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IN THE SUPREME COURT OF THE STATE OF UTAH

CONNIE LOU SWITZER, RAYMONE GORDON SWITZER, DONALD EUGENE SWITZER, RODNEY DEAN SWITZER, and THEREASE JO SWITZER, minors, by and through their Guardian ad litem, LOUELLA R. BOWLES,	
Plaintiffs/Appellants,	Case No. 15712
vs.	
BRYCE C. REYNOLDS, individually and formerly doing business as REYNOLDS SAND AND GRAVEL CO; CLARK EQUIPMENT COMPANY, Construction Machinery Division, and FOULGER EQUIPMENT COMPANY,	
Defendants/Respondents.	

RESPONDENT REYNOLD'S BRIEF

Appeal from Judgment of Third Judicial District Court
in and for Salt Lake County, Utah
Honorable Peter F. Leary, Judge

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Clerk, Supreme Court, Utah

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STATEMENT OF THE CASE

Louella R. Switzer Bowles, widow of Gordon Switzer, filed suit on behalf of herself and the five minor children of Gordon Switzer, seeking damages and recovery for the wrongful death of Gordon Switzer, pursuant to Section 78-11-7 Utah Code Annotated 1953 (as amended).

DISPOSITION IN THE LOWER COURT

The trial court granted the motion of Defendant Reynolds and dismissed the action on the grounds that the statute of limitations had expired prior to the filing of the suit.

STATEMENT OF FACTS

Decedent Gordon Switzer, while in the course of his employment on June 24, 1963, was involved in an accident which resulted in his death. On July 5, 1963, his widow, Louella R. Switzer, now known as Louella R. Bowles, filed an Application for Hearing to settle Industrial Claims with the Utah State Industrial Commission. The application was filed by her on behalf of the minor children who were named in the application. No recovery was ever granted to Mrs. Bowles and the children by the Industrial Commission. The complaint in the case was filed on October 31, 1974.

The hearing on Reynolds Motion to Dismiss was limited to the issue of whether or not the statute of limitations had expired prior to the filing of the suit. Arguments were limited to this issue and the court decided the motion on this issue. No evidence has yet been entered into the record on the issues of discharge in bankruptcy or negligence and workman's compensation coverage. It is therefore Respon-

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dent's contention that the points in Appellant's brief relating to these collateral issues are not germaine to the controlling issue on appeal; that is, whether or not the statute of limitations bars Appellants cause of action.

POINT I

RESPONDENT REYNOLDS PROPERLY RAISED THE STATUTE OF LIMITATIONS AS A DEFENSE TO APPELLANTS' CLAIMS.

Appellants contend that Respondent Reynolds has not cited the appropriate statutory section of the Utah code §78-12-28, in his answer, and therefore, cannot rely on the defense on appeal. It is true that the answer filed by Reynolds does se forth, in the third defense, that plaintiff's action is barred by Section 70A-12-28, Utah Code Annotated, but it is evident for three reasons that the section was the re of clerical error. First, there is and has not ever been a Section 70A-12-28, in the Utah Code Annotated, 1953. Title 70A deals with the Uniform Commercial Code and ends with chapter 11. Secondly, the answer of Reynolds specifically states that th action is barred "In that the action was not commenced within two years." Third Respondent properly cited §78-12-28 in a Motion to Dismiss, which was the first pleading he filed, and which gave Appellant timely notice of this defense. It there-fore becomes obvious that in transcribing dictation, the words "seventy-eight" we mistaken for "seventy-A".

The argument of Appellants implies that Respondent Reynolds relied on an inappropriate Statute of Limitations, citing several cases in support thereof. The Utah cases cited are not applicable or controlling as their facts are easily distingu from those of the present case. In Tanner vs. Provo Reservoir Co., 78 Utah 158 2P.2d 107, (1931), the defendants did not raise any issue as to the statute of limit tions until the time of appeal. The court's opinion does not state that any specific

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statute must be pleaded, but indicates only that the defense of the statute of limitations must be pleaded, or will not be available. The language, in fact, implies that the defense is not absolutely waived. The court suggests that if the defendants claimed that the plaintiff's right was barred by the statute of limitations, "they should be permitted to amend their pleadings so as to raise those issues" at 111. In Utah-Delaware Mining Co. vs. Industrial Commission, 76 Utah 187, 289 P.94 (1930) the court set forth the general rule that a party can rely on a statute of limitations as defense only where he pleads it at the first opportunity. The facts of that case showed a defendant mining company which did not raise the issue of statute of limitations until a re-hearing was not allowed to plead the defense. The court noted that the defendant had sufficient prior opportunity to raise his defense, held that it had been waived and did not permit the issue to be interposed at the re-hearing. In the present case the Respondent Reynolds not only raised the statute of limitations in his answer of January 1975, but also plead the statute at his first opportunity in a Motion to Dismiss, filed in November of 1974.

