

1976

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

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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DONALD V. TOLMAN,

Plaintiff and  
Appellant,

vs.

Case No. 14,625

K-MART ENTERPRISES OF  
UTAH, INC., a Utah corp-  
oration, and JEFF T. DONG,

Defendants and  
Respondents.

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BRIEF OF RESPONDENTS

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

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STATEMENT OF THE NATURE OF THE CASE

This is an action for false arrest allegedly  
occurring on November 16, 1974.

DISPOSITION IN THE LOWER COURT

The District Court granted Defendants' Motion  
for Summary Judgment based upon the Statute of Limitations.

NATURE OF RELIEF SOUGHT ON APPEAL

The granting of the Motion for Summary Judgment  
should be affirmed.

## STATEMENT OF FACTS

Respondents agree generally with the Statement of Facts as presented in Appellant's Brief.

Respondents submit, however, that the Statement of Facts in Appellant's Brief is overly detailed and contains many irrelevant factual allegations.

The operative facts of this case, briefly summarized, are as follows (all page references to the transcript of the pretrial conference):

1. The plaintiff went into the Orem K-Mart Store on November 16, 1974 (page 2).
2. At that time he was apprehended by the defendants for attempted shoplifting because it appeared that he had switched some price tags on an item and had gone to the checkout stand paying the lesser amount (page 2 and 3, page 5).
3. This action was initiated more than one year thereafter, the Complaint being filed on December 15, 1975, and Summons served on December 19, 1975. The plaintiff's Complaint sought damages for the alleged false

arrest and alleged that the defendants "arrested Plaintiff, took him to a room in the back of the store and falsely and maliciously detained and imprisoned Plaintiff and falsely brought charges against Plaintiff for theft" (Plaintiff's Complaint, paragraph 6).

4. The sole basis for Plaintiff's Complaint was an alleged false arrest and imprisonment of the plaintiff as is stated clearly in Plaintiff's Complaint and as admitted by Plaintiff's counsel on page 2 of the transcript of the pretrial proceedings.

5. The defendants filed a Motion to Dismiss or for Summary Judgment which was treated by the Court as a Motion for Summary Judgment, and granted, it being undisputed that the plaintiff's Complaint was not filed within one year.



AUTHORITIES AND ARGUMENT

POINT I. THIS ACTION IS BARRED BY  
THE STATUTE OF LIMITATIONS.

It is undisputed that the plaintiff's Complaint herein was not filed until more than one year after the alleged false arrest. The false arrest allegedly occurred on November 16, 1974, and the Complaint was not filed until December, 1975.

The plaintiff's claim, being one for false arrest, is governed by Section 78-12-29, Utah Code Ann. (1953), which provides for a one year Statute of Limitations in "an action for libel, slander, assault, battery, false imprisonment or seduction" (emphasis added).

Respondents agree generally with the proposition asserted by the appellants to the effect that the Statute of Limitations should only bar those actions which are clearly covered thereby.

The appellants contend that the statute should not be strained or applied in an overly strict manner, nor should the meaning of the terms thereof be strained

in order to bar the plaintiff's claim. The respondents agree with that proposition, but would remind the Court that neither, on the other hand, should the terms of the statute be strained in order to remove the bar to a cause of action which otherwise clearly is within the plain language and intent of the statute.

The general rule relating to construction of Statutes of Limitation is as set forth in Section 50 of 51 AmJur2d, Limitation of Actions, page 630:

Formerly, the defense afforded by the Statute of Limitations was not treated with the same favor as ordinary defenses, and being looked on with disfavor, Statutes of Limitation were strictly construed, particularly since such statutes are invariably in derogation of the common law. Now, however, the judicial attitude is in favor of Statutes of Limitation, rather than otherwise, since they are considered as statutes of repose and as affording security against stale claims. Consequently, except in the case of Statutes of Limitation against the government, the Courts are inclined to construe limitation laws liberally, so as to affect the intention of the legislature.

The principle that Statutes of Limitation are to be liberally construed does not mean, however, that the usual rules of statutory construction will be ignored. The Courts will not strain either the facts or the law in favor of a Statute of Limitations, nor should such a statute be extended by the Courts or be applied to cases not clearly within the statutory provisions. But neither should a Court give a strained construction in order to evade the effect of a Statute of Limitations.

The Statute of Limitations is regarded as a statute of repose and must be given a fair and reasonable construction and application, Gibson v. Jensen, 158 Pac. 426, 48 Utah 244.

Since the plaintiff's Complaint sounds solely in false arrest, and it is undisputed that the Complaint was not filed until more than one year after the cause of action accrued, the Summary Judgment granted by the Lower Court must be affirmed unless, as contended by Appellant, there is a difference between the tort of false imprisonment and false arrest.

POINT II. FALSE ARREST AND FALSE  
IMPRISONMENT ARE THE SAME TORT.

