the last filing day in the period of limitations, as would be the case with any statute of limitations.

The lower court appropriately applied the above principles to rule, as a matter of law, irrespective of the statute, that the State could not sit on the case for months and allow the regular statutory period to expire.

ARGUMENT

POINT I

THE PLAIN MEANING OF THE STATUTE AT ISSUE ALLOWS EXTENSION OF THE TWO YEARS STATUTE OF LIMITATIONS, ONLY IF THE TWO YEAR PERIOD "HAS EXPIRED" BEFORE DISCOVERY.

Both the State and the defendant concur that under principles of statutory construction, the Court should look first to the plain language of any statute. During that process, the Court should presume that the Legislature used each word advisedly and should give effect to each term according to its "ordinary and accepted meaning."J.J.W. v. State, 2001 UT App. 271, ¶ 17, 33 P.3d 59.

In addition, the plain meaning should be read in context of related statutes and

public policy. For example, in State v. Harlow, 919 P.2d 50 (UT App. 1996), this Court stated, ". . . [O]ur plain reading of Section 76-36-2 is supported by the entire domestic violence statutory scheme, its legislative history, and sound public policy." Id. at 54. The Court further elucidated on the requirement that "a statute 'be looked at in its entirety . . .'" id. at 54, citing State v. Scieszka, 897 P.2d 1224, 1227 (UT App. 1995). The Court then stated, "thus, this Court must harmonize subsection (3)(a) with the balance of the domestic violence legislation." Id. at 54, referring the reader also to State v. Bishop, 753 P.2d 439, 468 (Utah 1988).

Considering the plain words of the statute at issue, which allows the filing of criminal complaints for certain misdemeanors under certain circumstances, if the two-year statute of limitations has expired, Utah Code Ann. 76-1-303, applies only "if the period prescribed in Subsection 76-1-302 [the two year statute of limitations] has expired, . . .". In other words, within two years of the commission of any misdemeanor, a criminal complaint must be filed. However, if that period has expired, then and only then, may a complaint be filed if thereafter the crime is discovered, and if the filing is done within one year of that discovery. The plain language of the statute declares that the statute only takes effect, "if the [two year] period . . . has expired." This is precisely the portion of the statute omitted from the State's quotation thereof at page seven (7) of its brief. If that two year period has not expired, the statute is not even operable. It is a nullity.

Such a reading also comports with a reading of the statutory scheme with regard

to limitations of actions. For example, 76-1-302, quoted above, states that a misdemeanor "shall be commenced within two years after it is committed; . . ." The use of the word "shall" by the legislature, demonstrates a policy or determination that complaints which can be brought must be brought unless some clearly stated exception applies. Admittedly the statute does state, "unless otherwise provided," however, any exception otherwise provided should be clear and unambiguous.

In the present case, the State argues that the State is not obligated to file a known complaint within two years as the word "shall" seems to direct. The State argues that it can have probable cause of the commission of a crime in June of 2000 (see FACTS, above, para. 3), and yet can fail or refuse to file a case within the two year statute of limitations for months and months, eventually filing a complaint in April of 2001, rather than abide by the mandatory "shall" provisions of the statute. Such an action is contrary to the plain meaning that the two year period shall be followed except if that period has already expired when the State becomes aware of a crime.

POINT II

IF THERE IS AN AMBIGUITY, THE COURT SHOULD LOOK TO LEGISLATIVE INTENT, PUBLIC POLICY, AND OTHER SUCH CONSIDERATIONS.

While this defendant asserts that the statute at issue is plain and unambiguous, this defendant must acknowledge that this Court could find that the statute is ambiguous as follows. This argument is only presented as an alternative. One could argue that the clause in the statute, "if the [two-year limitation] period . . . has expired, . . ." then a

prosecution may be commenced could mean either (1) only if the discovery occurred after the two-year period has expired and a prosecution could otherwise not proceed, or (2) whether or not the discovery occurred within the two-year period, leaving the State free to extend the two years, even if an alleged crime is discovered in time to file within the two-year period. Assuming that such an ambiguity might be asserted or might be read into the statute, the following argument is made.

