

1990

Walter P. Larson, an individual, and Larson Ford Sales, Inc., a Delaware corporation v. Stephen Wade, individually, and Stephen Wade, Bryce Wade, Kipp Wade, dba SBK, a general partnership, and Valley Ford, a Utah corporation : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Larson v. Wade*, No. 900535 (Utah Court of Appeals, 1990).

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UTAH COURT OF APPEALS
BRIEF

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IN THE COURT OF APPEALS OF THE
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WALTER P. LARSON, an
individual, and LARSON FORD
SALES, INC., a Delaware
corporation,

Plaintiffs/Appellants,

v.

STEPHEN WADE, individually,
and STEPHEN WADE, BRYCE WADE,
KIPP WADE, dba SBK, a
general partnership, and
VALLEY FORD, a Utah
corporation,

Defendants/Respondents.

Case No. 900535-CA

Argument Priority 16

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FILED

FEB 25 1991

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Clerk of the Court
Utah Court of Appeals

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JURISDICTION

Appellants Walter P. Larson and Larson Ford Sales, Inc. (collectively "Larsons") initially appealed to the Utah Supreme Court under Utah Code Ann. § 78-2-3(3)(j). The Supreme Court transferred the case to the Court of Appeals pursuant to Utah Code Ann. § 78-2-3(4). The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j).

ISSUES PRESENTED FOR REVIEW

The only issue presented by this appeal is whether the district court erred in dismissing Larsons' complaint as untimely under the applicable statutes of limitation.

STANDARD OF REVIEW

The court should apply the same analytical standard as that applied by trial court on a motion for summary judgment and should review the trial court's legal conclusions for correctness. Durham v. Margetts, 571 P.2d 1332 (Utah 1977).

RELEVANT STATUTES AND RULES

Utah Code Ann. §§ 78-12-25(1) & (3):

Within four years:

(1) An action upon a contract, obligation, or liability not founded upon an instrument in writing

. . . .

(3) An action for relief not otherwise provided for by law.

Utah Code Ann. § 78-12-26(2):

Within three years:

. . .

(2) an action for taking, detaining, or injuring personal property, including actions for specific recovery thereof

Utah Rule of Civil Procedure 12(b):

(b) **How presented.** Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted. . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Utah Rules of Civil Procedure 56(b) & (c):

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . .

. .

STATEMENT OF THE CASE

I. NATURE OF CASE AND COURSE OF PROCEEDINGS

The Larsons filed this action in the Third Judicial District Court for Salt Lake County on June 24, 1987 alleging breach of an oral contract, interference with business relationships, breach of fiduciary duty, unjust enrichment and conversion. Stephen Wade, Bryce Wade, Kipp Wade, dba SBK; and Valley Ford (collectively "Wades") responded by filing a motion to dismiss on the grounds that the various claims were barred by applicable statutes of limitation. The motion to dismiss was based on the statements in the Larsons' complaint that the actions of the Wades upon which the various causes of action were based occurred prior to or concurrent with a specific event -- the filing of a creditor's plan of reorganization in the Larson Ford Sales bankruptcy proceeding, In re Larson Ford Sales, Inc., Bankr. No. 82C-02186, before the United States Bankruptcy Court for the District of Utah (hereinafter "Larson Ford Sales bankruptcy"). The Wades established by affidavit that the filing of the creditor's plan of reorganization in the Larson Ford Sales bankruptcy occurred more than four years prior to the date the Larsons

commenced their action. The Larsons filed an affidavit in opposition that did not controvert the fact that the creditor's plan of reorganization in the Larson Ford Sales bankruptcy was filed some time prior to June 10, 1983, the date upon which the bankruptcy court confirmed the creditor's plan. In July 1988, the court, treating the motion to dismiss as a motion for summary judgment, dismissed the amended complaint as barred by the applicable statutes of limitation as a matter of law.

The Larsons filed a "Notice of Extension of Time to Appeal" one day after the expiration of the thirty (30) day appeal period. The district court denied the motion for an extension. The Larsons appealed the denial of the motion for an extension to the Utah Supreme Court, which reversed the denial in an unpublished ruling. The Larsons thereafter brought this appeal.

II. STATEMENT OF RELEVANT FACTS

1. The Larsons filed their complaint on June 24, 1987. The Larsons filed a First Amended Complaint ("amended complaint") on July 9, 1987. R. 11.