American Theater Co. vs. Glassman, 95 Utah 303, 80 P.2d, 922 (1938) involved two possible statute of limitations. The respondent intentionally chose to sue under one Section of the Utah Code, while the court agreed that another Code Section was the proper under which suit should be instituted. This case involved a mistake of law in suing under an inappropriate statute of limitations, and did not involve a mistake of fact, such as the typographical error in the present case. Wasatch Mines Co. vs. William Hokinson, 465 P.2d 1007 (Utah 1970) did hold that a particular defendant improperly pleaded the statute of limitations, but the facts are not clear as to whether defendant attempted to cite any section of the Utah Code or not. The language of the opinion leads one to believe that the defendant merely pleaded

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the statute of limitations in a general manner and did not designate any section of statute or statutes upon which he relied. Furthermore, the opinion does not talk about the necessity of stating a sub-section of the code. As Respondent Reynolds set forth the section upon which he relied in his Motion to Dismiss, he has complied with the specificity ordered by Rule 9(h).

Appellants further allege that equitable estoppel is proper in the present situation to prevent Respondent Reynolds from relying on the statute of limitations Appellants state that throughout three years of discovery and hearing, neither defendant acted to have the complaint dismissed for the running of statute of limit. Appellants Brief, page 10. In actuality, Respondent Reynolds filed a Motion to Dis in November of 1974, setting forth the grounds that the action "was not commenced within two years as required by 78-12-28, Utah Code Annotated, 1953". This mot of Reynolds was filed prior to his answer and almost immediately upon receipt of the complaint from plaintiff. On December 10, 1974, Respondent's Motion was argued before the Honorable Steward M. Hanson, Jr. Plaintiff's counsel was pres and participated therein, and the Courts Amended Order provided that plaintiff's complaint be dismissed unless plaintiff amended the complaint to allege facts relati to the tolling of the statute of limitations. Defendant Reynolds has at no time taken any action which would constitute a waiver or abandonment of this defense, or an action upon which plaintiff could rely so as to justify a case for estopp.

If estoppel is at all proper in this case, it should be applied against plainti who has not raised the mistaken designation of the statute of limitations in plaintif answer until the appeal proceeding. Respondent Clark has discussed the applica of estoppel against Appellant in great detail under Point II of its brief, which ana and conclusion Respondent Reynolds concurs in as a correct statement of the law equitable principles involved.

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POINT II

THERE IS ONLY ONE CAUSE OF ACTION FOR A WRONGFUL DEATH CLAIM AND SUIT ON THAT CAUSE IS BARRED BY THE STATUTE OF LIMITATIONS FOUND AT §78-12-28(2) UTAH CODE ANNOTATED, 1953.

Plaintiff's Complaint is brought pursuant to §78-11-7, Utah Code Annotated, 1953. The relevant provisions of this section state that:

> When the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs or his personal representative for the benefit of his heirs, may maintain an action for damages against the person causing the death...

The statute of limitations controlling the time for bringing suit on the single cause of action for wrongful death is found at §78-12-28, Utah Code Annotated, 1953. This section provides that suit must be commenced within two years if it is an action to recover damages for the death of one caused by the wrongful act or neglect of another. An additional statute, §78-12-36, must be consulted in the present litigation to correctly determine the effect of §78-12-28. Section 78-12-36 was enacted to protect the claims of those under certain disabilities, including infancy, from the regular statutes of limitations. It states that:

> If a person entitled to bring an action other than for the recovery of real property is at the time of the cause of action... under the age of majority...the time of such disability is not part of the time limited for the commencement of the action.

Though the two-year limitation on recovery for wrongful death does not mention which disability, if any, tolls its running, plaintiffs assert that §78-12-36 allows minority to effectively toll the two-year statute and preserve all of the plaintiffs' claims for a period of two years subsequent to the date that the youngest child reaches her majority. This is not the rule of law governing this case.

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Though the disability statute only speaks in terms of minority, Utah cases

have imposed a further qualification on this particular disability. In order for statutes of limitations to be tolled during minority, the infant and his interests must not be represented by an adult administrator, official guardian or general guardian. This judicial development springs from the court's continued concern with balancing two competing interests, i.e., the policy of protecting the legal rights of infants, and the policy favoring a timely resolution of legal disputes. In Louisville and R.R. Co. vs. Sanders, 5 S.W. 564 (Ky 1887), a Kentucky court, in construing a wrongful death statute and limitations similar to the Utah statutes, explained that:

> The statutory savings on behalf of the infant is only intended to apply where there is no one in being who has power to sue. Unless this construction is given it, the statute of limitations is not one of repose, as the cause of action may be kept alive for over 20 years, although there is no one in being, during the entire time who has the right to sue. Sanders, supra, at 565

The Utah Supreme Court adopted the Sanders reasoning in Platz vs. International Smelting Co., 61 Utah 342, 213 Pac. 187 (1922), and indicated that the statute for recovery on wrongful death would run if a widow, heir or personal representative existed and could have sued. The Court stated:

> The great weight of authority, if not the unanimous authority, supports the argument of respondent to the effect that the statute of limitations begins to run against the right of action immediately after the death... Platz, supra, at 188.