If there is an ambiguity, courts go beyond the plain meaning of the terms used: "If we find the provision ambiguous . . . we then seek guidance from the legislative history and relevant policy consideration." State v. Ostler, 2001 UT 68, ¶ 31P.3d 528, citing World Peace Movement of Am v. Newspaper Agency Corp., 879 P.2d 253, 257-58 (Utah 1994).

(1) Policy Considerations: The Utah Supreme Court has clearly delineated a strong policy to narrowly construe and limit any statute which would extend a limitation of limitations. Although many of such strong policy statements are found in civil cases, if applied there, where only property interests are at issue, they should be given even greater weight where liberty interests may be at issue as well.

In O'Neal v. Division of Family Services, 821 P.2d 1139 (Utah 1991), the Supreme Court surveyed all cases wherein a discovery rule was used to extend a statute of limitations since the case of Meyers v. McDonald, 635 P.2d 84 (Utah 1981), the Supreme Court found, "in all but one of the cases following Meyers, . . . in which the application of the discovery rule was sought [to extend a statute of limitations], this

Court has rejected the claim because the plaintiffs were aware, or should have been aware, of the facts upon which a claim could be brought in time to file before the statutory period expired." Id. at 1144 (Emphasis added). The Supreme Court gave a reason for such narrow application of any rule extending discovery beyond a statute of limitations:

> "If we were to hold that a plaintiff who was aware of the facts constituting a cause of action could claim the benefit of the discovery rule . . . we would open the door to all manner of claims seeking to avoid the bar of statutes of limitations."

Id. at 1145. (Emphasis added). The strength of that policy consideration is emphasized by the facts of the O'Neal case. The Supreme Court specifically stated that it regretted its decision not to allow an exception because of "the trauma and the pain that O'Neal has suffered and continues to suffer," yet the Court felt so strongly about the importance of the policy, that it would not allow extension of the statute of limitations, in spite of such regrets. Id. at 1145.

In Estes v. Tibbs, 979 P.2d 823 (Utah 1999), the Supreme Court stated:

> "Courts should be cautious in tolling a statute of limitations; liberal tolling could potentially cause greater hardship than it would ultimately relieve."

Id. at 825. (Emphasis added.) The Court continued in a footnote to the above quoted language:

> "We note that it's a public policy concern, the cost to the judicial system itself would be tremendous, both in monetary terms and in terms of scheduling and time constraint. The cost would most certainly trickle down to affect every claimant whether represented by counsel or pro se."

Id. 825 n.5. The State opts for a broad, expansive, liberal interpretation of the statute which would increase the number of potential cases to which the exception should apply. The Defendant argues for precisely the type of narrow construction mandated by the Supreme Court. The Defendant's interpretation would limit the statute to its plain meaning and to a narrow application which would not allow the State, as it did in this case, to have actual knowledge of the commission of an offense, yet wait from June, 2000 through the expiration of the statute of limitations in February or March of 2001, and then eventually, bring the Complaint after the two-year statute of limitations has run. The Defendant's interpretation would only narrowly allow additional prosecutions if the State had not even been able to discover the commission of the crime until after the two-year period had expired. The State's reading of the statute, gives the State broad discretion in the face of a known crime, to disregard the statute of limitations and sit on the case until it becomes stale. That should not be allowed.

The following specific public policy considerations would be fostered by this Court following the Supreme Court's policy of narrowly interpreting discovery statutes to limit their application: (1) a diminution in stale cases brought against defendants, (2) encouraging the filing of case when evidence is more likely to be able to be preserved, witnesses' memories are fresher, etc., (3) pressuring of public prosecutors to bring cases when discovered, and not to sit on cases, intentionally or otherwise, to allow them to become stale, (4) a diminution in the numbers of cases brought before the courts if the

State sits on known cases, (5) a diminution in cost to the state litigants and to the public because cases are brought while evidence is fresh, and (6) allowing the State to go forward where the defendant, by fraud, has kept the State from discovering the crime.

