

2000

Mark Plaskon v. Craig Dearden, Commissioner,
Department of Public Safety, State of Utah; Robert
Brinkman, Bureau Chief, Crime Laboratory,
Department of Public Safety, State of Utah; and the
State of Utah : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARK PLASKON, :
Plaintiff/Appellant, : Case No. 20000066-CA
v. :
CRAIG DEARDEN, Commissioner, :
Department of Public Safety, :
State of Utah; ROBERT :
BRINKMAN, Bureau Chief, Crime :
Laboratory, Department of : Priority No. 15
Public Safety, State of Utah; :
and THE STATE OF UTAH, :
Defendants/Appellees. :

BRIEF OF APPELLEES

- - - - -
On Appeal from an Order of Dismissal of the
Third Judicial District Court in and for
Salt Lake County, State of Utah,
Honorable Tyrone E. Medley, Presiding

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ORAL ARGUMENT NOT REQUESTED BY DEFENDANTS/APPELLEES

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BRIEF OF APPELLEES
- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is taken from an Order of Dismissal of the Third Judicial District Court, filed December 20, 1999 (R. 138-39), granting defendants' motion to dismiss plaintiff's claims of defamation and interference with prospective economic relations under Rule 12(b)(6) of the Utah Rules of Civil Procedure (R. 38-39). The claims arose from plaintiff's termination from probationary state employment more than 11 years before he initiated the present action. Plaintiff filed a timely notice of appeal from the Order of Dismissal on January 19, 2000 (R. 140). By order of transfer from the Supreme Court of Utah dated May 18, 2000, this Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1996).

ISSUE PRESENTED UPON APPEAL AND STANDARD OF APPELLATE REVIEW

Plaintiff's appeal raises only the question whether the district court erred in ruling that, under Retherford v. AT&T Communications, 844 P.2d 949 (Utah 1992), a "continuing wrong" theory was inapplicable to plaintiff's cause of action for the purpose of extending the relevant statute of limitations.

STANDARD OF REVIEW: The applicability of a decided case to the controversy before the trial court is a question of law, reviewed for correctness. 4447 Assocs. v. First Sec. Fin., 1999 UT App 013, ¶9, 973 P.2d 992; see also State v. Montoya, 887 P.2d 857, 858 (Utah 1994); Billings v. Union Bankers Ins. Co., 918 P.2d 461, 464 (Utah 1996); Amax Magnesium Corp. v. Utah State Tax Comm'n, 874 P.2d 840, 842 (Utah 1994). Further, "[t]he propriety of a dismissal based on Utah R. Civ. P. 12(b)(6) is a question of law; therefore we review the district court's ruling for correctness." Stokes v. Wagoner, 1999 UT 94, ¶6, 987 P.2d 602; see also Tiede v. State, 915 P.2d 500, 502 (Utah 1996).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

All relevant text of constitutional provisions, statutes, and rules pertinent to the issue before the Court is contained in the body of this brief.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

Plaintiff filed the original complaint in this lawsuit on February 11, 1998 (R. 1-7), alleging causes of action in defamation and "unlawful business interference" (R. 1, ¶ 1). The complaint was not served on defendants. On June 30, 1998, an amended complaint was filed (R. 10-16), correcting an internal inconsistency between paragraphs 2 and 10 of the original complaint regarding the length of plaintiff's probationary employment (compare R. 1-2, ¶ 2, and 4, ¶ 10; R. 10, ¶ 2, and 12-13, ¶ 10) and raising plaintiff's requests for compensatory and punitive damages from one million to ten million dollars each (R. 6 and 15, prayer for relief, ¶¶ 3-4). As with the original complaint, plaintiff failed to serve the amended complaint on defendants, instead filing a second amended complaint on September 23, 1998 (R. 17-23), which added a new paragraph 11 asserting that defendants had failed to advise him of rights to the administrative review of his termination from employment and that he had been found entitled to an award of employment compensation over defendants' opposition (R. 20). Neglecting to serve defendants with this second amended complaint, plaintiff again amended the complaint on January 19, 1999 (R. 24-31), newly alleging a claim based on the asserted public accessibility of his employment records under the Governmental Records Access and Management Act (GRAMA), Title 3, Chapter 62 of the Utah Code,

enacted some five years after plaintiff's termination (R. 29, ¶ 21). He made timely service of this third amended complaint on defendants (R. 32-37).

Defendants responded with a motion under Rule 12(b)(6) of the Utah Rules of Civil Procedure to dismiss the complaint for failure to state a claim upon which relief can be granted (R. 38-39), supported by a memorandum (R. 40-82). The memorandum pointed out various jurisdictional and procedural flaws in the complaint in addition to identifying prior suits plaintiff had litigated with respect to the same set of facts. Following plaintiff's response (R. 83-112) and supplemental briefing by both parties (R. 123-27 (plaintiff) and 128-35 (defendants)), the court entered its order of dismissal (R. 138-39) on December 20, 1999 "for the reasons set forth in Defendants' memoranda in support and in reply" (R. 139). Plaintiff filed a timely notice of appeal on January 19, 2000 (R. 140).