It is evident that the statute of limitations assumes that an action should be brought only when there is a proper party who is in existence and competent to s[ue]. Therefore, the availability of a protecting adult will qualify the general rule that minority may toll a statute of limitations. Once such a proper party is present, t[ime] is of the essence and the right and remedy is lost if not pursued. Harrisburg

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Richards, 119 U.S. 199, 30L.Ed. 258 (1886). In Sanders, supra, the court disallowed the later suit of a minor on the following grounds:

> When the administrator qualified, there was a person in esse who had the right to sue and recover and receive the entire damages, leaving in existence the cause of action. The statute then began to run, not only against him but against the cause of action... (P.565)

Another Utah case mirrored the Sanders reasoning in holding that failure of an administrator, who was also the heirs' guardian, to sue within the period of limitations, estopped the minor from later suing on his own behalf. Dignan vs. Nelson, 26 Utah 186, 72 Pac. 936 (1903).

In addition to appointments of administrators, the mere presence of a general guardian will prevent a minor's infancy from tolling the statute of limitations. In Utah, parents are automatically designated as guardians for their children. §75-13-18 of the guardianship chapter of the Utah Code Annotated (1953, as amended) provides that:

> Husband and wife living together are joint guardians of their minor children, with equal powers, rights and duties with respect to the control and custody and services and earnings of their minor children...

This section states that parents are guardians of their children, which status allows the parent to sue under the wrongful death statute found at §78-11-7 Utah Code Annotated, 1953. When neither parent is alive, the court may appoint a guardian for minors as authorized in §75-13-12, for necessity or convenience. But no such appointment is necessary while a parent lives who can act as guardian under §75-13-18.

In Gallegos vs. City of Midvale, 27 Utah 2d 27, 492 P.2d 1335 (1972), the Court held that the minority of the two-year old plaintiff did not toll the statute

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requiring notification to the city within thirty days of injury on its sidewalks. court focused its decision on the fact that the infant's interest was assumed to be protected by her parents. In setting forth the grounds for dismissal, the court out:

> It should also be kept in mind that the little girl's welfare was being looked after by her parents as her natural guardians. They were as fully aware of her injuries and the cause thereof as if it had happened to one of themselves, and they could have proceeded earlier... Gallegos, supra, at 1338. (Emphasis added)

A later Utah case dealing with a different statutory right of suit in conflict the minority tolling provisions of §78-12-36 is Greenhalgh vs. Payson City, 53? 799 (Utah 1975). As in Gallegos (which was cited with approval), the infant pla was in the active care of its parents during the period of time in which the statut of limitations ran and could have proceeded during the critical time. Because the failed to take the action necessary to give the required notice to the city, the cour held the minor was barred from maintaining an action after the statute of limitation found in the governmental Immunity Act had run.

In a third action against a governmental agency, Varoz vs. Sevey, 506 P. 435, 29 Ut.2d 158 (1973) the court held that the minority of the four year old infa plaintiff did not toll the statute of limitations. In setting forth the rational for its holding, the court stressed the fact that the guardian ad litem was aware of the n for filing the statutory notice, yet failed to file in a timely manner with the prope entity.

The most recent Utah opinion dealing with a minor's suit against a defende covered by sovereign immunity laws is found in Scott vs. School Board of Gran School District, 568 P.2d 746 (Utah 1977). In deciding that the minor's claim w not barred by the statute of limitations found in Title 63 of the Utah Code, the co

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rationalized that the legislative intent found in an amendment extending the time limitations for suits against cities allowed further extentions for suits filed against school districts and other governmental entities.

The amendment at issue allowed minors to sue a city within the time limits specified "or within one year after the person reaches the age of majority, whichever is longer." §10-7-77, Utah Code Annotated, 1953, (1975, supp.).

In the Gallegos, Greenhalgh, Varoz, and Scott cases, the court was faced with the interplay of relatively short governmental immunity statutes and the general tolling provision found in §78-12-36. The first three decisions clearly held in favor of the short statute of limitations involved, rather than the general tolling statute.

The Scott departure from this policy is justified by the Amendment to §10-7-77. This extension specifically applied to municipal defendants, but was applied in the Scott case by implication to a school board, in an attempt to bootstrap all minor plaintiffs into the superior position granted to them only in recoveries against cities. The dissent of Justice Crockett concisely points out the first flaw in the majority's reasoning:

> "The general rule of statutory construction is that the legislative act is intended to mean just what it says. In amending the statute relating to cities, and in failing to so enact with respect to other public entities, it should be assumed that they intended just what they did and no more at 749."

