

1982

# Ken Holm and Glen Steed v. B & M Service, Inc. : Brief of Appellant

Utah Supreme Court

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Wendell P. Ables; Attorney for Plaintiffs and Appellants;

Christensen, Jensen and Powell; Attorneys for Defendant and Respondent;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

KEN HOLM and GLEN STEED	:	
d/b/a H & S ENTERPRISES,	:	
a partnership,	:	
	:	
Plaintiffs and	:	
Appellants,	:	
	:	Case No. 18067
vs.	:	
	:	
B & M SERVICE, INC.,	:	
	:	
Defendant and	:	
Respondent.	:	

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

Plaintiffs brought this action against defendant to recover damages for the negligent destruction to plaintiffs' personal property. (R.2,3)

DISPOSITION IN LOWER COURT

Defendant's Motion to Dismiss was granted on the ground that the Statute of Limitations had run on plaintiffs' claim. (R.6,9)

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the order dismissing plaintiffs' complaint and that the matter be remanded to Third District Court for further proceedings.

STATEMENT OF FACTS

On June 30, 1978 plaintiffs were moving \$40,000 worth

of steel pipe with their tractor and trailer 18 miles east of Rangeley, Colorado. Plaintiffs' tractor and trailer overturned causing minor damage to the pipe. (R.2,3)

The Colorado Highway Patrol investigated the accident and at its request, defendant's tractor attempted to tow plaintiffs' trailer carrying the steel pipe to the nearest town. (R.2,3)

Due to the recklessness and negligence of defendant's agents in securing the pipe to the trailer, coupling its tractor to the trailer and other particulars of negligence, the tractor of defendant and the trailer of plaintiffs overturned a second time causing extensive damage and destruction to plaintiffs' steel pipe. (R.2,3)

## ARGUMENT

### POINT I

ALL NEGLIGENT TORTS, INCLUDING PROPERTY DAMAGE, SHOULD BE GOVERNED BY THE PROVISION OF THE FOUR YEAR STATUTE OF LIMITATIONS, 78-12-25(2), UCA (1953).

The sole issue involved in this appeal is whether negligently caused property damage should be governed by the three year statute of limitations, 78-12-26(2), UCA (1953) or the four year statute of limitations, supra.

The four year statute of limitations, 78-12-25(2), UCA (1953) provides as follows:

Within four years:

(1) . . . .

(2) An action for relief not otherwise provided

for by law.

The three year statute of limitations, 78-12-26(2), UCA (1953) provides as follows:

Within three years -

(1) An action for waste, or trespass upon or injury to real property; provided, that when waste or trespass is committed by means of underground works upon any mining claim, the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such waste or trespass.

(2) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof; provided, that in all cases where the subject of the action is a domestic animal usually included in the term "livestock", if such animal had strayed or was stolen from the true owner without his fault, the cause shall not be deemed to have accrued until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession thereof by the defendant.

(3) An action for relief on the ground of fraud or mistake; but the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

(4) An action for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state.

In construing 78-12-26(2), supra, the 10th Circuit Court of Appeals in Utah Poultry and Farmers Cooperative v. Utah Ice and Storage Company, 187 F.2d 652 (10th Cir. 1951), had the following to say:

No decision has been cited, and we have found none, wherein the courts of Utah or California have specifically held the three year statute "all inclusive", of actions for injuries to personal property. We think, however, that the language of the adjudicated cases indicates a disposition to apply the statute to all actions for "taking, detaining or injuring personal property". (emphasis added).

There are still no Utah cases holding the three year statute to be all inclusive for injuries to personal property.

In the case of Reese v. Qualtrough, 48 Utah 23, 156 P. 955 (1916) defendants "had willfully and intentionally flowed large quantities of waste water through certain ditches . . . and had willfully and intentionally changed the course of said ditches . . . willfully and intentionally diverted the waters from the stream . . . killing plaintiff's fish living therein . . . willfully and intentionally place certain boards into the bed of the stream . . . whereby large numbers of said fish were killed and destroyed . . .".

This was clearly and unequivocally an intentional tort and the court correctly decided that the three year statute was applicable.

The language in Reese v. Qualtrough, supra, that, "It is the wrongful acts which result in injury and damage which give the right of action, and, if the injuries are to personal property, the statute fixes the time within which such an action must be brought, and the name of the action can have no effect upon the question of what statute controls.", should be construed as being limited to intentional injuries.

