

2008

Mark Greer v. Big 5 Corp. dba Big 5 Sporting Goods : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Rick L. Rose; Kristine M. Larsen; Ray Quinney and Nebeker, P.C.; Attorneys for Defendant/Appellee Big 5 Corp.

J. Kent Holland; Attorneys for Plaintiff/Appellee.

Recommended Citation

Brief of Appellee, *Greer v. Big 5 Corp.*, No. 20080364 (Utah Court of Appeals, 2008).
https://digitalcommons.law.byu.edu/byu_ca3/858

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE COURT OF APPEALS
STATE OF UTAH

MARK GREER,

Plaintiff/Appellant,

v.

BIG 5 CORP. dba BIG 5 SPORTING
GOODS,

Defendant/Appellee.

Case No. 20080364-CA

BRIEF OF APPELLEE BIG 5 CORP.

APPEAL FROM A FINAL JUDGMENT
IN THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE L.A. DEVER

J. Kent Holland (1520)
3838 South West Temple
Salt Lake City, UT 84118

Attorneys for Plaintiff/Appellant

Rick L. Rose (5140)
Kristine M. Larsen (9228)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500

Attorneys for Defendant/Appellee
Big 5 Corp.

IN THE COURT OF APPEALS
STATE OF UTAH

MARK GREER,

Plaintiff/Appellant,

v.

BIG 5 CORP. dba BIG 5 SPORTING
GOODS,

Defendant/Appellee.

Case No. 20080364-CA

BRIEF OF APPELLEE BIG 5 CORP.

APPEAL FROM A FINAL JUDGMENT
IN THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE L.A. DEVER

J. Kent Holland (1520)
3838 South West Temple
Salt Lake City, UT 84118

Attorneys for Plaintiff/Appellant

Rick L. Rose (5140)
Kristine M. Larsen (9228)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500

Attorneys for Defendant/Appellee
Big 5 Corp.

TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF JURISDICTION.....	v
II. STATEMENT OF ISSUES PRESENTED FOR APPEAL.....	v
III. CONSTITUTIONAL AND STATUTORY AUTHORITY	vi
IV. STATEMENT OF THE CASE.....	x
A. Nature of the Case.....	x
B. Course of Proceeding and Disposition of Case in the Trial Court.....	x
C. Statement of Facts Relevant to Issues Presented on Appeal.....	xi
V. SUMMARY OF ARGUMENT	xii
VI. ARGUMENT.....	1
POINT 1: THE TRIAL COURT CORRECTLY HELD THAT GREER’S CLAIMS AGAINST BIG 5 ARE TIME BARRED.....	1
POINT 2: THE STATUTE OF LIMITATIONS WAS NOT TOLLED DUE TO A STATUTORY PROHIIBITION.....	3
POINT 3: THE TRIAL COURT CORRECTLY HELD THAT UTAH CODE ANN. § 78B-2-104 DID NOT TOLL THE STATUTE OF LIMITATIONS	5
POINT 4: THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT WITHOUT ORAL ARGUMENT.....	9
VII. CONCLUSION	10