Another policy consideration points in the direction of a narrow application of the statute at issue. The two-year statute of limitations sets the appropriate standard. However, the discovery statute applies only where the case involves fraud or public office. The legislative policy appears to be that if the defendant has, by fraud, concealment, deceit, etc., precluded the State from bringing the cause of action within the regular statute of limitations, then, perhaps, the State should have an extended time in which to file a Complaint. Or if the matter relates to public office and a person still serves, then the case should be able to be brought if not discovered in time, in order to protect offices from potential crime or criminals.

It should be the act of the defendant in concealing the crime or the difficulty of discovery which should allow the additional time to file, not the discretion of the State in the face of an already discovered crime, which should allow the extension.

Another policy reason, is fundamental fairness. Where a party, especially the State in a criminal action, is aware of all the elements of a cause of action within a statutory period of limitations, the State should be required to file suit, if it intends to, within that period of limitations, without knowingly extending the staleness of the case to disfavor the alleged perpetrator.

Similar Legislative and Judicial Law. The State and the defendant agrees that

there are three circumstances where the discovery rules will be applied. They are: (1) a legislative discovery rule, (2) a specific judicial discovery rule where the defendant has concealed or misled the plaintiff until the statute of limitations has past, and (3) an extraordinary rule where exceptional circumstances exist which would make the operation of the statute of limitations irrational or unjust. See the State's concurrence that in the three circumstances of the discovery rules exist in their Brief at 10-11. The latter two were judicially created, the first, of course, legislatively. The State admits that, "when applying the two judicially created 'discovery rules,' Utah courts have consistently held that neither rule applies unless a plaintiff can show that he or she did not know and could not reasonably have known of the existence of the cause of action within the original limitations. (Eight citations omitted.)" State's Br. at 11.

The State also admits, "most statutes [legislative rules] that create 'discovery rules' state that the applicable statute of limitations does not even begin to run until the plaintiff discovers, or should have discovered, the cause of action. (Six statutory citations omitted.)" State's Br. at 12.

The State then argues that in spite of every other judicially and legislatively circumstance where the discovery rule applies, only in this particular case, contrary to the legislative intent in other statutes, and contrary to the judicial application of the extension of statutes of limitations, the Legislature intended a unique, aberrant, directly opposite result in passing the statute at issue. The State argues that contrary to the pre-existing policy considerations of the courts, the Legislature struck out in an entirely new

direction, even from the directions it had taken in past statutes. Any ambiguity, if it exists, should not be resolved in such a unique, aberrant and directly contrary way, but should be interpreted consistent with public policy, judicial policy, judicial fiat, and apparent legislative philosophy and intent in every other statute. Only if the meaning were precisely and clearly stated to do something completely different should such a result obtain. That is not the case here.

The State argues that because different language was used from other statutes where the limitation does not even begin to run until discovery, the Legislature intended the broader interpretation which the State espouses. State's Br. at 12-13. However, the Legislature's use of different language in the statute at issue illustrates the intent of the Legislature not to narrow the application of the discovery rule at hand. The following statutes are examples of those where the discovery rule operates so that the statute of limitations doesn't even begin until the cause of action is discovered: Utah Code Ann. 78-12-26(1). ("The cause of action does not accrue until the discovery by the aggrieved party . . ."; 78-12-26(2).); ("The cause does not occur until the owner has actual knowledge . . ."); 78-12-26(3) (The cause of action in such case does not occur until the discovery by the aggrieved party . . ."); 78-12-27 ("Must be brought within three years after the discovery, by the aggrieved party, . . .:); 78-14-4 ("Unless it is commenced within two years after the plaintiff or patient discovers,") In each of these cases, the statute of limitations does not even commence until the matter is discovered. If the Legislature had used similar language here, any class B misdemeanor regarding fraud or