B. Statement of Relevant Facts

Plaintiff was hired to work as a questioned document examiner in the Utah Department of Safety's crime laboratory, where defendant Brinkman was his immediate supervisor (Third Amended Complaint, R. 24, ¶ 2.) While plaintiff was still on probationary status, he was repeatedly warned about problems with his performance. In a May 28, 1986 memorandum given to plaintiff, which plaintiff refused to acknowledge by signing, Mr. Brinkman noted that plaintiff had engaged in insubordination by declining to follow specific instructions regarding his work

priorities (Exh. D to plaintiff's memorandum opposing motion to dismiss, R. 95 and 110). The memorandum also stated:

You have been talked to extensively in the past for this behavior. This memo is to be considered a written reprimand which will be placed in your permanent personnel file.

This is also notice that should we experience this behavior at any time in the future, it will be grounds for dismissal.

R. 95 and 110. On June 23, 1986, plaintiff received an Employee Performance Appraisal Form, which noted continuing performance problems, including "lack of cooperation, sarcasm and resistance to authority" (Exh. C to plaintiff's memorandum opposing motion to dismiss, R. 93 and 108). Plaintiff refused to sign the appraisal form. Plaintiff did not successfully complete his probation, and prior to its expiration, he was advised by letter, dated August 19, 1986 and served on him two days later, of his termination from employment effective August 24, 1986 (Third Amended Complaint, R. 26, ¶ 10; Exh. B to plaintiff's memorandum opposing motion to dismiss, R. 91-92 and 106-07). The termination was based on "numerous occasions" of counseling by his supervisors "in the areas of relations with co-workers, relations with your supervisors, the attitude which you display toward your case work and conforming to the rules and policies of the Laboratory and of the Department" (R. 91 and 106), as well as on two "below standard" performance appraisals (id.). The letter correctly advised plaintiff that "[u]nder Utah law, there is no appeal process for probationary employees" (id.).

On August 24, 1988, plaintiff filed a complaint in Third District Court against the State of Utah, defendant Brinkman, and John T. Nielson, then Commissioner of the Utah Department of Public Safety ("DPS") (Exh. A to defendants' memorandum supporting motion to dismiss, R. 52-59; see also Addendum A, attached). The case was dismissed without prejudice (R. 60). A second suit with substantially identical allegations, also brought in Third District Court, was filed on June 15, 1990 against the same defendants (Exh. B to defendants' memorandum supporting motion to dismiss, R. 62-67; see also Addendum B, attached), and was likewise dismissed without prejudice (R. 69) for failure to serve. On March 6, 1995, plaintiff filed suit in federal district court, substituting Douglas Bodrero for John T. Nielson as DPS Commissioner and amending the complaint before service (see Addendum C, attached; see also Second Amended Complaint, Civil No. 95CV210W, Exh. C to defendants' memorandum supporting motion to dismiss, R. 73-79). The complaint had the same factual basis as the prior state complaints, but added an allegation that unfair statements by defendants regarding his work skills, made in documents contained in his personnel file, prohibited him from obtaining employment with the Weber State University Crime Laboratory (R. 78, ¶ 20). In addition to defamation and unlawful interference claims, the federal suit also raised a Title VII claim for discrimination in employment (R. 73, ¶ 1). The federal court dismissed all claims with prejudice by order dated March 4, 1997 (see Exh. C to defendants'

memorandum supporting motion to dismiss, R. 80), reaffirming by subsequent order the merit of defendants' articulated grounds for dismissal and denying plaintiff's request for a non-prejudicial dismissal of his state causes of action (R. 80-81). No appeal was taken from this final order.

The present lawsuit ensued.

SUMMARY OF ARGUMENT

Plaintiff seeks to avoid the multiple procedural and jurisdictional defects of his suit by invoking a continuing violation theory based on Retherford v. AT&T Communications, 844 P.2d 949 (Utah 1992). In Retherford, the Supreme Court of Utah reversed summary judgment for defendants on statute of limitations grounds in an action for intentional infliction of emotional distress. The court held that because of the cumulative nature of retaliatory harassment, it could not rule as a matter of law that Retherford's cause of action accrued at the time she first complained of her coworkers' retaliatory actions, which was beyond the applicable statute of limitations. The court focused on the subjective nature of the element of plaintiff's extreme emotional distress and the difficulty in establishing the time of its accrual, observing that the leave of absence she ultimately took as a result of defendants' ongoing acts of harassment fell within the limitations period. By contrast, no such subjective element is present in the case at bar. Plaintiff's cause of action accrued, at the latest, when he

was made aware of unfavorable reports and reviews or when he was terminated on the grounds they documented. Plaintiff has articulated no reason to extend the four-year general statute of limitations to more than a decade after these events took place.

Moreover, the claims made in the present suit have already been litigated to decision on the merits by the parties or their privies in plaintiff's federal lawsuit, which resulted in a dismissal with prejudice of all claims. Res judicata prevents their relitigation here.