TABLE OF AUTHORITIES

Cases

<i>Beaver County v. Property Tax Div. et al</i> , 2006 UT 6, ¶ 37, 128 P.3d 1187	4
<i>Chen v. Stewart</i> , 2004 UT 82, ¶ 82, 100 P.3d 1177	1
<i>Citicorp Mortg., Inc. v. Hardy</i> , 834 P.2d 554 (Utah 1992).....	4
<i>Clawson v. Boston Acme Mines Development Co.</i> , 269 P. 147, 151-52 (Utah 1928)	8
<i>Dairyland Ins. Co. v. State Farm Mut. Auto. Ins. Co.</i> , 882 P.2d 1143, 1144 (Utah 1994)) v	
<i>DOIT, Inc. v. Touche, Ross & Co.</i> , 926 P.2d 835 (Utah 1996).....	4
<i>Emergency Physicians Integrated Care v. Salt Lake County</i> , 2007 UT 72, ¶ 8, 167 P.3d 1080	v
<i>Franklin Fin. v. New Empire Dev. Co.</i> , 659 P.2d 1040 (Utah 1983).....	2
<i>Frederic G. Krapf & Son, Inc. v. Gorson</i> , 243 A.2d 713 (Del. 1968)	7
<i>Gillham Advertising Agency, Inc. v. Ipson</i> , 567 P.2d 163, 166 (Utah 1977).....	6
<i>Lieber v. ITT Hartford Ins. Co., Inc.</i> , 2000 UT 90, ¶ 7, 15 P.3d 1030	4
<i>Mackay & Knobel Enterprises, Inc.</i> , 460 P.2d 828 (Utah 1969)	8
<i>Murphy v. Crosland</i> , 886 P.2d 74 (Utah Ct. App. 1994)	8
<i>Olseth v. Larson</i> , 2007 UT 29, ¶ 158 P.3d 532	6
<i>Ong Int’l v. 11th Ave. Corp.</i> , 850 P.2d 447, 455 (Utah 1993)	2
<i>Price v. Armour</i> , 949 P.2d 1251 (Utah 1997)	vi, 10
<i>Russell Packard Dev., Inc. v. Carson</i> , 2005 UT 14, ¶ 18, 108 P.3d 741	vi
<i>Spears v. Warr</i> , 2002 UT 24, ¶ 32, 44 P.3d 742	vi
<i>Wax v. Riverview Cemetery Co.</i> , 24 A.2d 431, 435-36.....	7
<i>Wilson Supply, Inc. v. Fraden Mfg. Corp.</i> , 2002 UT 94, ¶ 21, 54 P.3d 1177	1

Statutes

Del. Code Ann. tit. 8 § 136	vii, 5, 7
-----------------------------------	-----------

Del. Code Ann. tit. 8 § 312	vii, 7, 8
Utah Code Ann. § 16-10a-1405	8
Utah Code Ann. § 16-10a-1502 (2005).....	5
Utah Code Ann. § 78A-4-103(2)(j) (Supp. 2008).....	v
Utah Code Ann. § 78B-2-104 (Supp. 2008)	vi, xii, 5, 6, 9
Utah Code Ann. § 78B-2-112 (Supp. 2008)	v, xii, 3, 4, 5, 9
Utah Code Ann. § 78B-2-307 (Supp. 2008)	x, 1
Other Authorities	
Restatement, Conflict of Laws, Second, Sec. 299	6
Rules	
Rule 24(b), Utah Rules of Appellate Procedure.....	v
Rule 56(c), Utah Rules of Civil Procedure	xi
Utah R. Civ. P 56(e)	2
Utah R. Civ. P. 7(e)	vi, 9

Big 5 Corp. dba Big 5 Sporting Goods (“Big 5”), a defendant and appellee in the above-captioned case, submits this brief pursuant to Rule 24(b) of the Utah Rules of Appellate Procedure.

I. STATEMENT OF JURISDICTION

The Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78A-4-103(2)(j).

II. STATEMENT OF ISSUE PRESENTED FOR APPEAL AND CORRESPONDING STANDARD OF REVIEW

Appellee, Big 5, disputes Appellants’ Statement of Issues numbered I, II, and III and asserts the issues are more correctly stated as follows:

Issue No. 1:

Did the trial court err in granting summary judgment to Big 5 finding that the complaint was not timely filed?

“When reviewing a ruling on summary judgment, this court gives no deference to the lower court’s legal conclusions and reviews the issues presented under a correctness standard.” *Emergency Physicians Integrated Care v. Salt Lake County*, 2007 UT 72, ¶ 8, 167 P.3d 1080 (quoting *Dairyland Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 882 P.2d 1143, 1144 (Utah 1994)).

Issue No. 2:

Did the trial court err in granting summary judgment to Big 5 finding that the statute of limitations was not tolled pursuant to a statutory prohibition under Utah Code Ann. § 78B-2-112 for the period of time when Big 5 forfeited its corporate charter for

failure to appoint a registered agent in Delaware?

Both the application of a statute of limitations and the interpretation of statutory provisions present questions of law, which are reviewed for correctness. *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 18, 108 P.3d 741 (quoting *Spears v. Warr*, 2002 UT 24, ¶ 32, 44 P.3d 742).