2. The amended complaint alleges four causes of action:

First Cause of Action -- Breach of Contract

Second Cause of Action -- Interference with Business Relations

Third Cause of Action -- Breach of Fiduciary Duty,
Unjust Enrichment and
Conversion

Fourth Cause of Action -- Punitive Damages.

R. 13-18.

3. The claims in the amended complaint all arose from an alleged January 1983 oral agreement between Stephen Wade and the Larsons in which Wade allegedly agreed to purchase Larson Ford Sales, which was then in a chapter 11 bankruptcy, from Walter Larson, and to take certain actions in connection with the purchase, including filing and obtaining confirmation of a debtor's Chapter 11 bankruptcy plan of reorganization on behalf of Larson Ford Sales bankruptcy. Amended complaint, ¶¶ 4 & 5; R. 12-13.

5. In their second cause of action, the Larsons allege that after the Wades breached the oral contract, the Wades tortiously interfered with a contract the Larsons had entered into with another party to purchase Larson Ford Sales:

Subsequent to the breach of contract by WADE as set forth in the First Cause the Plaintiffs negotiated an agreement with a partnership known as HGBH
(Amended complaint, ¶ 10);

Defendant STEPHEN WADE, having breached his agreement with Plaintiff, conspired with and induced the HGBH partnership to breach their contract to provide like benefits. (Amended complaint, ¶¶ 10 & 13.)

R. 15 (emphasis added).

6. The Larsons' amended complaint states that both the breach of the oral contract and the interference with business affairs occurred prior to the submission by the Wades of a creditor's plan of reorganization in the Larson Ford Sales bankruptcy. Paragraph 13 of the amended complaint states: "This breach of HGBH was induced in order that defendant Stephen Wade could submit a creditor's plan in Chapter XI [sic] bankruptcy." R. 15. (emphasis added).

7. The third cause of action alleges that the Wades were unjustly enriched and converted personal property of Larson Ford Sales through a breach of fiduciary duty. In paragraph 17, the amended complaint states:

The Defendant having received the confidential data and information about the operation of LARSON FORD SALES, INC., did utilize said information such that based upon a claimed debt of \$130.12 did submit a contrary and adversary Plan to the Plaintiff's plan as a creditors[sic] plan to the bankruptcy court which plan violated the contractual agreement between Plaintiff and defendants

R. 17 (emphasis added).

8. The remaining fourth cause of action seeking punitive damages for intentional and malicious conduct is based upon the conduct of the Wades alleged in the first three causes of action. R. 17-18.

9. The Larsons' complaint states that the filing of the creditor's plan of reorganization was a breach of the oral

agreement. Amended Complaint, ¶ 17; R. 17. The creditor's plan of reorganization referred to in the amended complaint was filed by Stephen Wade, Inc. in the early spring of 1988. Affidavit of Stephen Wade ¶3; R. 40-41; Affidavit In Opposition To Defendants' Motion To Dismiss (hereinafter "Affidavit of Walter Larson") ¶4; R. 50.

10. In support of their motion to dismiss, the Wades submitted the Affidavit of Stephen Wade. The affidavit established the following facts:

a) Stephen Wade was president, director and the principal shareholder of Stephen Wade, Inc.

b) Stephen Wade, Inc. submitted a creditor's plan of reorganization in the Larson Ford Sales bankruptcy in early spring of 1983, and on June 1, 1983, submitted a second amended plan of reorganization;

c) The bankruptcy court confirmed the second amended creditor's plan of reorganization on June 10, 1983; and

d) Notice of confirmation of the creditor's plan of reorganization submitted by Stephen Wade, Inc. was mailed to all parties in interest in the Larson Ford Sales bankruptcy on June 10, 1983. R. 40-41.

12. In response to the motion to dismiss, the Larsons did not controvert the fact that the creditor's plan of reorganization was filed in the spring of 1983, or that the bankruptcy court had confirmed the creditor's plan of reorganization on June 10, 1983. Instead, the Larsons filed an affidavit to the effect that Walter Larson did not learn of a breach of the oral agreement until June 24, 1983, that Stephen Wade, Inc. was not a party to the alleged oral contract, and that Larson only learned of the disappearance of collateral pledged on Larsons' SBA loan eighteen months after June 24, 1983. R. 49-50.