Appellant attempts to circumvent the Statute of Limitations by claiming that his Complaint is for "false arrest" and that the Statute of Limitations only applies to "false imprisonment". The plaintiff cites several cases and authorities for the proposition that there are in fact two separate causes of action or torts.

The case of Fuller v. Zinik Sporting Goods, 538 P.2d 1036 (Utah 1975), does nothing more than state in the introductory paragraph that the plaintiff had sued Zinik's for false arrest, false imprisonment and malicious prosecution. No distinction is drawn by the Court between the various causes of action.

The case of Thompson v. General Finance Co., 468 P.2d 269 (Kan. 1970), simply uses the terms "false arrest" and "false imprisonment" interchangeably and the Opinion makes it clear that the Kansas Supreme Court was only talking about one "wrong" or "tort".

The issue considered by the Court was simply the distinctions between false arrest and malicious prosecution.

The "distinction between the two" which was supposedly made in McGlone v. Landreth, 195 P.2d 268 (Okla. 1948), was simply that "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 . . . ." The "distinction" referred to is a direct quote from 22 AmJur, False Imprisonment, Section 3.

Appellant did not set forth the entire quote from 22 AmJur; the preamble to that quoted portion states:

As is seen from the definitions, false arrest and false imprisonment as causes of action are indistinguishable. The only distinction lies in the manner in which they arise. (Emphasis added.)

None of the authorities cited by Appellant stand for the proposition that a claim for false arrest is not governed

by a Statute of Limitations similar to Section 78-12-29, Utah Code Ann. No case has been located by counsel for Respondents which stands for such a proposition, or even infers that there is such a distinction.

The tort of false imprisonment was first defined by the Utah Supreme Court in Smith v. Clark, 106 Pac. 653 (Utah 1910). In an Opinion written by Chief Justice Straup it was noted:

False imprisonment is the unlawful arrest and detention of the person of another, with or without a warrant or other process. It consists in an unlawful restraint upon a man's person, or control over the freedom of his movement, by force or threats . . . The actual detention of the person, and the unlawfulness thereof, constitute the trespass; the gravamen being the unlawfulness of the imprisonment or the detention.

Appellant cites the case of Hepworth v. Covey Bros. Amusement Co., 91 P.2d 507, 97 Utah 205 (1939) as being the "leading Utah case on the distinction existing between false arrest and false imprisonment". In Hepworth

the plaintiff was at a dancehall in the company of two other young men, one of them a minor. While sitting in the lounge they were confronted by two "floor-walkers" employed by the defendant. The floor-walkers demanded that the plaintiff and his friends accompany them to an office and they "booked" them for possession of liquor. Upon the trial of the case the plaintiff obtained a verdict. On appeal the defendant quarreled with some of the instructions given to the jury. The defendant had requested instructions emphasizing the elements of an "arrest". As noted by the Supreme Court, the implication was that "if the officer did not intend to arrest Hepworth, then the latter is not entitled to recover". The Court noted that the true issue was not whether the officer had intended to "arrest" the plaintiff, but whether there was in fact a false imprisonment, that is, whether by an exercise of force, express or implied, the plaintiff had been deprived of his liberty and compelled to go where he did not want to, that is, to accompany the floor-walkers to the office. The Court noted that it

was immaterial to the issue of whether the defendant had committed the tort of false imprisonment whether the defendant's employee had in fact intended to "arrest". The Court noted that if "the officer's acts and words were such as to reasonably create in Hepworth's mind the belief of a necessity of conforming to those demands or suffer the consequences, and Hepworth conformed rather than to chance the consequences, he was restrained of his liberty. Call the acts and words of the officer what you may -- an arrest or not -- the restraint was just as effective. The jury might well believed from the facts that Hepworth's liberty was restrained quite aside from whether or not they believe the officer intended making an arrest." The Court then draws the usual, and proper, distinction between false arrest and false imprisonment, making it clear that there is but one tort, that of false imprisonment, and that it may be committed with or without a false "arrest". The only difference is that false arrest is merely one method by which one may commit



the tort of false imprisonment.

False arrest and false imprisonment as causes of action are indistinguishable and the only distinction lies in the manner in which they arise, Alsup v. Skaggs Drug Center, 223 P.2d 530 (Okla. 1950), Harrer v. Montgomery Ward & Co., 221 P.2d 428, 124 Mont. 295, Holland v. Lutz, 401 P.2d 1015 (Kan. 1965).

False arrest and false imprisonment are essentially synonymous and may be defined as the detention of a person without his consent and without lawful authority, Slade v. City of Phoenix, 541 P.2d 550 (Ariz. 1975), Kaufman v. Brown, 209 P.2d 156, 93 Cal.App.2d 508.

If one looks in AmJur2d under the heading of "False Arrest", the only notation found thereunder are the words "see false imprisonment".