Issue No. 3:

Did the trial court err in determining that the tolling statute, Utah Code Ann. § 78B-2-104, was inapplicable where Big 5 continued to exist as a corporation in the state of Utah and was amenable to service of process within the state during the entire limitations period?

This is a legal issue reviewed for correctness. *Id.*

Issue No. 4:

Did the trial court err in granting summary judgment without holding a hearing?

“The question of whether the court erred in granting summary judgment without a hearing is governed by Rule [7(e) of the Utah Rules of Civil Procedure] and is therefore a matter of statutory construction which is reviewed for correctness.” *Price v. Armour*, 949 P.2d 1251, 1254 (Utah 1997).

III. CONSTITUTIONAL AND STATUTORY AUTHORITY

The issues presented on appeal are governed by the following statutes and rules.

I. Utah Code Ann. § 78B-2-307 provides:

An action may be brought within four years:

- (1) after the last charge is made or the last payment is received:

- (a) upon a contract, obligation, or liability not founded upon an instrument in writing;
 - (b) on an open store account for any goods, wares, or merchandise; or
 - (c) on an open account for work, labor or services rendered, or materials furnished;
- (2) for a claim, for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act:
- (a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;
 - (b) Subsection 25-6-5(1)(b); or
 - (c) Subsection 25-6-6(1); and
- (3) for relief not otherwise provided for by law.

II. Utah Code Ann. §78B-2-112 provides:

The duration of an injunction or statutory prohibition which delays the filing of an action may not be counted as part of the statute of limitations.

III. § 78B-2-104 provides:

If a cause of action accrues against a person while the person is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues the person departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

IV. Del. Code Ann. tit. 8 § 136(c) provides:

(c) After the resignation of the registered agent shall have become effective as provided in this section and if no new registered agent shall have been obtained and designated in the time and manner aforesaid, service of legal process against the corporation for which the resigned registered agent had been acting shall thereafter be upon the Secretary of State in accordance with § 321 of this title.

V. Del. Code Ann. tit. 8 § 312 provides in pertinent part:

(a) As used in this section, the term “certificate of incorporation” includes the

charter of a corporation organized under any special act or any law of this State.

(b) Any corporation may, at any time before the expiration of the time limited for its existence and any corporation whose certificate of incorporation has become forfeited or void pursuant to this title and any corporation whose certificate of incorporation has expired by reason of failure to renew it or whose certificate of incorporation has been renewed, but, through failure to comply strictly with the provisions of this chapter, the validity of whose renewal has been brought into question, may at any time procure an extension, restoration, renewal or revival of its certificate of incorporation, together with all the rights, franchises, privileges and immunities and subject to all of its duties, debts and liabilities which had been secured or imposed by its original certificate of incorporation and all amendments thereto.

* * *

(e) Upon the filing of the certificate in accordance with § 103 of this title the corporation shall be renewed and revived with the same force and effect as if its certificate of incorporation had not been forfeited or void pursuant to this title, or had not expired by limitation. Such reinstatement shall validate all contracts, acts, matters and things made, done and performed within the scope of its certificate of incorporation by the corporation, its officers and agents during the time when its certificate of incorporation was forfeited or void pursuant to this title, or after its expiration by limitation, with the same force and effect and to all intents and purposes as if the certificate of incorporation had at all times remained in full force and effect. All real and personal property, rights and credits, which belonged to the corporation at the time its certificate of incorporation became forfeited or void pursuant to this title, or expired by limitation and which were not disposed of prior to the time of its revival or renewal shall be vested in the corporation, after its revival and renewal, as fully and amply as they were held by the corporation at and before the time its certificate of incorporation became forfeited or void pursuant to this title, or expired by limitation, and the corporation after its renewal and revival shall be as exclusively liable for all contracts, acts, matters and things made, done or performed in its name and on its behalf by its officers and agents prior to its reinstatement, as if its certificate of incorporation had at all times remained in full force and effect.