13. The district court treated the motion to dismiss as a motion for summary judgment. The court granted the motion, holding that on the undisputed facts, plaintiff's claims were barred by the statute of limitations as a matter of law.

SUMMARY OF ARGUMENT

When a complaint on its face alleges that the causes of action arose prior to a specific date that would make the claims time barred under applicable statutes of limitations, summary judgment is appropriate. The allegations contained in the Larsons' amended complaint, on their face, state that any breach of the alleged oral contract or tortious conduct by the Wades occurred prior to or concurrent with the filing of a creditor's plan of reorganization in the Larsons Ford Sales bankruptcy. The

Wades established the uncontroverted fact that the creditor's plan of reorganization was filed sometime before June 10, 1983, which was more than four years prior to the date the Larsons filed their complaint. The amended complaint specifically states that the filing of the creditor's plan of reorganization was a breach of the contract, and also repeatedly states that the oral contract was breached sometime prior to the filing of the creditor's plan of reorganization. The statute of limitations did not commence running from the date the Larsons' claim to have discovered any breach of the agreement or the alleged tortious conduct, but from the date of the breach or intentional tort, which was no later than June 10, 1983.

A statute of limitations for intentional torts such as those alleged in the Larsons' amended complaint begins to run with the tort or activity leading to the damage, not upon the occurrence of the last injury or damage. The statute of limitations begins to run on a tort arising directly from a contractual relationship at the time the contract was breached.

The Wades did not waive their right to assert a statute of limitations defense by filing a motion to dismiss. The motion to dismiss and supporting memorandum specified the statutes on which the Wades relied and clearly placed the Larsons on notice. Finally, the bankruptcy pleadings from 1983 that the Larsons

failed to place in the record before the trial court are not relevant. The complaint's plain allegations state that the causes of action arose prior to or concurrent with the filing of the creditor's plan of reorganization, which, by undisputed evidence, was sometime prior to June 10, 1983. The claims are barred under applicable statutes of limitation.

ARGUMENT

- I. ACCORDING TO THE ALLEGATIONS OF THE LARSONS' OWN COMPLAINT, THE CONDUCT UPON WHICH THEY BASE THEIR CLAIMS OCCURRED NO LATER THAN THE TIME OF FILING THE CREDITOR'S PLAN OF REORGANIZATION.

The trial court properly granted summary judgment on the first cause of action for breach of the oral agreement because the alleged conduct occurred more than four years prior to the filing of the Larsons' complaint. Any such claim is time-barred pursuant to Utah Code Ann. § 78-12-25(1).

When a complaint alleges that the conduct upon which its various claims are based all occurred before a specific date which is outside the limitations period, the defendant is entitled to summary judgment. Commercial Equity Corporation v. Majestic Savings and Loan Association, 620 P.2d 56 (Colo. App. 1980) (summary judgment upheld where complaint alleged that conduct giving rise to wrongful foreclosure, tortious interference with contract, conversion and other claims occurred prior to specific date outside limitations period). In the instant case, the

conduct upon which each of the claims was based is alleged to have occurred prior to or concurrently with the filing of a creditor's plan of reorganization in the Larson Ford Sales bankruptcy. It is an undisputed fact that the creditor's plan was confirmed on June 10, 1983, establishing that plaintiffs' claims arose more than four years prior to June 24, 1987, the date the Larsons commenced this action.

A. The Filing Of The Stephen Wade, Inc. Creditor's Plan Of Reorganization Breached The Oral Agreement.

The Larsons' attempt to circumvent the statute of limitations by arguing that Stephen Wade, Inc., the proponent of the creditor's plan, was not a party to the oral agreement. Brief of Appellant at 11. The first amended complaint belies the Larsons' argument that the Stephen Wade, Inc. plan was not a breach of the alleged oral agreement. Paragraph 17 of the amended complaint states that the filing of the creditor's plan of reorganization "violated the contractual agreement between Plaintiffs and Defendants." R. 17. It is clear from both the complaint and Walter Larson's affidavit that the Larsons viewed the filing of a creditor's plan of reorganization by Stephen Wade, Inc., an entity which Stephen Wade controlled as president, director, and principal shareholder, (R. 40), as a breach of the oral agreement.