Finally, plaintiff has not followed the strictures of the Utah Governmental Immunity Act in commencing his action. Under Utah Code Ann. § 63-30-12 (1997), the act requires that a notice of claim be filed within one year of the asserted cause of action. The claim is deemed denied if no contrary action is taken within 90 days. If plaintiff relies on his original notice of claim, allegedly filed on or before August 24, 1987 (R. 56, ¶ 16), then the present suit has not been timely commenced within one year of the claim's denial or deemed denial. If, instead, plaintiff relies on his allegedly amended notice of claim dated August 21, 1998 (R. 96-97 and 111-12),¹ the notice falls outside the one-year period measured from the time the cause of action

¹A June 26, 1997 notice of claim purportedly attached to the original, amended, and second amended complaints does not appear of record. Moreover, since the third amended complaint, the only one served on defendants, does not refer to it, it is not at issue in the present appeal. Additionally, plaintiff's memorandum opposing defendants' motion to dismiss specifically relies on and attaches only the amended notice of claim dated August 21, 1998. In any event, neither date would be timely.

arose. Moreover, the present suit was commenced with the filing of the original complaint on February 11, 1998, fully six months before the date of the amended notice and therefore in violation of statute. Plaintiff has articulated no argument addressing these determinative procedural and jurisdictional errors.

As noted in defendants' memorandum supporting their motion to dismiss, plaintiff's complaint, read broadly, may have attempted to articulate claims under various other legal theories, including employment discrimination under Title VII of the Civil Rights Act of 1964, disability discrimination, civil rights violations under 42 U.S.C.A. § 1983 (Supp. 2000), and even constitutional due process violations (see R. 43-46). Defendants' arguments for the dismissal of these possible claims were adopted by the district court in its order granting dismissal "for the reasons set forth in Defendants' memoranda in support and in reply" (R. 139) and stand as independent grounds supporting the court's decision. Because plaintiff has failed to address these issues, they are deemed waived for purposes of appeal and will not be further addressed in this brief.

Plaintiff admits that his reliance on Retherford is placed solely on dicta contained in a footnote (see Aplt. Brief at 7). Given the multiple grounds supporting the district court's decision, plaintiff's argument is too slender a reed to bear the weight of reversal.

ARGUMENT

I. PLAINTIFF'S SUIT IS BARRED BY JURISDICTIONAL AND PROCEDURAL ERRORS UNDER THE UTAH GOVERNMENTAL IMMUNITY ACT.

"The proper interpretation and application of a statute is a question of law which [the appellate court] review[s] for correctness, affording no deference to the district court's legal conclusions." Gutierrez v. Medley, 972 P.2d 913, 914-15 (Utah 1998); see also State v. Martin, 1999 UT App 062, ¶7, 976 P.2d 1224. The trial court correctly adopted defendants' contention that the Utah Governmental Immunity Act barred plaintiff's claims, and plaintiff has mounted no argument to the contrary.

Plaintiff's Third Amended Complaint states, "This is an action for defamation and unlawful business interference" (R. 24, ¶ 1). The complaint names as defendants Craig Dearden, Commissioner of the Utah Department of Public Safety; Robert Brinkman, Bureau Chief of the Department's crime laboratory; and the State of Utah. Because the articulated claims lie against the State--a governmental entity as defined in Utah Code Ann. § 63-30-2 (1997 and Supp. 1999)--and its employees, acting within the scope of their employment, the case is governed by the provisions of the Utah Governmental Immunity Act.

Plaintiff has not argued that the act does not control his case.² In fact, his first three complaints in this case

²"Issues not briefed by an appellant are deemed waived and abandoned." American Towers Owners Ass'n v. CCI Mechanical, Inc., 930 P.2d 1182, 1185 n.5 (Utah 1996); see also Pixton v. State Farm Mut. Auto. Ins. Co., 809 P.2d 746, 751 (Utah App.

specifically invoke the act by stating that "[o]n or about June 26, 1997, a notice of claim against the State of Utah was filed, a copy of which is attached hereto and made a part hereof by reference" (R. 6, 15, and 22, ¶ 21).³ Moreover, he has not alleged that the defendant employees acted with fraud or malice, the only grounds on which he could bring an action against them other than under the Governmental Immunity Act, pursuant to Utah Code Ann. 63-30-4(3) (1997). His sole identification of defendants is in their capacities as employees of the state (R. 24, ¶ 1).

Section 63-30-3(1) of the act provides governmental entities immunity from suit for, among other things, "any injury which results from the exercise of a governmental function." Utah Code Ann. § 63-30-3(1) (1997). The act defines a governmental function as

any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core government function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.

1991) ("Generally, where an appellant fails to brief an issue on appeal, the point is waived").

³See n.1, supra. No such attachment appears in the district court record. However, plaintiff does provide an "Amended Notice of Claim Against Government Entity" dated August 21, 1998 as Exhibit E to his memorandum opposing defendants' motion to dismiss (R. 96-97 and 111-12). The memorandum contains no reference to a notice of claim dated June 26, 1997.

