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Donald V. Tolman v. K-Mart Enterprises of Utah, Inc. et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

DONALD V. TOLMAN, Plaintiff and Appellant, vs. K-MART ENTERPRISES OF UTAH, INC., a Utah corporation, and JEFF T. DONG, Defendants and Respondents.	Case No. 14,625

BRIEF OF APPELLANT

Appeal from Judgment of the Fourth Judicial District Court of Utah County, Honorable Allen B. Sorensen, Judge

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STATEMENT OF THE NATURE OF THE CASE

This is an action for damages for embarrassment, humiliation and disgrace arising out of the false arrest of plaintiff.

DISPOSITION IN THE LOWER COURT

This matter was decided upon defendants' Motion for Summary Judgment. From a summary judgment for defendants of no cause of action the plaintiff appeals.

NATURE OF RELEASE SOUGHT ON APPEAL

The appellant seeks to have judgment of the Court reversed and a trial granted to determine evidence and to determine damages.

STATEMENT OF FACTS

On November 16, 1974, Plaintiff Donald V. Tolman entered the place of business of Defendant K-Mart Enterprises

of Utah, Inc. (hereinafter referred to as "K-Mart") for the purpose of purchasing a can of body putty. He proceeded directly to the automotive department. After examining several different brands he selected a can and proceeded to the front of the store. Before arriving at the checkout counter he noticed that there were two price tags on the can. He returned to the automotive department and picked out another kit and started walking towards the checkout counter. As he was standing in line, he noticed that there were two (2) labels on this kit too. Plaintiff was in a hurry and rather than walk back to the automotive department and look for a can with only the lower price, he just peeled off the label with the higher price. He then paid for the item and proceeded to leave the store.

At this point Defendant Jeff Dong stopped plaintiff and informed him he was a security officer. He told plaintiff that he was under arrest. Plaintiff asked what it was that he had supposedly done to which Defendant Dong stated that that was what they all said.

Defendant Dong then called to another employee--the store manager--in a loud voice saying that he has just arrested plaintiff because plaintiff had tried to defraud K-Mart.

The store manager asked plaintiff if he would walk to the back of the store and not cause any disturbance. The store manager and Defendant Dong then escorted plaintiff to the rear of the store with one walking in front and the other

to plaintiff's side. Plaintiff was made to empty his pockets and then they asked to see the package. Defendant Dong took out the car body kit that plaintiff had just purchased and stated that he had seen plaintiff taking labels off containers and putting them on other items. Plaintiff objected and offered to take defendants to the area he had bought the item and show them that there were other kits that also had more than one price tag. However, defendants refused to go and examine the other body kits.

At this time, Defendant Dong produced a form which purportedly relieved K-Mart of any liability or responsibility for plaintifff's arrest. Defendants requested palintiff to sign said form with the additional impetus that if he would sign it the judge would be easier on plaintiff. Plaintiff refused to sign, at which time he was informed that if he did not they were going to call the police. However, defendants did not call the police right then, but continued to try and convince plaintiff to sign the release of liability.

Finally the police were called and plaintiff was escroted to the front of the store and when outside was handcuffed and placed in the seat of the police car and escorted to the Orem City Jail. Here he was photographed and booked.

Plaintiff remained at the jail approximately

one and one-half (1 1/2) hours before being released on bail. He went to Brigham Young University where, after telling his brother what had happened, they returned to K-Mart to purchase another of the kits as evidence. However, all of approximately two dozen of the same kits had been removed and there remained only an empty space. At the criminal trial plaintiff was found not guilty and several items were placed in evidence, which had two or three and as many as six or eight price tags on a single item as claimed by plaintiff, all different prices.

Defendants' Motion for Summary Judgment was granted upon the basis that Section 78-11-29, Utah Code Annotated, 1953, as amended, which reads as to actions for false imprisonment is applicable to actions for false arrest. Plaintiff asserts: (1) that false imprisonment and false arrest are not the same and (2) therefore, false arrest should be governed by Section 78-12-25, Utah Code Annotated, 1953, as amended, which provides that "an action for relief not otherwise provided for by law" shall be brought within four years.

POINT I

FALSE ARREST AND FALSE IMPRISONMENT ARE NOT THE SAME CAUSES OF ACTION

Black's Law Dictionary defines arrest as:

> "To deprive a person of his liberty by legal authority. Taking under real or assumed authority, custody of another for the purpose of holding or detaining

> him to answer a criminal charge or civil demand."

Imprisonment on the other hand is defined by Black's Law Dictionary as:

> The act of putting or confining a man in prison; the restraint of a man's personal liberty; coercion exercised upon a person to prevent the free exercise of his powers of locomotion.

Thus, it is apparent that there does exist some difference between false arrest and false imprisonment due to the very differences in the meaning of the two words.