The Larsons argue that the Wades are required to show that the plan of reorganization breached the oral contract and

the omission of the plan from the record is therefore "curious." (Appellant's Brief at 12.) The Larsons conveniently forget that their own complaint states emphatically that creditor's plan "violates the contractual agreement between plaintiff and defendants." R. 17. The contention on page 12 of Larsons' brief to that the plan might not be a breach totally flies in the face of what Larsons alleged in their own complaint.

The Larsons seem to forget that their complaint admitted the facts upon which the district court based its ruling. Rule 56(c) provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits" show there is no material issue of fact. Utah R. Civ. P. 56(c)(emphasis added). Parties are bound by the allegations or admissions of their pleadings. Dailey v. Barnhart, 768 P.2d 907, 909 (Okla. App. 1988). A specific allegation in a complaint is a judicial admission of the fact alleged. Kula v. Karat, Inc., 91 Nev. 100, 531 P.2d 1353, 1356 (1975); Taylor v. Pearl, 249 Or. 611, 439 P.2d 7 (1968).

Furthermore, the confirmation of the Stephen Wade, Inc. creditor's plan was, as a matter of law, a breach of the alleged oral contract. The Larsons' argument that Stephen Wade, individually, could have performed under the oral contract subsequent to confirmation of the Stephen Wade, Inc. creditor's plan

(Appellant's Brief at 12) has no basis in law. The Bankruptcy Code provides that "the court may confirm only one plan." Id. § 1129(c). The fact that Stephen Wade, individually, allowed a creditor's plan to be confirmed in contravention of his alleged contractual obligation to obtain confirmation of a debtor's plan, was a breach of the oral agreement.

The confirmation of the Stephen Wade, Inc. plan was a breach for the additional reason that Stephen Wade was the controlling person of that entity. Where a party, by a voluntary act, by his own conduct, causes failure of performance, the party has breached the agreement. See Cannon v. Stevens School of Business, Inc., 560 P.2d 1383, 1385 (Utah 1977). As president, principal shareholder, and director of Stephen Wade, Inc. (R. 40), Stephen Wade, individually, had control over the acts of his corporation. Stephen Wade, Inc.'s obtaining confirmation of a bankruptcy plan of reorganization was, therefore, an action in the control of Stephen Wade, which made performance of his obligations under the contract impossible. There is therefore no question that if there was such a contract, Stephen Wade breached it no later than June 10, 1983.

B. Whatever Its Nature, The Breach Of The Oral Contract Occurred Prior To The Date Of Filing The Creditor's Plan Of Reorganization.

As stated above, the Larsons' argument that the filing of Stephen Wade, Inc.'s creditor's plan of reorganization was not a breach of contract is inconsistent with the statements in the complaint that the filing was a breach. Further, the Larsons' contract claims are also barred because the Larsons' complaint repeatedly states that the Wades breached the oral contract prior to the submission of the creditor's plan of reorganization in the Larson Ford Sales bankruptcy.

Paragraph 4(d) of the amended complaint states that the January 1983 oral agreement for the purchase and acquisition of Larson Ford Sales required the Wades to file and obtain approval of a debtor's plan of reorganization in the Larson Ford Sales bankruptcy:

(d) Defendants agreed to submit on behalf of LARSON FORD SALES, a debtor's plan in the Chapter XI Bankruptcy and obtain approval thereof at no cost to WALTER P. LARSON. Such plan to include payment of \$175,000.00 to WALTER P. LARSON.

R. 12 (emphasis added).

Paragraph 10 of the amended complaint states that "[s]ubsequent to the breach of contract by WADE as set forth in the First Cause, the Plaintiffs negotiated an agreement with a partnership known as HGBH" R. 15 (emphasis added). The

Larsons then allege that "Defendant STEPHEN WADE, having breached his agreement with the Plaintiff, conspired with and induced the HGBH partnership to breach their contract to provide like benefits. This breach of HGBH was induced in order that the Defendant STEPHEN WADE could submit a creditor's plan in Chapter XI Bankruptcy." Amended complaint, ¶ 13; R. 15 (emphasis added). The date of confirmation of the creditor's plan of reorganization therefore becomes a reference point prior to which time the alleged conduct giving rise to the Larsons' claims must have occurred.

On its face, the complaint states that the breach occurred prior to the submission of the creditor's plan. The uncontroverted fact that the creditor's plan of reorganization proposed by Stephen Wade, Inc. was confirmed on June 10, 1983 (and the date notice was mailed to all interested parties), leaves no doubt that the alleged breach of contract occurred sometime prior to June 10, 1983. Thus, the breach of contract claim is barred under Utah Code Ann. § 78-12-25(1).