Utah Code Ann. § 63-30-2(4)(a) (1997 and Supp. 1999).

Additionally, "[a] 'governmental function' may be performed by any department, agency, employee, agent, or officer of a governmental entity." Utah Code Ann. § 63-30-2(4)(b) (1997 and Supp. 1999).

Section 63-30-10 (1997) retains immunity for injuries caused by employees' negligent acts or omissions, including "libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights." Utah Code Ann. § 63-30-10(2) (1997). It likewise retains immunity for "a misrepresentation by an employee whether or not it is negligent or intentional." Utah Code Ann. § 63-30-10(6) (1997). Plaintiff's allegations of defendants' false and misleading statements and defamation, all of which plaintiff asserts have prevented him from obtaining employment in his chosen field, clearly fit within these categories. Because immunity for these actions is retained, plaintiff's defamation-based claims could not go forward under the act even if plaintiff had complied with all procedural and jurisdictional requirements of the immunity act. However, he did not do so.

Both statute and precedent make clear that a timely notice of claim is a jurisdictional prerequisite to suit under the act. Section 63-30-12 states that

[a] claim against the state, or against its employee for an act or omission occurring during the performance of [his/the employee's] duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the [relevant authorities] within one year after the claim arises, or

before any extension of time granted under Section 63-30-11, regardless of whether or not the function giving rise to the claim is characterized as governmental.

Utah Code Ann. § 63-30-12 (1997 and Supp. 1999). As the supreme court has consistently held, failure to give the required notice is grounds for dismissal. See Rushton v. Salt Lake County, 1999 UT 36, ¶18, 977 P.2d 1201 ("To bring suit against a governmental entity for an injury, a party must file a written notice of claim with that entity. Failure to file such notice deprives the court of subject matter jurisdiction") (citation omitted); see also Madsen v. Borthick, 769 P.2d 245, 250 (Utah 1988). This Court applied the supreme court's Madsen holding in Lamarr v. Utah State Department of Transportation, 828 P.2d 535, 540 (Utah App. 1992), citing to Madsen and stating, "[T]he supreme court has held the statutory notice requirement is a jurisdictional requirement and a precondition to suit."

Once a timely notice of claim has been filed, Utah Code Ann. § 63-30-14 (1997) gives a governmental entity 90 days in which to approve or deny it. If no action is taken within that period, the claim is deemed denied. Under Utah Code Ann. § 63-30-15(2) (1997), a suit following this denial period must be commenced within one year of its expiration.

Plaintiff's original notice of claim, allegedly filed "on or before August 24, 1987" (R. 56), was timely as to his 1986 termination. However, it cannot serve to sustain the present suit, filed nearly a decade later, well past the one-year statute of limitations. The alleged notice of June 26, 1997 (see R. 6,

15, and 22, ¶ 21) appears nowhere of record, even though plaintiff claims to have attached it to his original, first amended, and second amended complaints in this action. Moreover, the complaint at issue here, the Third Amended Complaint, does not refer to it. The amended notice plaintiff claims to have filed on August 21, 1998 (R. 96-97 and 111-12) is based on events that took place in 1986 and is therefore not timely. Even if it were timely as to the claims asserted therein, it does not satisfy the precondition requirement because this suit was commenced by the filing of the original complaint more than six months before the date of the amended notice. Plaintiff has not cited, and defendants' research has not disclosed, any authority suggesting that a default of timely notice can be cured by notice given subsequent to the initiation of a legal action. In fact, under Rushton, even "[a]ctual notice does not cure a party's failure to meet these [notice] requirements." Rushton, 1999 UT 36, ¶19; see also Brittain v. State, 882 P.2d 666, 672 n.9 (Utah App. 1994); Litster v. Utah Valley Community College, 881 P.2d 933, 938 (Utah App. 1994). To accept a tardy notice of claim would gut the very purpose of notice: "to provide the governmental entity an opportunity to correct the condition that caused the injury, evaluate the claim, and perhaps settle the matter without the expense of litigation." Larson v. Park City Mun. Corp., 955 P.2d 343, 345-46 (Utah 1998); see also Bellonio v. Salt Lake City Corp., 911 P.2d 1294, 1297 (Utah App. 1996).

In short, the deficiencies of plaintiff's pleadings, as revealed in the record, fully support the district court's dismissal of plaintiff's complaint. Whether or not the court relied on these particular grounds for its order of dismissal, they are also sufficient for affirmance of the district court's decision.⁴

II. PLAINTIFF'S CLAIMS ARE BARRED BY BOTH THE CLAIM PRECLUSION AND ISSUE PRECLUSION BRANCHES OF RES JUDICATA.

Plaintiff suggests that the case at bar stands in the same procedural posture as Retherford. He correctly states that the Retherford court "dismissed the Federal claims with prejudice, as being untimely, and dismissed the State claims without prejudice for lack of pendant [sic] jurisdiction" (Aplt. Brief at 5-6). He then cautions the Court to "note that this procedural history is very similar to the present case" (id. at 6). A review of the series of lawsuits plaintiff has pursued with respect to the facts that underlie this case shows otherwise.