VI. Rule 7(e) of the Utah Rules of Civil Procedure provides:

(e) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action

unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

IV. STATEMENT OF THE CASE

A. Nature of the Case.

On December 1, 2001, Plaintiff/Appellant Mark Greer (“Greer”) claims that he was injured at a Big 5 Sporting Goods store in Salt Lake City, Utah when a snowboard fell from a display and struck him on the head. Greer subsequently filed a negligence action against Big 5 and served Big 5 with a copy of the summons and complaint on April 4, 2006. The copy of the complaint that was served on Big 5 bears a Third District date stamp dated November 28, 2005. The Third District, however, has no record of ever having received the complaint bearing a date stamp of November 28, 2005. Instead, the Third District’s docket – as well as court’s file – only shows that a complaint was filed on December 2, 2005. Pursuant to the applicable statute of limitations, Utah Code Ann. § 78B-2-307, Greer was required to bring his negligence action within four years or on or before December 1, 2005. Greer failed to do so. Accordingly, the trial court correctly granted summary judgment in favor of Big 5 dismissing Greer’s claims.

B. Course of Proceeding and Disposition of Case in the Trial Court

1. The docket and file of the Third District reflect that Greer filed this action on December 2, 2005. (R. 1-8.)
2. On April 4, 2006, Big 5 was served with a summons and a copy of a complaint bearing a date stamp of November 28, 2005. (R. 59-62.)
3. On January 7, 2008, Big 5 moved for summary judgment on the basis that Greer’s claims were barred by the applicable statute of limitations. (R. 74-80.)

4. Pursuant to the ruling dated March 28, 2008, the trial court entered an Order granting Big 5's Motion for Summary Judgment, dismissing all of Greer's claims against Big 5 with prejudice. (R. 125-128.)

5. On April 7, 2008, Greer filed a motion to alter or set aside the judgment. (R. 129-133.)

6. Greer filed a Notice of Appeal on April 24, 2008. (R. 139.)

7. By minute entry dated May 8, 2008, the trial court denied Greer's motion to alter or set aside the judgment. (R. 150-151.)

C. Statement of Facts¹ Relevant to Issues Presented on Appeal.

In support of its Motion for Summary Judgment as to Greer's claims, Big 5 submitted the following statement of undisputed material facts, with citations to the record, as required by Rules 7(c) and 56(c) of the Utah Rules of Civil Procedure.

1. Greer claims he was injured at a Big 5 store on December 1, 2001. (R. 2.)

2. Greer served Big 5 with a copy of the summons and complaint in this case on April 4, 2006. (R. 59-62.)

3. The copy of the complaint that was served on Big 5 bears a Third District date stamp dated November 28, 2005. (R. 60.)

4. However, a certified copy of the Complaint obtained from the Third District bears a date stamp of December 2, 2005. (R. 64-66.)

¹ Greer's statement of facts is defective because it improperly contains numerous factual assertions without any record citation. In addition, these factual assertions were not properly presented to the trial court in response to Big 5's summary judgment motion and, therefore, not properly argued on appeal.

5. The complaint served on Big 5 bearing a date stamp of November 28, 2005 is not in the Court's file and the Court has no record of ever having received it. (R. 110-111.)

V. SUMMARY OF ARGUMENT

The trial court correctly granted Big 5's Motion for Summary Judgment dismissing Greer's claims against Big 5. On appeal, Greer asks this Court to find that his claims are not time barred by holding that the trial court erred in not finding that Greer filed his complaint on November 28, 2005 by placing it in the after hours box. Greer, however, presented no evidence at the trial court in support of this assertion and he cannot do so now on appeal. In addition, Greer made no effort whatsoever to explain why a second non-amended complaint bearing a date stamp of December 2, 2005 is the only complaint on file with the Third District. Furthermore, Greer offered no explanation as to why the signatures and handwritten dates on the two complaints are clearly different. Thus, the trial court's finding that the complaint was not filed until December 2, 2005 is supported by sufficient evidence.

Greer's efforts to avoid summary judgment were factually and legally insufficient. Greer argued that if the trial court found that the complaint was not filed until December 2, 2005, the statute of limitations was tolled due to (1) a statutory prohibition against bringing suit against a corporation in forfeiture for failure to appoint a registered agent, and (2) Big 5 was "absent" from the state of Utah during the period of forfeiture and not amenable to suit. The trial court correctly determined, however, that the statute of limitations was not tolled pursuant to either Utah Code Ann. §§ 78B-2-104 or 78B-2-112.