The second major defect with the main opinion of Scott is also revealed in the Chief Justice's dissent. The main text states that an action by or against a minor requires the appointment of a guardian ad litem, citing Rule 17(b) of the Utah Rules of Civil Procedure. Rule 17(b), however, is not the exclusive method for litigating on behalf of a minor.

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As Justice Crockett notes:

> "Under our law they [parents] need not be appointed as guardians, ad litem, or otherwise. §78-11-6 Utah Code Annotated, 1953, expressly authorizes the father or mother, to act for redress for injury to a child without such an appointment."

The methods of suing on behalf of a minor as natural guardian parents unde §78-11-6 and as appointed guardians ad litems under Rule 17(b) are not exclusive or mandatory avenues for recovery, but are alternative routes equally proper for in cases seeking recovery for infants. Skollinsberg vs. Brookover, 484 P.2d 11 26 Ut.2d 45 (1971).

The practice of parents bringing actions as natural guardians for minors without court appointment has been obvious as recently as 1975. In Greenhalgh vs Payson City, supra, the mother of the infant used, in her own behalf for her inju and as a natural guardian, on behalf of her minor son Patrick to recover damages for his injuries. Though the Greenhalgh case did not involve a wrongful death recovery, it did deal with recovery of a claim belonging to the infant, as sought b the natural guardian mother.

The cases interpreting governmental notice limitations are helpful, but not controlling in resolving the present suit against private individuals for wrong death. The Utah cases on this issue must be consulted for the court's ultimate determination. In this regard, Parmley vs. Pleasant Valley Coal Co., 228 Pac.55 64 Ut. 125 (Utah 1924). still stands as good law for the principle that there exists only one cause of action for recovery on wrongful death which must be pursued within the period of limitations if a member of the class allowed to sue can do so.

In disallowing suit by a posthumas child for the wrongful death of his fath the Parmley court cited numerous cases, including Louisville and N.K. Co. vs.

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Sanders, supra. The Sanders court interpreted a wrongful death statute similar to that of Utah. Kentucky law clearly gave the right of recovery to the administrator, personal representative or widow of the decedent. The Kentucky court emphasized that each person authorized to sue did not possess an individual right and remedy of his own, but that there is only one cause of action and, therefore, only one recovery. The court explained:

> Here is but one cause of action. The right to sue upon it is given to either of three persons...if in this instance the administrator had sued, and either recovered or been defeated, it would have been a bar to subsequent action by the children. Sanders, supra, at 565.

After analyzing a substantial number of other representative cases, the Utah court concluded that the enforcement of the right to recover damages for death

> ...may therefore, be conferred on any one or all of the beneficiaries, and the enforcement of the right may be limited to one action which must be prosecuted for the benefit of all...there is but one cause of action, and only one action may be maintained. Parmley, supra, at 562 (Emphasis supplied)

This statement has not been modified, supplemented or overturned to date by the Utah court. It still applies in its entirety to a situation where there is a person in being who can act on behalf of an infant plaintiff, or on his own behalf on a claim. The case authorities cited by appellants are simply inapplicable because they deal with situations in which the statute of limitations was tolled by a disability during which time no one was empowered to bring suit for the wrongful death.

CONCLUSION

Respondent Reynolds raised the statute of limitations in a proper and timely manner by citing §78-12-28, Utah Code Annotated, 1953, at his first possible opportunity in his Motion to Dismiss. He is not barred or estopped from relying on the

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statute as a valid and sufficient defense.

Appellant Louella R. Bowles was, under Utah law, the general guardian of her five children from the moment of her husband's death on June 24, 1963. The single cause of action for wrongful death arose at that time, if it existed at all. Th widow was under no disability and was competent to file a suit to recover her dam as an heir, for her husband's wrongful death. In addition, Mrs. Bowles thereafte had all of the minor children in her active care. She had the opportunity and the right to bring action from that date forward for them as well and her failure to initiate a civil action within two years on either her behalf or her children's beha clearly bars the single cause of action for wrongful death.

The argument that Mrs. Bowles should have acted to protect her children's interests is strengthened by the fact that she did initiate action for them by filing an application with the Industrial Commission in July, 1963.

The statute of limitations having run, this case should be dismissed. The st was not tolled by the minority status of the children of the decedent because plain Louella R. Switzer Bowles could have instituted a suit as parent or natural guardi of the said children within the time allowed under Utah law. The judgment of the District Court dismissing the complaint of Appellant should be affirmed. No other ruling would be consistent with judicial opinions on this particular issue or in harmony with legislative policy.

Respectfully submitted,

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____

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