In 32 AmJur2d, False Imprisonment, Sections 1 and 2, page 74, false imprisonment is defined as the unlawful restraint by one person of the physical liberty of another. With regard to the distinction between false arrest and false imprisonment, it is noted in AmJur that

False arrest and false imprisonment as causes of action are said to be distinguishable only in terminology. The difference between them lies in the manner in which they arise.

The Restatement of Torts, Second, Sections 35-45, defines the tort in terms of "the interest in freedom from confinement". The Restatement sets forth many examples of conduct which would give rise to liability, including cases where the actor confines the plaintiff in a room, digs a pit into which he might fall, threatens him with bodily harm if he does not stay in one particular place, or purports to arrest. No distinction is drawn between "false arrest" and "false imprisonment". The Restatement makes it clear that the only distinction is in the manner in which the tort of false imprisonment is accomplished.

The last Utah Supreme Court case found which discusses false imprisonment in detail is Mildon v. Bybee, 375 P.2d 458, 13 Utah 2d 400 (1962). The Court there simply noted that "false imprisonment occurs whenever

there is an unlawful detention or restraint of another against his will". The Court makes reference to Section 76-21-1, Utah Code Ann., which simply defined the crime of false imprisonment as being "the unlawful violation of the personal liberty of another". No distinction was drawn between false arrest and false imprisonment.

As is apparent from the foregoing analysis, there is in fact no substantive distinction between false arrest and false imprisonment. There is but one tort, that of false imprisonment. If the false imprisonment is accomplished by who purports to take the other into custody pursuant to some type of legal authority, then the tort is oftentimes referred to as "false arrest".

There are no cases which stand for the proposition propounded by Appellant, that is, that there are two separate torts and thus a one year Statute of Limitations for false imprisonment and a four year Statute of Limitations for false arrest.

POINT III. THE STATUTE OF LIMITATIONS  
HAD EXPIRED BY THE TIME THE APPELLANT  
FILED HIS COMPLAINT.

On page 14 of Appellant's Brief it is asserted, without authority, that the claim in this case did not accrue until the conclusion of the criminal case, at which time the plaintiff herein was acquitted of the crime of shoplifting. Concededly the plaintiff was acquitted in February, 1975, and the action was filed in December, 1975. If in fact the cause of action did not arise until February of 1975, then the Complaint was timely filed. Such, however, is not the law, the authorities consistently holding that the cause of action for false imprisonment arises at the time the imprisonment terminates and not from the time when the proceedings under which the plaintiff's arrest occurred ended. 32 AmJur2d, False Imprisonment, Section 84, page 141; Alexander v. Thompson, 195 Fed. 31 (CA 6th, Mich.); Hackler v. Miller, 79 Neb. 206, 112 NW 303; Oosterwyk v. Bucholtz, 27 NW2d 361, 250 Wis. 521.

A cause of action for false imprisonment accrues upon the discharge from imprisonment even though legal proceedings under the arrest have not yet terminated, Belflower v. Blackshere, 281 P.2d 423 (Okla. 1955). A collection of cases setting forth the same rule is found in 49 ALR 2d 922.

POINT IV. THE TRIAL COURT WAS  
CORRECT IN GRANTING SUMMARY  
JUDGMENT.

Appellant contends that the Lower Court erred because Rule 9(h), Utah Rules of Civil Procedure, provides in part that a party who pleads the statute must specify the statute relied upon and may allege generally that the cause of action is barred by the provisions of that statute. The last sentence of the rule provides:

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.

The problem with Appellant's argument is that the allegation was not controverted. It was stipulated that the plaintiff's claim was solely for false arrest and occurred more than one year prior to the filing of the Complaint. Under such circumstances the Court was fully justified, and in fact required, by Rule 56(c) to rule in favor of the defendants when the pleadings, depositions and admissions on file showed that "there (was) no genuine issue as to any material fact and that the moving party (was) entitled to a Judgment as a matter of law".

#### CONCLUSION

1. The plaintiff slept on his rights and did not file his Complaint until more than one year had elapsed.
2. The plaintiff's claim is for false arrest or imprisonment and is barred by the Statute of Limitations.
3. There is no distinction between false

arrest and false imprisonment which would justify the application of any Statute of Limitations other than Section 78-12-29, Utah Code Ann. (1953).

4. The ruling of the Trial Court was correct.

It is respectfully submitted that the granting of Summary Judgment in favor of Defendants and against the plaintiff should be affirmed.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of September, 1976.

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MAILING CERTIFICATE

I hereby certify that <sup>two copies</sup> ~~a copy~~ of the foregoing Brief of Respondents was mailed to M. Dayle Jeffs of Jeffs and Jeffs at 90 North 100 East, P. O. Box 683, Provo, Utah 84601, by placing a copy of same in the U. S. mail, postage prepaid, this 17th day of September, 1976.

15/ Allen L. Larson