Subdivisions (1), (2) and (3) of 78-12-26, UCA (1953) describe intentional torts, acts or misconduct. The application of the four year statute rather than subdivision (1) of the three year statute was ruled upon in the case of O'Neill v. San Pedro, L.A. & S.L. R. Co., 38 Utah 475, 114 P.127 (1911). Plaintiff's house was located near defendant's railroad tracks and was damaged



by the jar of the trains and the emission of smoke and cinders. The court held that subdivision (1) of the three year statute, trespass to lands, was not applicable because there was no common law trespass which required direct entry on lands. Instead, the court held that the acts of defendant railroad were action on the case and the four year statute was applicable.

The following language was cited approvingly by the Supreme Court of Washington in Welch v. Seattle & M.R. Co., 56 Wash. 97, 105 P.166 (1909), the case having been cited in Reese v. Qualtrough, supra:

Mr. Blackstone, on star page 123 of Book 3 (Lewis' Ed.), makes a distinction as follows: "And it is a settled distinction that, where an act is done which is in itself an immediate injury to another's person or property, there the remedy is usually by an action of trespass vi et armis; but where there is no act done, but only a culpable omission, or where the act is not immediately injurious, but only by consequence and collaterally, there no action of trespass vi et armis will lie, but an action on the special case, as the damages consequent on such omission or act."

Thus, analysis of the factual situation in terms of whether it sounds in trespass or in action on the case has been the subject of judicial inquiry for hundreds of years and has been exercised by the Utah Supreme Court in the O'Neill case, supra.

Analysis and application to the instant case demonstrates the damage in plaintiff's personal property was unintentional and therefore, action on the case, and plaintiff's claim should have been held to be subject to the four year statute of limitations.

Personal injuries resulting from negligent misconduct are governed by the four year statute of limitations. See Thomas v. Union Pacific R. Co., 1 Utah 235 ( ). One of the most



frequently asserted causes of action excluding divorce and debt suits is for personal injury arising out of an automobile accident. In a great many of these cases a claim for automobile damage arises out of the accident.

This court has held that splitting causes of action is improper and a plaintiff's claims for personal injury and property damage must be asserted in one action. Raymer v. Hi-Line Transport, Inc., 15 Utah 2d 427, 394 P.2d 333 (1964). If the three year statute is applicable to negligently caused property damage as contended by respondent then the plaintiff who waits for three and one-half years for his severe and perhaps permanent injury to stabilize before filing suit has lost his claim for his property damage. See Dearden v. Hey, \_\_\_\_ Mass. \_\_\_\_, 24 NE.2d 644 (1939).

Respondent further claims that there would be two different limitation periods for damage to personal property and this would subvert the purpose of the three statute "because it is nearly always possible to allege an intentional tort in terms of negligence." Alleging a negligent tort rather than an intentional tort still leaves plaintiff with the burden of proving negligence in order to justify the longer period of limitation.

In the recent case of Matheson v. Pearson, Utah, 619 P.2d 321 (1980) this court found two different periods of limitation were applicable to an injury situation requiring a factual determination as to whether a tort was intentional or negligent and whether the one year statute of limitations or the four year statute of limitations was applicable.

It is submitted, contrary to respondent's contentions, that 78-12-26(2) UCA (1953) is not clear and unambiguous. "Taking"

and "detaining" "personal property" means forceful and intentional if any language ever could. Also it is submitted that the "or" linking "taking, detaining" "with injuring personal property" is conjunctive so that the "injuring" must be part of the "taking" and "detaining".

This interpretation is reinforced by including the action for specific recovery of personal property in the statute itself. The very presence of this remedy suggests intentional wrong doing.

#### CONCLUSION

It is submitted that this court should rule that negligently caused injuries to personal property are governed by the provisions of 78-12-25(2) rather than 78-12-26(2). The three year statute can and should be interpreted that way. Bench and bar alike will be able to detect an intentional tort under 78-12-26(2) and a negligent tort under 78-12-25(2).

Dated this \_\_\_\_\_ day of March, 1982.

Respectfully submitted,

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Wendell P. Ables  
Attorney for Plaintiffs and Appellants  
Suite 14, Intrade Building  
1399 South Seventh East  
Salt Lake City, Utah 84105

CERTIFICATE OF SERVICE

I hereby certify that on the \_\_\_\_\_ day of March, 1982  
I mailed a true and correct copy of the foregoing Brief, to Dale  
J. Lambert of Christensen, Jensen and Powell, Attorneys for  
Defendant, 900 Kearns Building, Salt Lake City, Utah 84101.

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