public officer could be brought at any time within a year of discovery, whenever the discovery occurred. The two-year statute could be completely ignored. The State argues for an interpretation of the current statute which would have that same result. The State argues that it has one year from discovery to file, regardless of whether the two-year statute expires well after discovery and before filing. If that had been the intent of the Legislature, the Legislature could have used similar language to its statutes quoted above. The Legislature could have either (1) omitted the language, "if the [two-year] statute has expired . . ." (2) said that the State could have one year from discovery to file, regardless of the two-year statute, or (3) said that the State has one year to file from discovery, or two years from the event, whichever is longer. The last of these three possibilities is precisely the interpretation which the State seeks. Defendant asserts that such language was not used, because the Legislature did not desire for complaints to be filed one year after discovery, if known within the regular two-year period, and not withing one year of discovery or withing the regular two-year period, whichever is longer, as the State argues. The narrower construction is consistent with policy considerations mentioned above. The fact that language similar to the above statutes was not used, is an indication that the Legislature did not want every case to begin to run when the matter is discovered, and to allow prosecutors to sit on claims, known during the regular two year period of time, but the Legislature desired only to allow prosecution where the type of crime was such that it resulted in the inability of the State to bring actions within that two-year period of time.

A comparison to other language used by the Legislature also assists in concluding that the narrow interpretation is correct. In 76-1-304(1), the Legislature provides that, "the period of limitation does not run against any defendant for any period of time in which the defendant is out of the State following the commission of an offense. If the State Legislature had intended the consequence espoused by the State, the Legislature could have used similar language that the two-year limitation does not run when the crime is for "either fraud or a breach of fiduciary obligation" until the crime is discovered. If the Legislature had used such language, then the filing of the Complaint at issue would have been clearly timely, however, the Legislature chose not to have a general tolling of the two-year statute of limitations if a crime is discovered within the two years.

POINT III

THERE IS ONLY ONE DISCOVERY RULE APPLIED IN THREE CIRCUMSTANCES, THEREFORE, THE STATE'S ARGUMENT FAILS THAT INTERPRETATION OF THE STATUTE IN THIS CASE SHOULD BE CONTRARY TO ALL OTHER LEGISLATIVELY AND JUDICIALLY CREATED CIRCUMSTANCES.

As indicated in POINT II, above, the State's position is that the statute at issue is unique and contrary to all other judicially created or legislatively created discovery statutes, considerations, or rules. See also, plaintiff's argument that, "Section 76-1-303, however, is fundamentally different from the two judicially created 'discovery rules,' and the above cited 'discovery rules' that the Legislature has created for civil causes of action." State's Br. at 12.

Contrary to plaintiff's argument, the Utah Supreme Court, as recent as 1998, has clearly indicated that there is only one consistently applied discovery rule, which is used in different circumstances, either by the Legislature, or by the Courts. In Walker Drug Company v. LaSalle Oil Company, 902 P.2d 1229 (Utah 1995) the Supreme Court discussed the three circumstances where the single discovery rule may apply, stating, "We have previously recognized three circumstances in which the discovery rule applies: (1) in situations where the discovery rule is mandated by statute; (2) situations where plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct; and (3) in situations where the case presents exceptional circumstances and the application of the general goal would be irrational or unjust . . ." Id. at 1231, citing Warren v. Provo City Corporation, 838 P.2d 1125, 1129 (Utah 1992). (Emphasis added). Thus, there are not three discovery rules, but one discovery rule consistently applied in three circumstances, as indicated above. As recently as 1998, in Williams v. Howard, 970 P.2d 1282 (Utah 1998), the Court reiterated the fact that there is one discovery rule applied in three situations: "There are three situations in which we have determined that application of the discovery rule is appropriate: [these three situations omitted here]." Id. at 1285 (Emphasis added.) The Court went on to hold that in a medical malpractice case, the creation of a per se rule, applying the rule to legal malpractice, is unnecessary, because, there is only one rule applied in different circumstances. See also the quote from O'Neal, above, at page 9, wherein the court talks of "the discovery rule."