As further evidence of the difference in meaning, plaintiff-appellant cites Fuller v. Zinik Sporting Goods Co., (1975) 538 P.2d 1036, where plaintiff brought suit for false arrest, false imprisonment and malicious prosecution. Thompson v. General Finance Co., (1970) 205 Kan. 76, 468 P.2d 269, speaks of an action for false arrest or for false imprisonment.

In many of the false imprisonment cases, they speak of false arrest or false imprisonment cases. Obviously there must be a distinction between the two or else it would be unnecessary to mention false arrest in connection with false imprisonment.

That a distinction between false arrest and false imprisonment does exist is apparent from the

opinion in Ogulin v. Jeffries, (1953) 121 Cal. App.2d 211, 263 P.2d 75, which cites the following at page 78:

> A person detained pursuant to a lawful arrest cannot bring an action for the false arrest itself. Stubbs v. Abercrombic, 42 Cal. App. 170, 183 P. 458. However, an action for false imprisonment arising from unlawful detention may be maintained if the defendant unlawfully detains the prisoner for an unreasonable period of time and unnecessarily delays taking him before a magistrate within a reasonable time after his arrest. Williams v. Zelzah Warehouse Co., 126 Cal. App. 28, 14 P.2d 177, Section 849 Penal Code, Section 145 Penal Code, Vernon v. Plumas Lumber Co., 71 Cal. App. 112, 234 P. 869, 35 C.J.S. False Imp. § 51, P. 582; Roseman v. Korb, 311 Mass 75, 40 NE 2d 255.

This is cited as correct in Kaufman v. Brown, (1949) 93 Cal. App.2d 508, 209 P.2d 156.

A further distinction between the two is cited in McGlone v. Landreth, (1948) 200 Okla 425; 195 P.2d 268.

As stated in 22 Am. Jur., Section 3, there is a distinction in the manner in which causes of action for false arrest and false imprisonment arise. The distinction is there stated as follows at page 354:

> In a false arrest, false imprisonment exists, but the detention is by reason of an asserted legal authority to enforce the processes of the law; in a false imprisonment, the detention is purely a matter between private persons for a private end, and there is no intention of bringing the person detained before a Court, or of otherwise securing the administration of the law.

This is further cited in Allsup v. Skaggs Drug Center, ( ) 203 Okla 325, 223 P.2d 530.

Though not controlling in the instant case it should be noted that the Statute of Limitations of Pennsylvania 12 P.S. § 31 states:

> Actions of trespass, of assault, menace, battery, wounding, imprisonment or any of them, within two years next after the cause of such actions or suits and not after

In 12 P.S. § 51:

> Every suit to recover damages for malicious prosecution or for false arrest, 'must be brought within one year from the date of the occurrance of such right of action, and not thereafter.'

This points up the fact that at least one legislature had recognized the fact that there is a distinction between false arrest and false imprisonment. The Pennsylvania legislature has seen fit to impose different limitations on each of this causes of action.

The leading Utah case on the distinction existing between false arrest and false imprisonment is Hepworth v. Covey Bros. Amusement Co., (1939) 97 Utah 205, 91 P.2d 507. Wherein at page 509 it states:

> We wish to invite attention to a distinction in the law which we believe has been confused in the briefs. False arrest may be committed only by one who has legal authority to arrest or who has pretended legal authority to arrest. False imprisonment may be committed by anyone who imprisons without legal right. One who commits a false arrest of another

> may be liable in damages for false imprisonment, but from this we must not reason that if there is a failure of proof of false arrest of necessity there is a failure of proof of false imprisonment. False arrest is merely one means of committing a false imprisonment. False imprisonment may be committed without any thought of attempting an arrest.

Though the distinctions are fine, it is apparent that the distinction does exist. A further quotation from a footnote in Banles v. Food Town, (1957), 98 So.2d 719 at page 721:

> In the false or unlawful arrest, the detention is by reason of an asserted legal authority to enforce the processes of law; it is one means of committing a false imprisonment, although a false imprisonment (which includes an unreasonable detention) may be committed without an arrest. 35 C.J.S. False Imprisonment § 2,6; 22 Am Jur. False Imprisonment § 3

POINT II

THE STATUTE OF LIMITATIONS IS TO BE CONSTRUED SO AS TO INCLUDE ONLY THOSE CASES CLEARLY WITHIN THE STATUTORY PROVISIONS

The purpose of statutes of limitations is to give timely notice to an adverse party so he can assemble a defense when the facts are fresh. This is cited in Elkins v. Derby, (1974) 115 Cal. Rptr. 641, 525 P.2d 81, at page 86:

> That the purpose in the oft-quoted words of Justice Holme is to '[prevent] surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared.'

