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Case No. 20051180

IN THE SUPREME COURT OF UTAH

BERTINA RAE OLSETH, Plaintiff and Appellant, vs. MATTHEW D. LARSON, Defendant and Appellee.	)	BRIEF OF APPELLEE MATTHEW D. LARSON

ON CERTIFIED QUESTION OF UTAH STATE LAW FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

On Appeal From An Order of the United States District Court for the District of Utah, Civil No. 2:02-CV-1122PGC

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NO ORAL ARGUMENT REQUESTED BY DEFENDANT/APPELLEE MATTHEW D. LARSON

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PRIOR AND RELATED APPEALS

To the best of Appellee Matthew D. Larson's knowledge, there are no prior or related appeals in this case.

ISSUES ON APPEAL

1. Does Utah Code Ann. § 78-12-35 toll the applicable statute of limitations where the person against whom the claim has accrued was at all times amenable to service of process through Utah's long-arm statute, Utah Code Ann. § 78-27-24?

STATEMENT OF THE CASE AND UNDISPUTED FACTS

Olseth filed her first action in this matter on May 15, 2000 against Salt Lake City Corporation ("the City"), Salt Lake City Police Department and various police officers of Salt Lake City in their official capacities (Case No. 2:00-CV-0402C), including Larson. That action alleged civil rights violations resulting from Olseth's arrest and injuries sustained when she was shot while commandeering a police vehicle on May 15, 1998. The only cause of action pled in her complaint, relevant to this action, was for an alleged 42 U.S.C. § 1983 violation based on her allegation of unlawful use of deadly force "against all Defendants in their official capacity."

Olseth's first complaint was dismissed by Judge Tena Campbell on May 15, 2002 for failure to prosecute. Olseth filed her second complaint on October 11, 2002 against essentially the same parties, but named Larson for the first time in his individual capacity. The City moved for dismissal of all causes of action and parties. On June 6, 2003, the court granted in part the

City's motion, allowing only the "loss of limb or member" cause of action to remain against the City and Larson. Memorandum Order and Opinion, Federal Doc. #17.

On May 2, 2003, Olseth filed an Amended Motion for Alternate Means of Service and Second Motion for Enlargement of Time (Doc. # 14). Because Larson was an out-of-state resident, and she was unable to locate him, her Motion requested alternate service of process by publication or mail, and an enlargement of time to effect service. This Motion was granted on June 6, 2003. Order of Alternate Service Upon Defendant Larson, Doc. #18.

Upon the stipulation of the parties (stipulating only to the filing of the Amended Complaint, reserving all affirmative defenses and dispositive claims, if any), Olseth amended her complaint on September 17, 2003. Amended Complaint, Doc. #22. Olseth's Amended Complaint named Larson as the sole Defendant in his individual capacity, and asserted a cause of action against him under 42 U.S.C. § 1983 for alleged violations of her 14th, 9th and 10th Amendment rights.

Larson moved for summary judgment, arguing that the Court lacked personal jurisdiction over him since he was never sued as an individual until Olseth filed her second complaint on October 11, 2002, more than four years

after the incident complained of. Because Larson was sued for the first time in his individual capacity beyond the statute of limitations period, the District Court granted Larson summary judgment. The Court gave Olseth 10 days to research the issue further and petition the Court for reconsideration. The Court further told counsel for Larson that no response to a motion to reconsider would be required, unless notified otherwise by the Court.

Olseth timely filed a Motion to Alter or Amend Judgment (Doc. #42), but failed to address the controlling authority of the case. The Court denied Olseth's motion. Order Denying Motion to Alter or Amend Judgment, Doc. #44. Olseth appealed the Court's ruling to the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit").

On December 16, 2005, the Tenth Circuit issued its Certification of Question of State Law, ruling in Larson's favor on one issue, and certifying the current issue to the Utah Supreme Court. The Utah Supreme Court issued its Order of Acceptance on February 6, 2006.

SUMMARY OF ARGUMENT

The Federal District Court properly granted summary judgment in favor of Larson, holding that Utah Code Ann. § 78-12-35 does not toll the applicable statute of limitations where the person against whom the claim

has accrued was at all times amenable to service of process through Utah's long-arm statute, Utah Code Ann. § 78-27-24.

Olseth's cause of action accrued on May 15, 1998 when she was shot by Officer Larson while she attempted to commandeer a police vehicle. Olseth never sued Larson as an individual until October 11, 2002, four years and five months after her cause of action accrued. It is undisputed that the applicable statute of limitations in this case is four years.