Plaintiff initially filed suit in Third District Court in 1988 (R. 52-59 and Addendum A, attached). The complaint was not served on defendants and was subsequently dismissed without prejudice (R. 60). He filed a second case in Third District Court in 1990, which he again failed to serve (R. 62-67 and

⁴A reviewing court "may affirm a trial court's decision on any reasonable legal basis, provided that any rationale for affirmance finds support in the record." State v. Heaton, 958 P.2d 911, 916 (Utah 1998); see also White v. Deseelhorst, 879 P.2d 1371, 1376 (Utah 1994) ("[W]e may affirm the judgment on any ground, even one not relied upon by the trial court").

Addendum B, attached). This suit was likewise dismissed without prejudice (R. 59) for failure to serve defendants. In 1995, he filed a third action, this time in federal district court (R. 73-79 and Addendum C, attached), making service on defendants, who filed a motion to dismiss (see Addendum C, entries for December 30, 1996). The motion was granted and all claims were dismissed with prejudice (see R. 80). The federal court subsequently denied plaintiff's motion to set aside the dismissal with prejudice as to the state claims, finding no grounds that would justify such action and reaffirming the grounds for dismissal as meritorious (R. 81). Plaintiff took no appeal from the court's decision. Consequently, the decision operates as an adjudication on the merits of the case,⁵ barring the present claims as res judicata.⁶ "The application of res judicata is a question of law, reviewed for correctness with no deference given to the trial court." J.M. v. State, 1999 UT App 238, ¶15, 986 P.2d 115; see also State, Office of Recovery Servs. v. V.G.P., 845 P.2d 944, 946 (Utah App. 1992).

⁵See Fed. R. Civ. P. 41(b): "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision [involuntary dismissal] and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." Plaintiff has not argued that any of these exceptions apply to the dismissal of his federal case. His state claims, therefore, were dismissed on the merits, activating the doctrine of res judicata.

⁶As with the issue of the Governmental Immunity Act's procedural and jurisdictional requisites, the issue of res judicata has not been briefed by appellant and is therefore waived for purposes of appeal. See n.2, supra.

The term "res judicata" comprises two distinct legal doctrines: claim preclusion and issue preclusion. Under the first branch,

Claim preclusion bars a cause of action only if the suit in which that cause of action is being asserted and the prior suit satisfy three requirements. First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Madsen, 769 P.2d at 247. In issue preclusion, or collateral estoppel,

the adjudication of an issue bars its relitigation in another action only if four requirements are met. First, the issue in both cases must be identical. Second, the judgment must be final with respect to that issue. Third, the issue must have been fully, fairly, and competently litigated in the first action. Fourth, the party who is precluded from litigating the issue must be either a party to the first action or a privy of a party.

Id. at 250.

In this case, both branches of res judicata are satisfied. The plaintiff here was also the plaintiff in the federal case and is the party who is to be precluded from relitigating his state claims. The State and Robert Brinkman, defendants here, were also defendants in the federal case. The third federal defendant, Douglas Bodrero, preceded present defendant Craig Dearden as Commissioner of the Utah Department of Public Safety and these parties are consequently in privity. The state claims presented in the federal case are virtually identical to the claims raised in the case at bar: "an action for defamation and

unlawful interference with Plaintiff's ability to pursue his chosen profession" (R. 73, ¶ 1) based on the allegation "[t]hat subsequent to the Plaintiff leaving employment with the State of Utah, he has attempted to obtain employment in the area of crime scene investigation, document examination and other forensic fields and has consistently been denied employment based upon the false reports generated from the Defendants" (R. 28, ¶ 17 (present suit); R. 78, ¶ 18 (federal suit)). Even the most recent instance of alleged defamation and interference with prospective employment, the denial of employment with the crime laboratory at Weber State University in 1995, is the same in both cases (see R. 28-29, ¶ 19 (present suit); R. 78, ¶ 20 (federal suit)). In their allegations that plaintiff has "consistently been denied employment" on the basis of defendants' statements (R. 28, ¶ 17 (present suit); R. 78, ¶ 18)), both suits allege an ongoing violation. The parties fully litigated these state issues to conclusion on the merits in the federal suit, as explained above, and a decision on the merits was rendered in defendants' favor, from which plaintiff took no appeal. Even if they had not been so litigated, the factual similarities in the two cases show that the state issues could have and should have been raised in the federal case. Given the identity of the parties, facts, and issues, plaintiff cannot escape the application of res judicata to his claims here.

III. PLAINTIFF HAS NOT ARTICULATED A "CONTINUING WRONG" THAT WOULD SUPPORT JURISDICTION OF HIS CLAIMS.

Plaintiff's sole argument for the timeliness of his claims is based on a footnote in Retherford which he acknowledges in his brief "is dicta and is not a part of the holding of the case, and therefore the case does not provide any precedential value for this Court" (Aplt. Brief at 7). In light of the procedural, jurisdictional, and res judicata hurdles that plaintiff has failed to overcome, this argument cannot support the weight of reversal.