Rather, Big 5's certificate of incorporation was restored and revived effective on June 11, 2003 as if the forfeiture had never occurred. Moreover, Greer was not statutorily prohibited from bringing his claims against Big 5 during the period of forfeiture. Big 5 also continued to exist as a corporation even while in forfeiture and was amenable to service of process in both Delaware and Utah during the limitations period.

Finally, the trial court did not err in denying Greer's request for a hearing on Big 5's motion. The substantive issues have been authoritatively decided under well established Delaware and Utah law. Greer's motion in opposition was frivolous in that his legal arguments and factual assertions were insufficient. Finally, Greer failed to show that he was prejudiced by the trial court's denial of his request for a hearing. For these reasons, the trial court's decision should be affirmed.

VI. ARGUMENT

POINT 1: THE TRIAL COURT CORRECTLY HELD THAT GREER'S CLAIMS AGAINST BIG 5 ARE TIME BARRED.

Under section 78B-2-307 of the Utah Code, Greer's negligence action against Big 5 must have been brought within four years of the accident. Utah Code Ann. § 78B-2-307 ("An action may be brought within four years: . . . for relief not otherwise provided for by law.") Greer claims he was injured at a Big 5 store on December 1, 2001. (R. 2.) The trial court correctly determined, however, that Greer did not file his complaint until December 2, 2005, a day after the expiration of the statute of limitations. (R. 127.)

In order to challenge a court's factual findings, "an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in light most favorable to the court below." *Wilson Supply, Inc. v. Fraden Mfg. Corp.*, 2002 UT 94, ¶ 21, 54 P.3d 1177. If the marshaling requirement is not met, the appellate court has grounds to affirm the court's findings on that basis alone. *Wilson Supply*, 2002 UT 94 at ¶ 26. Greer claims that there is "literally no evidence to marshal." (Appellant Brief at 7.)

In situations where there is virtually nothing in the record that would support the trial court's findings, a claim of no evidence might be sufficient. However, an appellee need only point to a scintilla of evidence that supports a court's findings in order to refute an appellant's claim of no evidence.

Chen v. Stewart, 2004 UT 82, ¶ 82, 100 P.3d 1177 (quoting *Wilson Supply*, 2002 UT 94 at ¶ 22).

In this case, Greer made no effort to explain what evidence the trial court relied on

and why it was not sufficient. Specifically, Greer did not mention the complaint on file with the Third District bearing a date stamp of December 2, 2005. (Appellant's Brief at 12.) Instead, Greer simply contends that the complaint served on Big 5 bearing a date stamp of November 28, 2005 should be controlling for determining whether Greer timely filed his complaint. *Id.* Notwithstanding that the Third District has no record of ever having received the November 28, 2005 complaint, Greer claims that his counsel placed the complaint in the Third District's pleading drop box. *Id.* Greer, however, failed to present any affidavits or other evidentiary materials in support of this contention to the trial court despite ample opportunity to do so. Thus, this fact should be disregarded. *See Franklin Fin. v. New Empire Dev. Co.*, 659 P.2d 1040 (Utah 1983) (citing Utah R. Civ. P 56(e)) (When a party opposes a properly supported motion for summary judgment and fails to file any responsive affidavits or other evidentiary materials allowed by Subdivision (e), the trial court may properly conclude that there are no genuine issues of fact unless the face of the movant's affidavit affirmatively discloses the existence of such an issue.) Furthermore, any such evidence regarding the circumstances of the filing of the complaint bearing a date stamp of November 28, 2005 must have been submitted to the trial court for its consideration, and cannot be considered for the first time on appeal. *Ong Int'l v. 11th Ave. Corp.*, 850 P.2d 447, 455 (Utah 1993) (stating that failure to raise issue in trial court precludes its consideration on appeal).

Greer failed both at the trial court level and now on appeal to address the fact that the only complaint in the Third District's file bears a date stamp of December 2, 2005.