In Los Angeles County v. Security First National

Bank of L.A., (1948) 84 Cal. App.2d 575, 191 P.2d 78, at page 82:

> Statutes of limitations are designed to prevent the resurgence of stale claims after the lapse of long periods of time as a result of which loss of papers, disappearance of witnesses, feeble recollections, make ineffectual or extremely difficult a fair presentation of the case. But they are not intended as defenses to just demands of comparatively recent origin. When the facts relied upon leave it clearly in doubt whether the case is within the statute pleaded courts should not indulge a strained construction in order to support the plea. McGrath v. Butt County, 30 Cal.App. 2d 734, 738, 87 P.2d 381.

The various Supreme Courts of sister states have gone on to declare from this statement of the general purposes of the statutes of limitation that the facts of the case must clearly bring it within the provisions of the law sought to be applied.

In Mowry v. City of Virginia Beach, (1956) 198 Va 205, 93 SE 2d 323, it states at page 326:

> It is generally held that statutes of limitations are ordinarily favored and are entitled to a reasonable construction; but they may not be applied to cases not clearly within their provisions. Their determination is not governed by equitable questions but by the language of the statute construed according to the manifest intention of the legislature, and, when free from ambiguity, should be construed according to the usual meaning of the words and as a whole. 53 C.J.S. Limitations of Actions, § 36 P. 910 and 34 Am. Jur. Limitations of Actions, § 37, page 40.

Bradford v. City of Shreveport, (1974) 294 S.2d 855, at page 859.

> It is well settled that prescriptive statutes are strictly construed and the facts of the case must bring the action clearly within specific provisions of the law sought to be applied. Prescription cannot be extended by analogy from one subject to another. (citations omitted)

In Pugneir v. Ramharter, (1957) 275 Wis 70, 81 NW2d 38, 81 ALR 2d 522 at page 528, a statute of limitations was announced as a defense against an action against a town chairman. The statute referred to a three year limitation or actions against a sheriff, coroner, town clerk or constable for breach of duty. The Court ruled that an action against a town chairman was not banned by this statute. It then went on to say:

> A statute of limitations should not be applied to cases not clearly within its provisions. It should not be extended by construction. 53 C.J.S. Limitations of Actions § 3(b), pp 912-913. Statutes creating limitations are to be reasonably and fairly construed, but should not be extended by construction. Fish v. Collins, (1916) 164 Wis. 457, 160 N.W. 163.

United Carbon Co. v. Mississippi River Fuel Corp. (1956) 89 So.2d 209, 230 La 709 at 212:

> It is equally well settled that prescriptive statutes are strictly construed, and the facts of the case must bring the action clearly within the specific provisions of the law sought to be applied. (citations omitted)

It has been further stated in Williams v. Bailey (Okla) (1954) 268 P.2d 868, at page 873:

> It is a postulate that a limitations statute basis only the particular actions which it recite , and no others, and that a statute can be given such force only as the Legislature could impart to it within the limitations of the State and Federal Constitutions.

This view was again cited in Roberts v. Roberts, (Wyo) (1945) 162 P.2d 117 at 121:

> It was said in an early case that 'the doctrine is well established in the construction of Statutes of Limitations that cases within the reason, but not within the words of the statute are not barred, but may be considered as omitted cases, which the legislature have not deemed proper to limit . . . Nor is this doctrine at war with that so frequently held in the books, that the statute is to be liberally expounded.

In 37 C.J.S. 691, it is said that:

> It is a familiar principle that a statute of limitations should not be applied to cases not clearly within its provisions; it should not be extended by construction. In Hatch v. Spofford, 26 Conn. 432, 438 a case cited by Wood, supra, it is said that statutes of limitations are 'to be construed and applied, according to the exact and specific language of the enactments, and not upon any supposed general and abstract principles of equity. Courts may not extend them to cases, because they seem to be of an analogous character.

Another case which follows this reasoning is Gibson v. Gibson, (1966) 240 Ark. 827, 402 SW 2d 647 where at page 648 the court stated:

> We note at the outset of this discussion that this court many times expressed its reluctance to apply a statute of limitations to actions not specifically enumerated therein.

The statute of limitations as a defense has been furtehr limited in other sister states.

Cannavina v. Poston, (1942) 13 Wash.2d 182, 124 P.2d 787 at page 789:

> While we have long recognized the rule in this state that a plea of the statute of limitations is not an unconscionable defense, we have also recognized and so stated that it is 'not such a meritorious defense that either the law or the fact should be strained in aid of it'. Bain v. Wallace, 167 Wash. 583, 10 P.2d 226, 228 [emphasis supplied]

This view of the statute of limitations has been followed in Hardbarger v. Deal, (1962) 258 N.C. 31, 127 SE 2d 771; Guy F. Atkinson Co. v. State of Washington, (1965) 66 Wash.2d 576, 403 P.2d 880; Rochester v. Tulp, (1959) 54 Wash.2d 71, 337 P.2d 1062; Wickwire v. Reard, (1951) 37 Wash.2d 748, 226 P.2d 192, 23 ALR 2d 1323.