Utah Code Ann. § 78-12-35 did not toll the four year statute of limitations in this matter. This Court held in Lund v. Hall that limitations periods are not tolled when a defendant is out of state so long as he is still amenable to service of process in Utah. This is the majority position of most states, and satisfies the purposes of limitation periods: encourage promptness in prosecution of actions, and avoid the injustice resulting from stale claims, lost evidence, faded memories and disappearing witnesses.

By virtue of Utah's long arm statute, Larson was at all times subject to service of process whether physically in the state or out. By citing with approval two cases holding that limitations periods are not tolled where the defendant was amenable to service of process by virtue of those states' long arm statutes, Lund has, by implication, approved of the principle that long

arm statutes are acceptable substituted process for the purposes of tolling questions.

Olseth could have applied to the district court at any time for substituted service of process on Larson. Indeed, she successfully petitioned the district court on May 2, 2003, and received leave of court to serve Larson by publication, albeit much too late. Olseth has failed to show why she could not timely serve Larson under Utah's long arm statute, and he should not be prejudiced by her dilatory attempts, or lack thereof, to afford *him adequate due process.*

Because Larson was amenable to service of process by virtue of Utah's long-arm statute, no tolling applies. This is the judicial trend in Utah, and the majority position nationally. Thus, this Court should hold that Utah Code Ann. § 78-12-35 does not toll the applicable statute of limitations where the person against whom the claim has accrued was at all times amenable to service of process through Utah's long-arm statute, Utah Code Ann. § 78-27-24.

ARGUMENT

I.

NO TOLLING APPLIES

A.

OLSETH'S BRIEF LARGELY FAILS TO ADDRESS THE RELEVANT ISSUES

At the outset, Larson informs the Court that he does not intend to address the outrageous, ridiculous, and unsupported allegations made by Olseth regarding the shooting, alleged perjury, and concealment of evidence on pages 12 and 13 of her brief. Those allegations serve no purpose other than to prejudice the Court against Larson, they are irrelevant to the issues at hand, and Larson requests that they be stricken and/or ignored by the Court.

Further, Larson will not respond to the arguments in Olseth's brief that do not relate to the issue of law certified to this Court by the United States Court of Appeals for the Tenth Circuit. Specifically, all issues identified by Olseth in her Summary of the Arguments on page 6 of her brief are irrelevant to the certified question of law, and are largely not addressed in her Argument[1]. In addition, arguments related to choice of appropriate

[1] Olseth argues that Larson failed to prove that he was "ever amenable to service." Not only is this argument irrelevant, it is Olseth's burden to prove entitlement to tolling of the statute of limitations in this case. *See* Tracy v. Blood, 78 Utah 385, 3 P.2d 263, 266 (1931) ("Apparently, all courts are agreed, and in this case it is conceded that the burden was upon the plaintiff to plead and prove facts sufficient to toll the statute of limitations."); Kennedy v. Lynch, 513, P.2d 1261, 1263 (N.M. 1973) (Therefore, when the plaintiff relies upon exceptions to prevent the running of the statutory period, he must prove that he is

statute of limitation in Point I (pp. 7-9), and evidence of Larson's amenability to service in Point II (16-17) are similarly irrelevant, and will not be addressed.

B.

Utah Code Ann. § 78-12-35 did not toll the four-year statute of limitations.

Olseth and Larson agree that the applicable statute of limitations in this case is four years. They disagree, however, as to how the limitation period should be computed. Olseth attempts to persuade this Court that Larson's absence from the State of Utah tolled the four-year statute of limitations during the time period he was out of state. Her argument disregards the purpose of Utah's tolling statute, relies on overruled case law, and ignores state and federal case law to the contrary. Furthermore, she conveniently fails to disclose the fact that she requested and was granted leave by the district court to serve Larson by publication.

Utah Code Ann. § 78-12-35 [hereinafter referred to as "Utah's tolling statute"] does not differ materially from its original enactment in Laws of Utah (1872), chapter IV, section 23. At that time, a person's ability to

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entitled to the benefit of all these exceptions."); 54 C.J.S. Limitations of Actions, § 365 ("In order to show that a cause of action apparently barred by limitations or prescription is not barred because of extraneous facts, it is necessary to prove all the facts put in issue that are necessary to take the case out of the operation of the statute."). The record is devoid of any facts supporting Olseth's contention that Larson was not amenable to service of process at all times. Therefore, her argument fails.

obtain personal jurisdiction over an out-of-state resident was severely limited by the due process clause of the Fourteenth Amendment to the United States Constitution. Given this restraint, the tolling statute served the important purpose of preventing the statute of limitations from expiring on valid claims when the defendant was out of state and personal jurisdiction was not possible. Pennoyer v. Neff, 95 U.S. 714 (1877) (holding in personam jurisdiction could only be obtained if the defendant is personally served within the state's territory or the defendant voluntarily appears).