Greer also cannot explain why the signatures and handwritten dates on the two complaints are clearly different. (R. 3, 62.) If counsel signed and filed the Complaint on November 28, 2005, why did he sign and date another copy and file it again on December 2, 2005? What happened to the November 28, 2005 complaint that he allegedly dropped in the Court's rear drop box? Greer had ample opportunity to offer a reasonable explanation for this discrepancy at the trial court, yet failed to do so. The trial court considered all of these facts and properly found that there was not sufficient evidence to support Greer's assertion that he filed the complaint on November 28, 2005. Instead, the trial court correctly found that Greer did not file his complaint until December 2, 2005, after the statute of limitations had expired. This finding is supported by sufficient evidence and should be affirmed on appeal.

POINT 2: THE STATUTE OF LIMITATIONS WAS NOT TOLLED DUE TO A STATUTORY PROHIBITION.

Greer argues that the statute of limitations was tolled because Big 5 was subject to a statutory prohibition when Big 5 forfeited its certificate of incorporation for failure to designate a registered agent in Delaware. Greer's reliance on section 78B-2-112 of the Utah Code, however, is misplaced and the trial correctly determined that the commencement of Greer's action was not stayed by any statutory prohibition. When interpreting a statute,

[the] primary goal is to give effect to the legislature's intent in light of the purpose the statute was meant to achieve. The best evidence of the true intent and purpose of the legislature in enacting a statute is the plain language of the statute. We therefore look first to the statute's plain language.

Lieber v. ITT Hartford Ins. Co., Inc., 2000 UT 90, ¶ 7, 15 P.3d 1030 (citations and internal quotation marks omitted).

The statute provides that “[w]hen the commencement of a cause of action is stayed by injunction or a statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.” Utah Code Ann. § 78B-2-112 (Supp. 2008). Pursuant to the statute’s plain language, a statute of limitations is only tolled when *the plaintiff* is prohibited by injunction or statute from proceeding with his claims during an injunction or mandatory stay. *See, e.g., Beaver County v. Property Tax Div. et al*, 2006 UT 6, ¶ 37, 128 P.3d 1187 (party’s claims tolled during mandatory stay); *Citicorp Mortg., Inc. v. Hardy*, 834 P.2d 554 (Utah 1992) (reading 78-12-41 in conjunction with the stay provisions of the Bankruptcy Code, plaintiff’s action was tolled for the duration of the stay); *DOIT, Inc. v. Touche, Ross & Co.*, 926 P.2d 835 (Utah 1996) (statute of limitations period for action by depositors of failed thrift institutions was tolled pursuant to Thrifts Settlement Financing Act which imposed statutory prohibition on prosecution of claims until panel issued its report authorizing depositor’s claims for litigation).

Here, Greer presupposes that he was statutorily prohibited from bringing suit during the period of time Big 5 was in forfeiture, which is simply not the case. Indeed, Greer has not cited, nor has Big 5 uncovered, any statute prohibiting the commencement of an action against a corporation that is in forfeiture. In fact, both Delaware and Utah

law are to the contrary. Under Delaware law, a plaintiff is not barred from bringing suit against a corporation in forfeiture for failure to designate a registered agent. Section 136 of the Delaware Corporation Code provides in pertinent part,

After the resignation of the registered agent shall have become effective as provided in this section and if no new registered agent shall have been obtained and designated . . . service of legal process against the corporation . . . shall thereafter be upon the Secretary of State.

Del. Code Ann. tit. 8 § 136(c).

Similarly, under Utah law “the failure of a foreign corporation to have authority to transact business in this state does not impair the validity of its corporate acts, nor does the failure prevent the corporation from defending any proceeding in this state.” Utah Code Ann. § 16-10a-1502(6). Moreover, during the time limited for the commencement of this action, Big 5 had the authority to transact business in the state of Utah as a foreign corporation and had a registered agent for service of process within the state. (R. 115-116.) Accordingly, section 78B-2-112 of the Utah Code is not applicable to toll the statute of limitations because there is no statutory prohibition that prevented Greer from bringing an action against Big 5 during the limitations period.

POINT 3: THE TRIAL COURT CORRECTLY HELD THAT UTAH CODE ANN. § 78B-2-104 DID NOT TOLL THE STATUTE OF LIMITATIONS.