In every circumstance or situation in which "the discovery rule" is applied by appellate courts in Utah, it is applied to deny extension of the statute of limitations where the party filing the Complaint could have brought the action within the statutory period of time. The State has cited no Utah circumstance, whatsoever, in which a party who knew of the existence of a cause of action within the regular limitations period, was allowed to take advantage of the discovery rule, statutory or judicial. As only one example, in Williams v. Howard, above, the Court stated that, "as with the plaintiff in Atwood [v. Sturm, Ruger & Co., 823 P.2d 1064 (Utah 1992)] Williams does not offer a reasonable explanation as to why he could not have filed an action against Howard, . . . at sometime [prior to the running of the statute of limitations]" Id. at 1285-86. (Emphasis added). The Court continued, "[W]e stress that 'the discovery rule does not apply to a plaintiff who becomes aware of his injuries or damages and the possible cause of action before the statute of limitations expires.'" Atwood, 823 P.2d at 1065. (Emphasis added).

In O'Neal v. Division of Family Services, above, the Utah Supreme Court specifically talked of the requirement of the discovery rule, that a plaintiff show that he was unaware of his cause of action until after the expiration of the statute of limitations. The Court then stated, "This requirement [that the plaintiff shows he was unaware of his cause of action] would seem a definitional prerequisite to reliance on any version of the discovery rule, judicial or legislative. [citation omitted]." Id. at 1144 (emphasis added). Thus, the Utah Supreme Court has clearly established that in Utah, extensions to statute of limitations, judicial or legislative, simply do not apply where a suit can be timely

brought within an initial limitation period. As indicated in the immediately preceding quotation. As stated in O'Neal, this principle applies to "any version of the discovery rule, judicial or legislative." Id.

The State cites to four cases from other states which hold as the State desires. State's Br. At 7. In none of those cases does the court mention the policies and principles espoused by the Utah Supreme Court, mentioned above.

In addition, there is no discussion of balancing the two competing interests (1) not to allow the State to sit on known cases until after the two-year limitation period has expired, compared to (2) ensuring that the State can prosecute every case even if first discovered after the clerk's office closes the last filing day of the regular statute of limitation. See POINT V, below.

Considering the policies discussed above, the better interpretation is the narrow one described by the Defendant.

POINT IV

A REASONABLE BALANCING OF INTERESTS RESULTS IN REQUIRING THE STATE TO FILE CHARGES WHEN KNOWN WITHIN THE STATUTE OF LIMITATIONS.

The State states that the Legislature reasonably balanced the State's interest in prosecuting crime with a defendant's interest in avoiding prosecution on a stale charge. State's Br. at 8. The Defendant comes to a different conclusion. The proper balancing is as follows. On the one hand, defendants should not be subject to stale claims. A claim

is stale if the State has discovered it and knowingly allows the statutory two years to expire. On the other hand, if the statute "has expired," and the case involved concealment or fraud, which, by its nature may not have been able to be discovered because of the defendant's fraudulent or concealing actions, the case may, nevertheless, be filed after the expiration of the two-year period, with the other limitations provided by the statute. That balancing is proper. What is not a reasonable balance, would be allowing the State the discretion in all sorts of known cases involving fraud to knowingly sit on a matter and let it become stale, in spite of the fact that it could have been brought well before it became stale. Such a proper balancing as stated above, also gives meaning and effect to the principles and directives of the Utah Supreme Court in POINT II, above, that courts should be extremely cautious in tolling statutes of limitation, and not allow "a plaintiff who was aware of the facts . . . [to] claim the benefit of the discovery rule." POINT II, above.

POINT V

INTERPRETATION OF THE STATUTE TO PRECLUDE THE STATE FROM COMMENCING ALREADY KNOWN ACTIONS AFTER THE LIMITATIONS PERIOD HAS EXPIRED DOES NOT YIELD AN ABSURD RESULT

The State's argument concerning absurd results fails for at least three reasons: (1) cases could be brought even if first discovered close to the end of the statutory period; (2) the State's same argument would apply to the regular two-year period or any statute of limitations; (3) the State's hypothetical is an extreme, unlikely, ad absurdam

possibility, which even if it occurred, would be better than allowing limitation periods to be regularly ignored where long since discovered by the State; and (4) in an extraordinary circumstance perhaps the judicially created rule for extraordinary circumstances could be employed. Each of these reasons will be separately discussed below.