In the early 1900's, the jurisdictional reach of the states' courts began to expand, and by 1945, the United States Supreme Court adopted a more flexible standard for the assertion of personal jurisdiction. International Shoe Co. v. State of Washington, 326 U.S. 310 (1945). This new standard only required that the defendant have certain minimum contacts with the forum state such that the maintenance of the suit did not offend "traditional notions of fair play and substantial justice." Id. at 316. As a result of International Shoe and its progeny, states began enacting long-arm statutes, which were comprehensive jurisdictional statutes based upon the defendant's conduct in the forum state. These long-arm statutes greatly expanded the jurisdictional reach of the states' courts, allowing a court to exert personal jurisdiction to the outer limits of the due process clause.

Utah's long-arm statute, Utah Code Ann. § 78-27-24, was enacted in 1969. It allowed Utah's courts to exert personal jurisdiction over any person, whether or not they are residents of Utah, if that person committed any of the acts enumerated in the statute. Its provisions are to be applied "so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution." Utah Code Ann. § 78-27-22. Utah Code Ann. § 78-27-25 allows service of process upon any party outside the state pursuant to the provisions of Rule 4 of the Utah Rules of Civil Procedure.

Utah's tolling statute must be interpreted in light of its history, purpose, and in context with other statutes. When the purpose of the statute conflicts with its literal meaning, the purpose of the statute must be given effect. The tolling statute's purpose is to prevent the expiration of valid claims by virtue of the running of the statute of limitations where personal jurisdiction over a defendant cannot be obtained because the defendant is no longer within the state. Thus, in light of this purpose, the language in the tolling statute referring to a defendant who is "out of the state" describes a defendant who is beyond the personal jurisdiction and process of the court and not merely a defendant who is physically absent from the state.

Further, the purpose of the tolling statute should be harmonized with the purposes of the long-arm statute, the substitute service of process provisions of Rule 4 U.R.C.P and the statute of limitations, which are to allow parties to expeditiously adjudicate their claims. The purpose of the tolling statute is served where the long-arm statute or substitute service statute brings the defendant within the personal jurisdiction of the court. Under these circumstances, the tolling statute no longer applies because the need to delay the running of the statute of limitations ceases to exist. Under this construction, the purposes of all the provisions are served.

To construe Utah's tolling statute in the manner urged by Olseth would allow lawsuits to be tolled indefinitely, for no good purpose, and to be brought in many cases at the virtually unlimited pleasure of the plaintiff. Defendants would not know with any certainty when they were safe from the threat of litigation. Plaintiffs could defer initiation of a suit until witnesses and evidence become unavailable and effectively deprive the defendant of their defense. Our legislature cannot have intended such an absurd and illogical result.

Against this background, Olseth's reliance on Keith-O'Brien Co. v. Snyder, 169 P. 954 (1917), is misplaced. In Keith-O'Brien, the Utah Supreme Court found that even though the defendant's wife continued to

reside in the state during the defendant's seven-year absence, the statute of limitations ran only during the time periods defendant was in state. At the time, most jurisdictions with similar statutes permitted such tolling of the limitation period.

This view has slowly eroded, beginning with Snyder v. Clune, 390 P.2d 915 (1964). The Snyder Court held that a non-resident motorist's absence from the state did not toll the statute of limitations where substituted service was provided for by statute (the Nonresident Motorist Act). The Utah Court of Appeals revisited the same issue twenty-three years later in Van Tassell v. Shaffer, 742 P.2d 111 (Utah Ct. App. 1987). By this time, seventy years after the Keith-O'Brien decision, the majority of states did not apply comparable tolling provisions where a defendant was out of state but still amenable to process. The Van Tassell court reluctantly followed the Supreme Court's precedent from Keith-O'Brien, stating:

> We must also assume that proceedings under the nonresident motorist act are the only Utah proceedings in which the applicable statute of limitations is not tolled by absence from the state until and unless the Utah Supreme Court states otherwise. **We observe, however, that the majority view, which holds that defendant's absence does not toll the statute of limitations where defendant is amendable to personal jurisdiction, would be preferred by this Court as the Utah rule, as we find it to be more consistent with the purposes of statutes of limitations.**

Van Tassell, 742 P.2d at 113 (footnote omitted, emphasis added).