The trial court did not err in rejecting Greer’s argument that section 78B-2-104 of the Utah Code tolled the applicable statute of limitations from June 12, 2003 to November 3, 2003. The Utah Supreme Court recently stated that the purpose of Utah’s

tolling statute is “to prevent a defendant from depriving a plaintiff of the opportunity of suing him by absenting himself from the state during the period of limitation.” *Olseth v. Larson*, 2007 UT 29, ¶ 24, 158 P.3d 532 (citations omitted). Indeed, the “legislative intent is ascertainable from the plain language of the tolling statute . . . [which] expressly prevents a defendant from depriving a plaintiff of a valid claim merely by leaving the state.” *Id.* The statute states, “[i]f after a cause of action accrues [the defendant] departs from the state, the time of his absence is not part of the time limited for the commencement of the action.” Utah Code Ann. § 78B-2-104.

Greer’s argument erroneously assumes two legal and factual propositions: (1) if a corporation forfeits its corporate status due to failure to appoint a registered agent then the corporation ceases to exist; and (2) if a corporation ceases to exist in its state of incorporation then it is “absent” from the state of Utah for purposes of the tolling statute. (Appellant’s brief at 10-11.) Not only does Greer fail to provide any legal authority in support of these propositions, but his arguments are directly contrary to both the law and the facts.

Delaware law is determinative of whether Big 5 continued to exist as a corporation while in forfeiture. *Gillham Advertising Agency, Inc. v. Ipson*, 567 P.2d 163, 166 (Utah 1977) (citing Restatement, Conflict of Laws, Second, Sec. 299, which states: “(1) whether the existence of a corporation has been terminated or suspended is determined by the local law of the state of incorporation. (2) The termination or suspension of a corporation’s existence by the state of incorporation will be recognized for most purposes

by other states.”) Delaware statutory and case law clearly states that forfeiture is not the equivalent of dissolution. When a corporation has forfeited its charter, with a provision for revival, it does not cease to exist and remains subject to suit. *See Frederic G. Krapf & Son, Inc. v. Gorson*, 243 A.2d 713 (Del. 1968) (held corporation does not cease to exist during a period of forfeiture and remains subject to suit); *Wax v. Riverview Cemetery Co.*, 24 A.2d 431, 435-36 (corporation with a forfeited charter is not dissolved, but merely in a suspended state, and thus amenable to suit).

Section 136 of the Delaware Corporation Code, which addresses resignation of registered agents, is intended to assure the orderly maintenance of an agent for the convenience of parties wishing to bring actions against a corporation. It specifically provides, in subsection (b), that corporations which fail to designate new agents will have their charters forfeited, and in subsection (c) that service of process shall thereafter be made upon the Secretary of State. Del. Code Ann. tit. 8 § 136. Nowhere in the statute does it provide that a corporation ceases to exist and lacks the capacity to be sued. *Id.*

Section 312 also expressly provides that the corporation may reestablish its good standing by nomination of a successor agent. Upon filing the certificate of restoration and revival, Big 5’s certificate of incorporation was fully revived and reinstated effective on June 11, 2003, as if the forfeiture had never occurred. (R. 113.) The Delaware Corporation Code states:

Upon the filing of the certificate in accordance with § 103 of this title the corporation shall be renewed and revived with the same force and effect as if its certificate of incorporation had not been forfeited or void pursuant to this title, or

had not expired by limitation. . . . and the corporation after its renewal and revival shall be as exclusively liable for all contracts, acts, matter and things made, done or performed in its name and on its behalf by its officers and agents prior to its reinstatement, as if its certificate of incorporation had at all times remained in full force and effect.

Del. Code Ann. tit. 8 § 312 (emphasis added). *See also* Certificate of Restoration and Revival of Certificate of Incorporation of Big 5 Corp (R. 113.)