1) Cases could be brought even if first discovered close to the end of the statutory period. The State argues that results would be absurd if the State were not allowed to disregard the original limitations period, because the State might theoretically be barred in a hypothetical case from prosecuting if discovered too close to the expiration of the two-year period to be able to investigate, screen and file the case. However, the State only needs probable cause in order to file a Complaint, and that can be accomplished within a few minutes of time. If an offense is "discovered," that means that at least probable cause has been found, and a Complaint or Information can be filed immediately. If there is no probable cause to believe an offense has been committed, then the offense has not yet been discovered. If an offense is suspected but there is not yet probable cause, the offense has not been discovered and investigation can continue until probable cause is found. During investigation, as soon as probable cause is discovered, an Information can be drafted within minutes and filed. As an illustration only, as a former prosecutor, I and my associates would often come to work in the morning, review investigative reports demonstrating possible probable cause regarding crimes just committed or discovered, draft Informations, and be in court by 9:00 am or

9:30 am for the filing of the Informations at the time of an arrestee's arraignment. On the other hand, if the facts did not establish probable cause, no crime was discovered, no information was prepared and filed, and the arrestee was released at the appearance in court. Investigation may or may not then continue to try to discover whether a crime has been committed. Thus, the only cases which might not be able to be brought under the Defendant's narrow construction, might be cases discovered after the clerk's office closed on the last filing day in the regular two-year period. That is not absurd, even if such an isolated, extreme case might ever exist.

An absurd result does occur, however, under the State's interpretation where the State has the discretion in all cases discovered in the last year of the two-year statute, to sit on all such cases until stale. That is more absurd and is more likely to be able to occur in a vastly greater number of cases.

2) The State's same argument would apply to the regular two-year period. The State's same argument would apply to any statute of limitations. If we are to imagine possible, but ad absurdum scenarios, as the State proposes, we could imagine a theft by an unknown person not involving fraud, evidence of the identity of whom is finally discovered, after investigation or by accident, very shortly before the running of the two-year statute of limitations. The statute still runs, and the Complaint may or may not be able to be brought, depending upon timing and resources of the prosecutor. Such an extreme, imaginative case does not make the regular two-year statute any more inapplicable or unconstitutional that the Defendant's narrow interpretation of the statute at issue.

3) The unlikely State's hypothetical is an extreme, unlikely, ad absurdam possibility, which even if it occurred, would be better than allowing limitation periods to be regularly ignored where long since discovered by the State. The likelihood of a case being discovered within a few hours of the expiration of a statute of limitations so that prosecution could not be undertaken is remote at best. Far more likely and far worse would be the State doing precisely what it did in this case, that is, discovering an alleged crime during the last year of the regular statute of limitations, and sitting on it. The State talks of balancing. Proper balance would be to require the State to act responsibly where a great number of cases are far more likely to be affected, that is, where the State may discover a crime anywhere in the last year of a regular statute of limitations. That would be far better than allowing the State discretion to sit on all of that greater number of potential cases, that is, all cases discovered during the last year of the regular statute, in favor of assuring that the State can prosecute that unlikely possibility that one of those cases may be discovered after the clerk's office has closed the last day filing is allowed in the two-year period.

(4) In an extraordinary circumstance, perhaps the judicially created rule for extraordinary circumstances could be employed. The State uses a hypothetical, extreme example to argue an absurd result. Even if a class B misdemeanor were first discovered just after the clerk's office closed on the last day of filing, not in time for an Information to be typed up and filed, perhaps the second judicially recognized circumstance where the discovery rule can be applied, extraordinary circumstances could be employed to

allow filing if such an unlikely extreme example occurred.

POINT VI

IN THE ALTERNATIVE, THE COURT'S RECOGNITION AND APPLICATION OF THE DISCOVERY RULE'S PREREQUISITE, FAILURE OF DISCOVERY IN TIME TO FILE, WAS CORRECT.