C. The Larsons' Tort Claims Are Also Time Barred Because The Facts Alleged Occurred More Than Four Years Prior To The Date Of The Larsons' Complaint.

The claims for tortious interference with business relations, breach of fiduciary duty, unjust enrichment and conversion contained in the Larsons' second and third causes of

action are barred by the four year statute of limitations of Utah Code Ann. § 78-12-25(3).^{1/} The Larsons allege in paragraph 13 of the amended complaint that Stephen Wade "conspired with and induced the HGBH partnership to breach their contract to provide like benefits. This breach of HGBH was induced in order that the Defendant STEPHEN WADE could submit a creditor's plan in Chapter XI Bankruptcy." R. 15 (emphasis added). This conduct, by Larsons' own admission (see supra at 13), all occurred prior to the June 10, 1983, confirmation date.

The Larsons' breach of fiduciary duty, unjust enrichment, and conversion claims are also barred based upon the allegations of the complaint. The amended complaint states that "in the process of and concurrent with negotiations involved in the contract referred to in the first cause of action herein, the plaintiff made available to the defendant confidential data and information in order that the defendant could formulate and provide a debtor-in-possession plan for the Larson Ford Sales Chapter XI plan of reorganization." Amended Complaint, ¶ 15 (emphasis added). (R. 16). The Larsons then allege that the Wades

^{1/} While the court below based its dismissal of all claims on a four year statute of limitations, the three year limitation of § 78-12-26(2) applies to the conversion and unjust enrichment claims. This point makes no difference in this case because the Larsons' claims arose more than four years prior to the commencement of the case.

breached the fiduciary duty by utilizing the confidential information to "submit a contrary and adversary Plan to the Plaintiff's plan" to unjustly enrich the Wades and convert the Larsons' property. Amended Complaint, ¶ 17; R. 17. These claims are therefore based upon conduct which occurred at the time of submission of the creditor's plan of reorganization. The claims are barred under the four year statute of limitations of Utah Code Ann. § 78-12-25.

D. The Larsons' Punitive Damages Claim Is Time Barred.

The punitive damages claim for intentional and malicious conduct alleged in the Larsons' fourth cause of action is based upon the same conduct as the first three causes of action. R. 17-18. The claim therefore is barred by Utah Code Ann. §§ 78-12-25 and 78-12-26.

II. THE AFFIDAVIT OF WALTER LARSON DOES NOT CREATE MATERIAL ISSUES OF FACT.

The Larsons argue that they are entitled to four inferences from the affidavit of Walter Larson. Appellants' Brief at 13-14. None of the "inferences" reasonably arise from the Walter Larson Affidavit (R. 49-50) or the pleadings. One cannot reasonably infer that the Stephen Wade, Inc. creditor's plan of reorganization did not breach the alleged oral agreement when the amended complaint states that it did. (Amended Complaint, ¶ 17; R. 17.) Likewise, the Larsons are not entitled to an inference

that the alleged contract was not breached until June 24, 1983 when there are numerous statements in their amended complaint that the breach occurred prior to the filing of the creditor's plan of reorganization. (Amended Complaint, ¶¶ 10, 13 & 15; R. 15-16.) Furthermore, there is nothing in the pleadings, the affidavit of Walter Larson, or elsewhere in the record that could support an inference that the Wades wanted Larson to have no knowledge of any breach because of doubts as to whether Stephen Wade, Inc. could proceed with its plan of reorganization. The cursory affidavit of Walter Larson speaks for itself. Walter Larson does not even address the date of any breach of conduct or tortious conduct, only the date he discovered it.

Incredibly, the Larsons argue in their brief that "[t]he only overt act of any party to the contract alleged in this suit is the order evicting Walter P. Larson from the premises of the Larson Ford dealership." Appellants' Brief at 14. The Larsons cannot sweep aside the numerous allegations of overt acts and breach of contract in their amended complaint as discussed in Part IA above.