The Retherford court suggested three factors to be considered in determining the existence of a continuing violation: (1) subject matter, (2) frequency, and (3) permanence. See 844 P.2d at 976 n.18. The circumstances of plaintiff's case do not fulfill these criteria.

As to subject matter, the inquiry involves whether all alleged acts involve the same type of discrimination. Plaintiff has alleged no discrete acts since his denial of employment by the Weber State University Crime Laboratory in 1995 that have resulted in discrimination against him. He argues only that "[o]bviously Petitioner's allegations of disseminating untrue information about him over a period of years qualifies" (Aplt. Brief at 7). He has identified neither specific statements nor specific parties to whom such statements were disclosed after the 1995 incident, which was litigated to conclusion on the merits in his prior federal case. Relying only on the 1995 incident subjects his complaint to dismissal for lack of a timely notice

of claim and on grounds of res judicata, as discussed in Points I and II, above.

Petitioner fares no better with the frequency factor. His complete argument, after asserting that the factor favors his position, is as follows: "They are not isolated incidents, but continuing incidents that extend over a number of years of making his file available through GRAMMA [sic] and other reporting services so that any potential employer could review the documents" (Aplt. Brief at 7). Again, these allegedly "continuing incidents" are unidentified other than the asserted--and litigated--1995 disclosure to Weber State University. Moreover, there is no evidence of record that negative documents were added to his personnel file subsequent to his separation from state employment in 1986--some five years before the Governmental Records Access and Management Act (GRAMA) became effective in 1991. The continuing existence of negative documents, especially in the absence of demonstrated new publication, cannot sustain a finding of frequency simply on the basis of continued availability.

Russell v. McMillen, a case cited to support the application of a "continuing wrong" theory in Currier v. Holden, 862 P.2d 1357, 1377-78 (Utah App. 1993) (Orme, J., concurring in the result), is instructive on this point. Russell was a Colorado libel case in which a series of newspaper articles, published beginning on October 6, 1976, allegedly libeled the plaintiff. The Colorado Court of Appeals recognized that "[a] cause of

action in libel accrues when the defamatory statements are published. And, each separate publication constitutes a separate and distinct claim for libel." Russell v. McMillen, 685 P.2d 255, 258 (Colo. App. 1984). Nonetheless, the court held Russell's claims barred as to the 1976 articles by his failure to file his libel complaint within the one-year statute of limitations. The mere existence and presumably continuing availability of the 1976 articles to public scrutiny did not render the violation "continuing" as to those articles for limitations purposes. Plaintiff's situation is similar. He had an opportunity to challenge the allegedly defamatory documents when he first became aware of them, or, at the latest, when he became aware in 1995 that they were being disclosed to prospective employers. See R. 28-29, ¶ 19, in which plaintiff admits that in the process of applying for employment with Weber State University, he

was advised that reports emanating from the Defendants question his competence, his integrity and his ability to work with people, all of which serve to perpetuate an unfair and invalid profile of the Plaintiff, which in the highly competitive area of criminalistic, [sic] prohibits him from obtaining employment and has thus far prohibited him from obtaining employment at the Weber State University Crime Lab.

Just as the continuing availability of the newspaper articles to public scrutiny did not save Russell's action, the continued availability of plaintiff's personnel file does not constitute a "continuing wrong" that overcomes the relevant statute of limitations.

In the Retherford court's three-factor analysis, "[t]he third factor, perhaps of most importance, is degree of permanence." Retherford, 844 P.2d at 976 n.18 (quoting Berry v. Board of Supervisors, 715 F.2d 971, 981 (5th Cir. 1983)). The relevant inquiry is as follows:

Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

Id. While plaintiff disavows knowledge of the contents of his personnel file until "two years ago" (Aplt. Brief at 7), he has not addressed his own representation that he was aware of negative documents in his file that were made available to Weber State University in 1995. Under the Retherford dicta, this event should have put him on notice that the continued existence of the documents could be expected to result in adverse consequences regardless of a continued discriminatory intent on defendants' part. Plaintiff's August 21, 1998 notice of claim was untimely with respect to this factor, and, as explained in detail above, requires dismissal of his suit.

Retherford simply does not support the result plaintiff wishes to reach: an avoidance of the statute of limitations despite his demonstrated prior awareness of his asserted harm. Plaintiff admits that Retherford is not of precedential value in his suit. Defendants submit that even if the Court were inclined to adopt the dicta contained in Retherford's footnote 18, the

facts of the case at bar neither compel nor justify its application here.