The lower court did not accept Defendant's interpretation of the statute, set out in the above points, because the court felt that the critical language in the statute, "If the period prescribed [in the regular statute] has expired," may have been added to the Section 303 to ensure that a case discovered in the first year of the regular statute would not create a mere one year limitation. Memorandum Decision, R. 86-87. The court felt that the legislature may have added the language at issue to avoid that result. The Defendant would disagree with that position in one regard, because the critical language does not address cases discovered in the first year. However, in the alternative to the Defendant's position set out above, the court was correct in applying the principles in O'Neal v. Family Services, above (821 P.2d 1139, 1144 (Utah 1991)). The lower court appropriately cited to page 1144 of that decision. Memorandum Decision, R. 88. On that page of O'Neal, the Supreme Court mentions the "prerequisite to any application of the discovery rule - ignorance by the plaintiff of the facts giving rise to the cause of action." Id. at 1144. (Emphasis added). As indicated above, the discovery rule is found in three circumstances, one legislative and two judicial. A prerequisite to any application of the discovery rule, in any of these circumstances, is ignorance by the plaintiff of the

case during the regular statutory period.

In O'Neal, after mentioning the prerequisite, the Court recounted case after case illustrative of the prerequisite's application to the discovery rule:

> Brigham Young University v. Paulsen Constr. Co., 744 P.2d 1370, 1374 (Utah 1987) (stating that where plaintiff is aware of facts serving as basis for cause of action three and one-half years before statute of limitations expires, the action is time-barred); Auerbach Co. v. Key Sec. Police, Inc., 680 P.2d 740, 743-44 (Utah 1984) (stating that where plaintiffs offer no basis for invoking discovery rule where underlying cause of action is known and claim is brought one year late, discovery rule is inapplicable); Becton Dickinson & Co. v. Reese, 668 P.2d 1254, 1257 (Utah 1983) (refusing to apply discovery rule where plaintiff is aware of basis for claim before statutory period expired); Lord v. Shaw, 665 P.2d 1288, 1290-91 (Utah 1983) (stating that where plaintiff has access to the courts and is aware of facts giving rise to cause of action prior to running of statute, claims is time-barred).

Id. at 1144.

In the present case, the lower court applied the principle of that prerequisite to preclude the State from unreasonably sitting on the case where the State had had actual knowledge of the case almost a year before the regular statute expired. The lower court ruled that if the State was aware of the facts in time to file, they had to do so, relying on one of the two judicial circumstances of the discovery rule. The lower court's application of the prerequisite to the discovery rule was correct.

There is only one difference between the position of the Defendant set out in the above Points of this brief and the lower court's position. In the above Points, the above-mentioned principle concerning the necessary prerequisite (lack of timely discovery) to

the application of the discovery rule is argued as a policy whereby the arguably ambiguous statute should be interpreted to preclude the State from sitting on the case until the regular statute of limitations has expired. The lower court's position was to apply the discovery rule's same prerequisite as a matter of law to come to the same result. The Court stated, " . . . [T]his court . . . will follow the dicta from O'Neal in holding that, for the discovery rule of Section 303 to apply, the State must have discovered the action after the general statute of limitations has run." The lower court's application of the principles regarding the discovery rule's prerequisite is also correct.

Whether that prerequisite is applied as a matter of policy as in the above Points, or as a matter of law as in this Point, the result is appropriate and correct, that is, to protect defendants from stale suits, and to force the State which has actual knowledge of an alleged defense, to file during any regular limitations period.

CONCLUSION

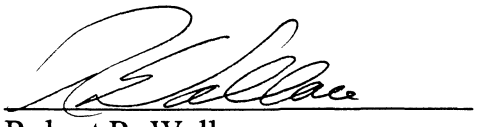
The order of the lower court dismissing the misdemeanor complaint against Marie S. McKinnon should be affirmed.

DATED this 21st day of February, 2002.

Robert R. Wallace
Attorney for Defendant Marie S. McKinnon

CERTIFICATE OF MAILING

I hereby certify that (2) true and correct copies of the attached Defendant's Brief were mailed, postage prepaid, this 21st day of February, 2002 to the following:



Robert R. Wallace