No issue of fact arises from the statement in Walter Larson's affidavit that the creditor's plan of reorganization was filed by Stephen Wade, Inc., who was not a party to the alleged contract. Brief of Appellant at 13-14. The statement does not

contradict the Wades' position, and is, in fact, consistent with the affidavit of Stephen Wade filed in support of the motion to dismiss. R. 41. As discussed in Section IA above, the Larsons' argument that Stephen Wade, Inc.'s filing a creditor's plan of reorganization could not have been a breach of the oral agreement ignores the specific statement in paragraph 17 of the amended complaint (R. 17) that filing the creditor's plan was a breach. Further, whatever the nature of the breach of the alleged agreement, the Larsons' are bound by the numerous statements in their complaint that the conduct giving rise to the claims occurred prior to the date the creditor's plan of reorganization was filed.

The statement in Walter Larson's affidavit that he first learned of a breach of the oral agreement on June 24, 1983, and that Larson did not learn that the SBA loan collateral completely disappeared until eighteen (18) months later, does not create material issues of fact. Mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitations. Brigham Young University v. Paulsen Construction Company, 744 P.2d 1370 (Utah 1987). Moreover, the Larsons' complaint would have been untimely even if the the so-called "discovery" rule applied to an action for breach of an oral contract:

The discovery rule has no application when an action easily could have been filed between the date of discovery and the end of the limitation period.

Id. at 1374. Walter Larson's affidavit indicates that he was fully aware of all of his claims more than two and one-half years before the expiration of the four year statutes of limitation.

The fact that Walter Larson's affidavit indicated that some of the damage from the alleged tortious conduct may not have occurred until sometime in 1984 does not create a material issue of fact with respect to the commencement of the statute of limitations. The statute of limitations in the case of a willful, intentional tort begins to run with the tort or activity leading thereto, not when the injured party can ascertain the damages. See O Bray v. Malmberg, 26 Utah 2d 17, 484 P.2d 160, 162 (1971) (damages resulting from an intentional tort need not be shown, except nominally, for statute of limitations to commence running). According to the Larsons' own statements, the Wades' tortious conduct occurred prior to the submission of that creditor's plan. The undisputed facts are that Stephen Wade, Inc. first submitted a creditor's plan of reorganization in the spring of 1983. The creditor's plan was confirmed June 10, 1983. It is clear from the undisputed facts that the conduct complained of occurred more than four years prior to June 24, 1987.

Even if the complaint did not specifically state that the tortious conduct occurred more than four years prior to the Larsons' filing their complaint, the claims would still be barred

by the statute of limitations. Many courts hold that when a tort claim arises directly from a contractual relationship, the statute of limitations begins to run at the time the contract was breached. Kitchen Krafters, Inc. v. Eastside Bank, 789 P.2d 567, 572 (Mont. 1990). The rationale for the rule is as follows:

First, the breach itself is actionable and it encourages the party to act within [the period of limitations] of an actionable breach rather than to delay until damages increase. The rule also recognizes that plaintiff has chosen to deal with the defendant and that a contract may be stated in terms to minimize losses from defective performance.

Aetna Life and Casualty Co. v. Sal E. Lobianco & Son Co., 43 Ill. App. 3d 765, 357 N.E. 2d 621, 624 (1976), aff'd sub nom West American Insurance Co. v. Sal E Lobianco & Son Co., 69 Ill.2d 126, 370 N.E.2d 804 (1977).

The torts alleged by the Larsons arose directly from the alleged contractual relationship with the Wades. As discussed above, the statute of limitations for breach of the oral contract commenced running prior to June 10, 1983. The statute of limitations for the torts alleged in the second and third causes of action also commenced running prior to June 10, 1983, and had therefore run prior to June 24, 1987, the date the Larsons filed their action.

III. THE LIMITATIONS ISSUE WAS PROPERLY BEFORE THE DISTRICT COURT.

The Larsons' argument that the Larsons should have been required to answer by reason of Utah R. Civ. P. 8(c) and 9(h) is without merit. The purpose of the requirement in Rule 9(h) of the Utah Rules of Civil Procedure that a responsive pleading specify the statute of limitations upon which a party relies is to give the opposing party adequate notice. In the instant case, the memorandum supporting the Wades' motion specified the Wades' theory and applicable statutes. The Larsons cannot claim that they were not apprised of the statutory provisions upon which the Wades based their defense. Rule 8(c) requires a defendant to specify affirmative defenses when answering. The Wades have yet to even file an answer and therefore, are not subject to waiver arguments under Rules 8(c) and 12(h).^{2/}