CONCLUSION

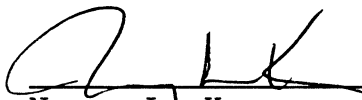
Plaintiff has failed to demonstrate a "continuing wrong" that would warrant an extension of the statute of limitations in his case. There is no subjective element in his claims that would require determination by a trier of fact. The uncontested, objective facts, as pleaded by plaintiff, show that he was aware of defendants' statements as long ago as the time of his termination from state employment in 1986. He was certainly aware of their dissemination by 1995, when he was rejected for employment by the Weber State University Crime Laboratory, and, in fact, litigated the matter to decision on the merits in federal district court. He cannot now be heard to claim, on the same factual basis, that he was unaware of the permanent implications of defendants' statements. Nor can he escape his own failures to follow the procedural requirements of the Governmental Immunity Act in order to protect his rights.

The record supports the district court's dismissal of plaintiff's action on multiple grounds which plaintiff's rationale does not overcome. For this reason, as more fully explained above, defendants respectfully request the Court to affirm the trial court's dismissal of this case.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLISHED OPINION

Defendants/appellees believes the law is sufficiently clear that neither oral argument nor a published opinion is necessary in this case. However, they wish to participate if oral argument is ordered by the Court.

Dated this 26th day of July, 2000.


A handwritten signature in black ink, appearing to read 'N. Kemp', is written over a horizontal line.

Nancy L. Kemp
Assistant Attorney General
Attorney for Defendants/Appellees

CERTIFICATE OF MAILING

I hereby certify that on this 26th day of July, 2000, I caused to be mailed, first class postage prepaid, two true and correct copies of the foregoing BRIEF OF APPELLEES to the following:

John T. Caine
Richards, Caine & Allen
2568 Washington Boulevard
Ogden, Utah 84401



ADDENDUM A

Party Name	Case Num	CT DOB	Par Cit Num	LEA Judge/Commsr
NIELSON, JOHN T.	880905485 CV		DEF	J RUSSON, L

THIRD DISTRICT COURT-SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

MARK PLASKON vs. JOHN T. NIELSON

CASE NUMBER 880905485 {Civil}

CURRENT ASSIGNED JUDGE
LEONARD H. RUSSON

PARTIES

Plaintiff - MARK PLASKON
Represented by: JOHN T. CAINE

Defendant - JOHN T. NIELSON

Defendant - ROBERT BRINKMAN

Defendant - STATE OF UTAH

ACCOUNT SUMMARY

CASE NOTE

PROCEEDINGS

08-24-88 Filed: Complaint

08-24-88 Judge RUSSON assigned.

convert

10-02-88 Note: Case converted from COUNTY system, Civil file date

08/24/88. slc
06-23-89 Order to Show Cause scheduled on July 12, 1989 at 09:00 AM with
Judge RUSSON. susies
06-23-89 Note: Order to Show Cause - No. 1 susies
06-23-89 Note: OSC scheduled for 07/12/89 at 0900 A in room E
with LHR susies
07-12-89 Judgment #1 Entered
07-12-89 Note: Order of Dismissal - Reason: susies
07-12-89 Note: Judgment and Order without Prejudice susies
07-12-89 Note: Case judgment is Dismissed susies
07-12-89 Note: Case disposition is Closed susies

ADDENDUM B

1 of 1 (1 - 1 on screen)

Running Report ...

Displaying Report

THIRD DISTRICT COURT-SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

MARK PLASKON vs. JOHN T NIELSON

CASE NUMBER 900903525 {Civil}

CURRENT ASSIGNED JUDGE
SCOTT DANIELS

PARTIES

Plaintiff - MARK PLASKON
Represented by: JOHN T. CAINE

Defendant - JOHN T NIELSON

Defendant - ROBERT BRINKMAN

Defendant - STATE OF UTAH

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	75.00
	Amount Paid:	75.00
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: CIVIL FILING FEE

Amount Paid:	75.00
Amount Credit:	0.00
Balance:	0.00

CASE NOTE

PROCEEDINGS

06-15-90 Filed: Complaint		
06-15-90 Judge DANIELS assigned.		convert
06-15-90 Fee Account created	Total Due: 75.00	convert
06-15-90 CIVIL FILING FEE	Payment Received:	75.00 chells
Note: FILING FEE		
01-16-91 Note: Order of Dismissal - Reason:		janetmb
01-16-91 Note: Failure to Serve Summons		janetmb
01-17-91 Judgment #1 Entered		
01-17-91 Note: Case judgment is Dismissed		janetmb

ADDENDUM C

U.S. District Court
District of Utah (Central)
CIVIL DOCKET FOR CASE #: 95-CV-210

Plaskon v. Bodrero, et al

Filed: 03/06/95
Assigned to: Judge Tena Campbell
Demand: \$0,000
Nature of Suit: 442
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 42:2003 Job Discrimination

MARK PLASKON
 plaintiff

John T. Caine
[COR LD NTC]
RICHARDS CAINE & ALLEN
2568 WASHINGTON BLVD
OGDEN, UT 84401
(801) 399-4191

v.