Utah law likewise holds that suspension [the equivalent of forfeiture under Delaware law] of a certificate of incorporation does not mean the end of corporate existence. Utah Code Ann. § 16-10a-1405 (a “dissolved corporation continues its corporate existence . . . and [d]issolution of a corporation does not . . . prevent commencement of a proceeding by or against the corporation in its corporate name.”) *See also* *Murphy v. Crosland*, 886 P.2d 74 (Utah Ct. App. 1994) (holding suspension of corporation did not affect corporation’s existence); *Mackay & Knobel Enterprises, Inc.*, 460 P.2d 828 (Utah 1969) (the term suspended itself imports a temporary restriction of function not the end of corporate existence); *Clawson v. Boston Acme Mines Development Co.*, 269 P. 147, 151-52 (Utah 1928) (held that foreign corporations may assert a statute of limitations defense even if the corporation failed to register an agent or otherwise comply with statutes governing foreign corporations). Thus, not only did Big 5 continue to exist during the period of forfeiture, but Big 5’s corporate status was revived and reinstated as if the forfeiture never occurred. Moreover, Big 5 was registered to conduct business in the state of Utah and had a registered agent for service of process within the state during the entire limitations period. (R. 115-116.) Thus, the trial court

correctly rejected Greer's argument that the statute of limitations was tolled because Big 5 was "absent".

POINT 4: THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT WITHOUT ORAL ARGUMENT.

Pursuant to Rule 7(e) of the Utah Rules of Civil Procedure, "[t]he court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action . . . unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided." Utah R. Civ. P. 7(e) (emphasis added).

Here, the trial court properly denied Greer's request for a hearing because the dispositive issues governing the granting of Big 5's motion for summary judgment have been authoritatively decided and Greer's opposition memorandum was frivolous. (R. 150.) Neither section 78B-2-112 nor 78B-2-104 of the Utah Code are applicable to toll the statute of limitations here. In fact, Greer fails to cite to any statutory prohibition against commencing suit against a corporation in forfeiture for failure to appoint a registered agent. Point 2, *supra* at 4,5. Greer likewise fails to cite to controlling Delaware and Utah law, which clearly provide that a corporation continues to exist and is subject to suit even if its corporate charter has been forfeited. Point 3, *supra* at 6-8. Greer's argument that Big 5 was "absent" from the state of Utah for 144 days is likewise frivolous as it is contrary to both the law and the facts. *Id.*

Even if the trial court erred in not holding the hearing, for such error to compel reversal of the trial court's substantive ruling, it must have been prejudicial. *Price v.*

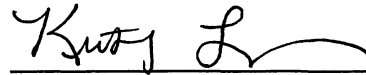
Armour, 949 P.2d 1251, 1255 (Utah 1997). “If the error was harmless, that is, if the error was sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the case , then a reversal is not in order.” *Id.* (citations omitted). Greer has failed to show that he was prejudiced by the trial court’s ruling on the summary judgment motion without a hearing. He has not shown that he would have made new or additional arguments at the hearing that were not covered by his memorandum in opposition. Indeed, the arguments made by Greer on appeal to this Court in his appellate brief are the same arguments that he made in his memorandum before the trial court. Thus, this Court should find that even if the trial court erred in not holding a hearing on Big 5’s motion for summary judgment, such error was harmless.

VII. CONCLUSION

The trial court correctly granted Big 5’s Motion for Summary Judgment. On the undisputed facts presented to the trial court, Greer filed his complaint on December 2, 2005, after the applicable statute of limitation had expired. Moreover, Greer was not statutorily prohibited from bringing his claims against Big 5 during the limitation period. The tolling statute likewise does not apply given that Big 5 was not “absent” from the state of Utah during forfeiture since Big 5 continued to exist in Utah as a corporate entity and had a registered agent within the state at all times during the limitations period. Accordingly, Big 5 respectfully requests that the Court affirm the decision of the trial court dismissing Greer’s claims.

DATED this 3 day of December, 2008.

RAY QUINNEY & NEBEKER P.C.

A handwritten signature in cursive script, appearing to read "Rick L. Rose", written over a horizontal line.

Rick L. Rose

Kristine M. Larsen

*Attorneys for Defendant/Appellee
Big 5, Corp.*

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing BRIEF OF APPELLEE BIG 5 CORP were mailed, postage prepaid, on this 3 day of December, 2008, to the following:

J. Kent Holland
3838 South West Temple
Salt Lake City, Utah 84118

RAY QUINNEY & NEBEKER P.C.



Rick L. Rose
Kristine M. Larsen

*Attorneys for Defendant/Appellee
Big 5 Corp*

1011605