In addition, the trial court treated the Wades motion as a motion for summary judgment to be "disposed of as provided

^{2/} A defendant who answers but fails to include an affirmative defense waives the defense and may not assert it later. Phillips v. JCM Development Corp., 666 P.2d 876, 884 (Utah 1983); Staker v. Huntington Cleveland Irrigation Co., 664 P.2d 1188 (Utah 1983); Pratt v. Board of Education, 564 P.2d 294, 298 (Utah 1977) aff'd on reh'g, 569 P.2d 1112 (1977). See also W.W. & W.B. Gardner, Inc. v. Pappas, 24 Utah 2d 264, 470 P.2d 252 (1970) (defendant who filed answer not raising statute of frauds could not do so through motion). The Wades cannot have waived their limitations defense because they have yet to file an answer.

in Rule 56". Utah R. Civ. P. 12(b). Rule 56(b) permits a defendant to file a motion for summary judgment "at any time", even prior to answering. Id. 56(b). "Even if the district court had not treated the Wades' motion as one for summary judgment, the Larsons hypertechnical procedural argument should not prevail. Courts in several jurisdictions allow defendants who have not answered to raise statute of limitations defenses by motion. E.g., Dicenso v. Bryant Air Conditioning Co., 131 Ariz. 605, 643 P.2d 701 (1982); Beckman v. Chamberlain, 673 P.2d 480 (Mont. 1983). Wright & Miller also state that the rules should be construed to allow a party to move to dismiss based on the statute of limitations:

[T]he courts appear to be wise in overlooking formal distinctions between affirmative defenses and motions, which have their primary justification in history rather than logic.

5 Wright & Miller, Federal Civil Procedure § 1277 (1990 ed.).

The Larsons cannot seriously contend that the Wades waived their statute of limitations defense by filing a motion attacking the sufficiency of the complaint. Such an argument elevates form over substance. The district court's order should be affirmed.

IV. THE EFFECTIVE DATE OF THE CREDITOR'S PLAN OF REORGANIZATION IS NOT RELEVANT.

The Larsons have asked the court to "supplement" the record on appeal to introduce pleadings from the Larson Ford Sale bankruptcy. On February 13, 1991, the court denied the motion to supplement the record without prejudice. The Larsons argue that the Wades did not introduce the bankruptcy papers because they would create a question of fact.^{3/} As discussed in point I above, according to the Larsons' own statements in their amended complaint, the submission of the creditor's plan "violated the contract." Amended Complaint ¶17; R. 17. Thus, the breach of contract and tortious conduct occurred prior to or concurrent with the filing of the creditor's plan of reorganization. The effective date of the plan and its implementation are not relevant. The Larsons' claims are barred by the statutes of limitation because the creditor's plan of reorganization was submitted or filed, and also confirmed, more than four years prior to the Larsons initiating their action.

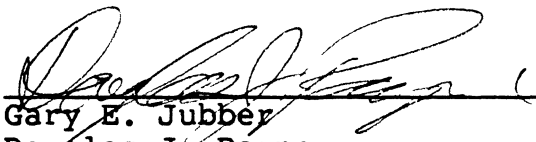
CONCLUSION

The facial allegations of the complaint, coupled with the uncontroverted fact that the creditor's plan of reorganization in the Larson Ford Sales bankruptcy was confirmed June 10,

^{3/} The Larsons offer no explanation for their own failure to submit the bankruptcy papers to the district court.

1983, establish as a matter of law that the claims asserted by the Larsons are barred by the statutes of limitation. The court should affirm the district court's order.

DATED this 25th day of February, 1991.



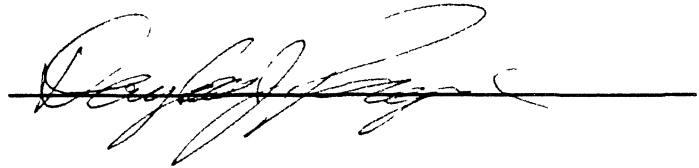
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CERTIFICATE OF SERVICE

I hereby certify that I caused ^{few} ~~a~~ true and correct copy^{ies} of the foregoing Brief of Respondents to be mailed, postage pre-paid, this 25th day of February, 1991 to the following:

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A handwritten signature in cursive script, appearing to read "Douglas J. Payne", is written over a horizontal line.