In 1997, the Utah Supreme Court agreed, finally overruling the Keith-O'Brien precedent in Lund v. Hall, 938 P.2d 285 (1997). The Court held "[w]e agree with the court of appeals' opinion in Van Tassell regarding the preferred interpretation of the tolling provision and hold that under section 78-12-35 the statute of limitations will not be tolled when a defendant is out of state, so long as he is still amenable to service of process in the state of Utah." Id. at 290.

The Court noted that its holding was consistent with the majority of states' treatment of the issue, and recognized the valid purpose of statutes of limitations: to encourage promptness in prosecution of actions, and avoid the injustice resulting from stale claims, lost evidence, faded memories and disappearing witnesses. Id. at 291. With the modern concept of substituted service, it was no longer necessary to toll the limitations period when a defendant was otherwise amenable to service of process at all times, whether he was physically in state or not. The Court reasoned that "tolling the statute of limitations regardless of whether defendant remained amenable to service of process could lead to claims being filed many years after the cause of action arose and would be contrary to the rationale behind statutes of limitations." Id.

Olseth argues that Lund should be limited only to motor vehicle accidents involving nonresident motorists, but she argues for a distinction without importance. While it is true that the Court has not had occasion to pass on the effect given to the tolling statute in a context other than an automobile accident involving the nonresident motorist act, the Lund Court did not limit its holding to such cases. The Court expressly stated that where substituted service is available, the limitations period will not be tolled.

It should be noted that the Lund Court cited with approval two cases that held the statute of limitations was not tolled where defendant was amenable to service of process by virtue of the state's long arm statute. *See* Bray v. Bayles, 618 P.2d 807, 810 (Kan. Ct. App. 1980) and Lipe v. Javelin Tire Co., 536 P.2d 291, 294 (Idaho 1975). The majority of other states have adopted a similar view[2].

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[2] *See, e.g.*, Selby v. Karman, 521 P.2d 609, 611 (Ariz. 1974) ("[w]e, therefore, hold that the terms 'without the state' and 'absence' as used in A.R.S. § 12-501 mean out of the state in the sense that service of process in any of the methods authorized by rule or statute cannot be made upon the defendant to secure personal jurisdiction by the trial court."); Venables v. Bell, 941 F. Supp. 26, 27 (D. Conn. 1996) ("[Connecticut State Code] section 52-590 does not toll the running of a limitations period just because a defendant cannot be found. Rather, the statute preserves a right of action only if the defendant's absence from the state makes it impossible to obtain personal jurisdiction over him in Connecticut."); Shin v. McLaughlin, 967 P.2d 1059, 1064 (Hawaii 1998) ([w]e hold that the statute of limitations is not tolled when a defendant is 'out of state,' as long as he is still amenable to service of process in the state. This interpretation is also consistent with courts in other jurisdictions construing similar statutes"); Stonecipher v. Stonecipher, 963 P.2d 1168, 1173 (Idaho 1998) (construing nearly identical tolling provision, "[w]here jurisdiction over a defendant may be had under the 'long arm statute,' the defendant is not absent from the state within the meaning of [Idaho tolling provision]."); Ko v. Eljer Inds., Inc., 678 N.E.2d 641, 648 (Ill. App. 1997) (no tolling where defendant subject to service of process outside of Illinois pursuant to long-arm statute); Hansen v. Larsen, 797 A.2d 118, 122 (Ct. App. Md. 2002) ("a person is not 'absent from the State' merely because he or she does not reside in Maryland . . . if jurisdiction over a defendant may be had under the long arm statute, the defendant is not absent from the state within the meaning of the statute that tolls the running of a statute of limitations."); Doe v. Anderson, 524 N.W.2d 336, 341 (Neb. 1994) ("the tolling

Interestingly, less than three months prior to the Utah Supreme Court's decision in Lund, Utah's federal district court was faced with predicting how the Utah Supreme Court would rule in a factually similar case. In Ankers v. Rodman, 995 F. Supp. 1329 (C.D. UT 1997), U.S. District Court Judge David Sam considered Plaintiff Ankers' battery complaint against pro basketball player Dennis Rodman. Ankers filed suit against Rodman beyond the one-year limitation period for battery. Rodman moved for dismissal, and Ankers argued (as did Lund and Olseth) that Utah Code Ann. § 78-12-35 tolled the limitations period while Rodman was absent from the state.