DOUGLAS BODRERO, Commissioner,
Department of Public Safety
State of Utah
 defendant

Mark Ward, Mr.
FAX 9,3660101
[COR LD NTC]
UTAH ATTORNEY GENERAL'S OFFICE
160 E 300 S SIXTH FLOOR
PO BOX 140811
SALT LAKE CITY, UT 84114-0811
(801) 366-0100

ROBERT BRINKMAN, Bureau Chief,
Crime Laboratory Department of
Public Safety
 defendant
STATE OF UTAH
 defendant

Mark Ward, Mr.
(See above)
[COR LD NTC]

Mark Ward, Mr.
(See above)
[COR LD NTC]

DOCKET PROCEEDINGS

DATE # DOCKET ENTRY

Note: Highlighted document numbers indicate that an imaged copy of the associated document is available which may be viewed or downloaded by clicking on the highlighted document number.

3/6/95	1	Complaint filed, assigned to Judge David K. Winder Receipt #: 65288 (rak) [Entry date 03/07/95]
7/25/95	2	NTC of case reassigned to Judge Campbell. (tl)
7/25/95	--	Case reassigned to Judge Tena Campbell (tl)
7/27/95	3	Amended complaint(second amd cmp) by Mark Plaskon . Amends [1-1] complaint (tl) [Entry date 07/28/95]
9/25/95	4	Return of summons executed as to Douglas Bodrero c/o Jennifer Haywood, Agt for UT State, Robert Brinkman c/o Phyllis Nicoriana, Agt of St Crime Lab 8/24/95 Answer due on 9/13/95 for Robert Brinkman, for Douglas Bodrero (tl) [Entry date 09/26/95]
9/25/95	5	Return of summons executed as to St UT c/o Pam Blackham, Legal Sec on 9/1/95 Answer due on 9/21/95 for St UT (tl) [Entry date 09/26/95]
5/21/96	6	Order, to show cause w/i 10 days why service was not made within 120 days following the filing of complaint signed by TC, 5/21/96. cc: atty (ksj)
6/4/96	7	Response by Mark Plaskon to [6-1] order to show cause w/i 10 days why service was not made within 120 days following the filing of complaint (ksj)
11/6/96	8	Notice of Hearing filed : status conference set for 10:00 11/20/96 To be held before Judge Tena Campbell (tb)
11/20/96	9	Order, to file an answer to the complaint on or before 12/10/96 signed by Judge Tena Campbell, 11/20/96. cc: atty (ksj)
11/20/96	10	Minute entry:, terminated deadlines It is the order of the court that defendant file an answer by 12/10/96. : Tena Campbell Court Reporter: Ray Fenlon Court Deputy: Theresa Brown (tb)
12/30/96	11	Motion by Douglas Bodrero, Robert Brinkman, St UT to dismiss amd cmp (mjm) [Entry date 12/31/96]
12/30/96	12	Memorandum by Douglas Bodrero, Robert Brinkman, St UT in support of [11-1] motion to dismiss amd cmp (mjm) [Entry date 12/31/96]
1/3/97	13	Affidavit of J. Mark Ward (ksj) [Entry date 01/06/97]
2/7/97	14	Order, to show cause w/i 10 days of the date of this order why dft's motion to dismiss should not be granted and 2nd amd complaint dismisses signed by Judge Tena Campbell, 2/6/97. cc: atty (ksj)
3/5/97	15	Order granting [11-1] motion to dismiss amd cmp signed by

Judge Tena Campbell, 3/4/97. cc: atty (ksj)

3/5/97 -- Case closed per order of 3/5/97, doc # 15 (ksj)
[Entry date 03/28/97]

3/10/97 16 Motion by Douglas Bodrero, Robert Brinkman, St UT for
sanctions under rule 11 FRCP (ksj) [Entry date 03/11/97]

3/10/97 17 Certificate of service [16-1] motion for sanctions under
rule 11 FRCP by Douglas Bodrero, Robert Brinkman, St UT (ksj)
[Entry date 03/11/97]

4/4/97 18 Response by Mark Plaskon to [11-1] motion to dismiss amd
cmp (ksj)

4/4/97 19 Motion by Mark Plaskon to set aside judgment: [15-1]
order (ksj)

4/4/97 19 Response by Mark Plaskon to [16-1] motion for sanctions
under rule 11 FRCP (ksj)

4/4/97 20 Affidavit of John T. Caine (ksj)

4/4/97 21 Order denying [16-1] motion for sanctions under rule 11
FRCP signed by Judge Tena Campbell, 4/4/97 cc: atty. (ksj)
[Entry date 04/07/97]

4/8/97 22 Reply by Douglas Bodrero, Robert Brinkman, St UT to
response to [16-1] motion for sanctions under rule 11 FRCP,
[11-1] motion to dismiss amd cmp (ksj)

4/8/97 22 Response by Douglas Bodrero, Robert Brinkman, St UT to
[19-1] motion to set aside judgment: [15-1] order (ksj)

4/9/97 23 Order denying [19-1] motion to set aside judgment: [15-1]
order signed by Judge Tena Campbell, 4/9/97. cc: atty. (ksj)

Case Flags:
JONES
CLOSED

END OF DOCKET: 2:95cv210

PACER Service Center			
Transaction Receipt			
07/11/2000 09:07:51			
PACER Login:	ag0015	Client Code:	plaskon
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