The Court then went on to cite at page 649 from Breining v. Lipincott, 126 Ark. 77, 187 SW 2d 915, page 916:

> The statute is plain and the intent of the legislature must be gathered from the words rised and where the words rised are unambiguous, courts cannot add to or take from them their obvious meaning.

In an Iowa case, Sprung v. Rasmussen, (1970), 180 NW. 2d 430 at 433, the court said:

> Courts do not favor defense of statute of limitations and statutes of limitations should not be applied to cases which do not come within their provisions. Pugnier v. Ramharter, 275 Wis 70, 81 NW 2d 38

The contention as expressed in Point I of this brief is that there are differences which exist between false arrest and false imprisonment. These differences should be recognized and as stated in the cases above, since false arrest is not specifically enumerated, it must come not under the one year statute of limitations, but rather under the four year general statute of limitations for all other types of actions.

In deciding upon this important matter, it is well for the Court to remember what was stated very well in Hotaling v. General Electric Co., (1962) (N.Y.) 16 A.2d 339, 228 N.Y.S.2d 376 at page 379:

> Statutes of limitations are construed, where possible, so as to give the parties their day in court, and should not be defeated by overstrict construction such as the appellants would have us adopt in the present action.

Though in the other cases it has been stated that statutes of limitations should be strictly construed, this states that they should not be so overstrict that they preclude a party to his day in court. This view was further endorsed in Callarama v. Associates Discount Corp. of Delaware, (1972) 329 N.Y.S.2d 711, 69 Misc.2d 287.

In order to allow plaintiff his day in court the Court should operate on that oft-cited maxim of laws that

> If a substantial doubt exists as to which is the applicable statute of limitations, the longer rather than the shorter period of limitations is to be preferred. Hardings Co. v. Eimco Corp, 1 Utah 2d 320 266 P.2d 494 at 323, citing 34 Am Jur. Limitations of Action, § 50.

This is further manifested in Sprung v. Rasmussen, supra. at page 433:

> Where two statutes of limitations are involved, the one giving the longer period to a litigant seeking relief is preferred and applied.

The Court should note a case from New York, Huff v. State of New York, (1965) 263 N.Y. 2d 897, which stands for the proposition that although the claim arose at the time plaintiff was released from imprisonment and he must therefor serve a claim for false arrest against the state within ninety (90) days, the claim did not accrue until the claimant could fairly ascertain the damages he has sustained.

The expression "claim accrued" is not identical with the expression "cause of action arose". The claim accrues when it matures, and the words "claim accrued" have the same meaning as "damages accrued".

The claim did not accrue until the time of acquittal.

In applying these rules, it should be remembered by the Court that plaintiff was arrested on November 16, 1974. The matter came to trial on February 25, 1975 and the Complaint in the matter was filed December 16, 1975, only one month past the claimed one year statute of limitations. Therefore, the Court in seeking to determine the applicable statute of limitations should see that only 10 months had passed since the termination of the trial in this matter. In no way is that a time in which "witnesses could disappear, notes be lost and memories have faded."

POINT III

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BASED UPON STATUTES OF LIMITATIONS WITHOUT SUBMITTING THE MATTER FOR TRIAL AND WITHOUT THE TAKING OF EVIDENCE

Rule 9(h) of the Utah Rules of Civil Procedure provides as follows:

> In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied uopn sufficiently clearly to identify it. If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred. [emphasis supplied]

By the rules of procedure where the allegations of statute of limitations or defense of statute of limitations is asserted, if controverted by the plaintiff, the facts showing that the cause of action is barred must be established at the trial upon the basis of the evidence presented. In this case now before the Court the trial court was premature in granting summary judgment of dismissal without hearing the evidence and making an evaluated distinction whether the action was one for false arrest, humiliation and damages or a simple case of false imprisonment as claimed by the plaintiff.

CONCLUSION

The summary judgment to the defendants and against plaintiff in this action is contrary to the public policy of the courts in this state in allowing each litigant his

day in court and the opportunity to present the substance of this case to an impartial jury. Plaintiff respectfully requests and asks the Supreme Court to reverse the ruling of the trial court and remand the case for trial.

Respectfully submitted this 1st day of September, 1976.

M. Dayle Jeffs

M. Dayle Jeffs

MAILING CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing Brief of Appellant was mailed to Allen Larson of Worsley, Snow & Christensen, at 700 Continental Bank Building, Salt Lake City, Utah 84101, by placing a copy of same in the U. S. Mails postage prepaid, this 1st day of September, 1976.

M. Dayle Jeffs