Rodman argued that he was subject to service of process under Utah's long arm statute for the entire time since Ankers' cause of action arose. Because no Utah appellate court had considered whether Section 78-12-35 applied to nonresident defendants who are subject to service under the long arm statute, Judge Sam was required to anticipate how Utah's Supreme Court would rule. After a thorough review and analysis of Utah precedent,

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statute does not suspend the statute of limitations when one is absent from the state but nonetheless remains amenable to the service of personal process."); Dupree v. Zenith Goldline Pharmaceuticals, 63 S.W.3d 220, 222 (Missouri 2002) (no tolling where service upon defendant can be had pursuant to long-arm statute); Kennedy v. Lynch, 513 P.2d 1261 (N.M. 1973); State v. McGarry, 151 A.D.2d 819 (S. Ct. N.Y. App. Div. 1989); Meyer v. Paschal, 498 S.E.2d 635, 639 (S.C. 1998) ("we find the tolling statute is inapplicable when the nonresident defendant is amenable to personal service of process and the defendant can be brought within the personal jurisdiction of our courts."); Arrowood v. McMinn County, 121 S.W.2d 566 (1938) (no tolling unless defendant's absence from state is such as to prevent service of process); Summerrise v. Summerrise, 454 P.2d 224 (Wash. 1969) (defendant's absence from state did not toll limitation period because plaintiff could have secured personal jurisdiction over defendant under long-arm statute).

including Snyder and Van Tassell, Judge Sam correctly concluded that cases involving the nonresident motorist act are not the only ones where the Utah Supreme Court would decide not to toll the limitation period due to absence from the state where the defendant is subject to the reach of Utah's long arm statute.

There, as here, a defendant cannot deprive a plaintiff of the opportunity of suing him by absenting himself from the state during the period of limitation. Because the long arm statute subjects the defendant to the jurisdiction of the state, the defendant's absence does not deprive the plaintiff of such an opportunity.

Utah's express purpose in providing for jurisdiction over nonresidents is to "provide its citizens with an effective means of redress against nonresident persons, who, through certain significant minimal contacts with this state, incur obligations to citizens entitled to the state's protection." Utah Code Ann. § 78-27-22. Utah's long-arm statute provides that:

> **Jurisdiction over nonresidents--Acts submitting person to jurisdiction.** Any person . . . whether or not a citizen of resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself . . . to the jurisdiction of the courts of this state as to any claim arising our of or related to:
>
> . . .(3) the causing of any injury within this state whether tortious or by breach of warranty . . .

Utah Code Ann. § 78-27-24 (3).

In this case, the record contains no valid explanation for Olseth's delay of more than four years from the date that Larson allegedly injured her. It is nonsensical to suppose that, where Larson was at all times subject to the personal jurisdiction of Utah courts and was within reach of the court's process, Olseth could refrain from taking action against Larson until after the limitations period expired simply because Larson resides in another state. Larson submitted himself to the jurisdiction of the state of Utah under the long arm statute by virtue of his alleged role in causing injury to Olseth in Salt Lake City on May 15, 1998. Whether physically in state or out, he was at all times amenable to service of process in the state of Utah. Olseth could have applied to the court at any time for substituted service by publication pursuant to Rule 4 of the Utah or Federal Rules of Civil Procedure and Utah's long-arm statute. Indeed, she did just that on May 2, 2003, and received leave of court to serve Larson by publication, albeit much too late. Olseth has utterly failed to show any reason why Larson could not be served within the four-year limitation period, and he should not be prejudiced by Olseth's dilatory attempts, or lack thereof, to serve him with process.

CONCLUSION

Contrary to Olseth's assertion, Utah Code Ann. § 78-12-35 did not toll the four-year statute of limitations. Pursuant to Utah's long-arm statute and substituted service of process provisions, Larson was at all times subject to the personal jurisdiction of Utah's courts, and Olseth's failure to timely avail herself of these provisions is fatal to her claims. This Court should conclude that Utah's tolling statute is inapplicable where a nonresident defendant is amenable to service of process and the defendant can be brought with the jurisdiction of Utah's courts.

Therefore, Defendant/Appellee Matthew D. Larson respectfully requests that this Court AFFIRM the District Court's decision to grant summary judgment in Larson's favor.

Dated this 30th day of May, 2006.

J. WESLEY ROBINSON
Senior Salt Lake City Attorney
Attorney for Appellee
Matthew D. Larson

CERTIFICATE OF DELIVERY

I hereby certify that on the 30th day of May, 2006, I caused to be mailed, first class postage pre-paid, two true and correct copies of the foregoing BRIEF OF APPELLEE MATTHEW D. LARSON to:

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