2012

Peak Alarm Company v. Salt Lake City Corp : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

PEAK ALARM COMPANY, INC., a Utah corporation, JERRY D. HOWE, an individual, and MICHAEL JEFFREY HOWE, an individual, Plaintiffs/Appellees, v. SALT LAKE CITY CORPORATION, a Utah municipal corporation; SHANNA WERNER, an individual; CHARLES F. "RICK" DINSE, an individual; SCOTT ATKINSON, an individual; and JAMES BRYANT, an individual, Defendants/Appellants.	**Supreme Court Case No. 20120050** **Trial Court No. 050906433**

BRIEF OF APPELLEES PEAK ALARM COMPANY, INC., JERRY D. HOWE and MICHAEL JEFFREY HOWE

APPEAL FROM THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH HONORABLE L. R. DEVER PRESIDING

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JURISDICTION

This Court has jurisdiction over this appeal under Utah Code Ann. § 78A-3-102(3)(j).

STATEMENT OF ISSUE ON APPEAL

This case involves a single issue: should an injured party's claim against the government be barred by the statute of limitations that would apply to the claim if made against a private actor even though the injured party has complied with all requirements of the Utah Governmental Immunity Act? This is a legal question subject to review for correctness. *See Duke v. Graham*, 2007 UT31, ¶ 7 158 P.3d 540 (review of a trial court's statutory interpretation involves "conclusions of law that we review for correctness, granting no deference to the district court"). This issue was preserved at *R. 3021-23, 3036-37.*

STATUTES[1]

The interpretation and application of the following statutory language is of central importance to the resolution of this appeal:

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[1] Plaintiffs note that Defendants'/Appellants' brief fails to comply with Utah R. App. P. 24 (a)(6), which requires that "statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation." Defendants do not even cite to the statutes that are "of central importance" to this appeal, and they do not set out verbatim in their brief or reproduced in their Appendix the language of the statutes on which they rely.

Utah Governmental Immunity Act, Utah Code Ann. § 63-30-1 *et seq.* (1997).[2]

63-30-2. Definitions.

(1) "Claim" means any claim or cause of action for money or damages against a governmental entity or against an employee.

63-30-11. Claim for injury -- Notice -- Contents.

(1) A claim arises when the statute of limitations that would apply if the claim were against a private person begins to run.

63-30-13. Claim against political subdivision or its employee – Time for filing notice .

A claim against a political subdivision, or against its employee for an act or omission occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the governing body of the political subdivision according to the requirements of Section 63-30-11 within one year after the claim arises . . . regardless of whether or not the function giving rise to the claim is characterized as governmental.

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[2] As this Court noted in the prior appeal of this matter, in 2004 the Utah Legislature repealed the Utah Governmental Immunity Act, Utah Code Ann. §§ 63-30-1 to -38 (1997) and re-enacted the statutory scheme as the Governmental Immunity Act of Utah, effective July 1, 2004. Utah Code Ann. §§ 63-30d-101 to -904 (2004). The current version of the statute is codified at Utah Code Ann. § 63G-7-101 *et seq.* This brief cites and addresses the former statute it was in effect when Mr. Howe's claims arose.

63-30-14. Claim for injury – Approval or denial by governmental entity or insurance carrier within ninety days .

Within ninety days of the filing of a claim the governmental entity or its insurance carrier shall act thereon and notify the claimant in writing of its approval or denial. A claim shall be deemed to have been denied if at the end of the ninety-day period the governmental entity or its insurance carrier has failed to approve or deny claim.

63-30-15. Denial of claim for injury – Authority and time for filing action against governmental entity.

(1) If the claim is denied, a claimant may institute an action in the district court against the governmental entity or an employee of the entity.

(2) The claimant shall begin the action within one year after denial of the claim or within one year after the denial period specified in this chapter has expired, regardless of whether or not the function giving rise to the claim is characterized as governmental.

Utah Statutes of Limitations, Utah Code Ann. §§ 78-12-1 *et seq.* (2003)[3]

78-12-1. Time for commencement of actions generally.

Civil actions may be commenced only within the periods prescribed in this chapter, after the cause of action has accrued, except in specific cases where a different limitation is prescribed by statute.

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[3] As above, the citations and language of these statutes are the versions in effect at the time of the actions giving rise to Plaintiffs' Complaint.

78-12-30. Actions on claims against county, city, or town.

Actions on claims against a county, city, or incorporated town, which have been rejected by the county executive, city commissioners, city council, or board of trustees, as the case may be, shall be brought within one year after the first rejection thereof by such board of country or city commissioners, city council, or board of trustees.

STATEMENT OF THE CASE

A. The Nature of the Case

This case arises out of a campaign Defendants conceived and carried out against Plaintiffs, who are in the business of providing private security alarm installation and monitoring. Plaintiffs advocate a public policy of close coordination between private security providers and police to augment public safety while addressing the phenomenon of "false alarms." Defendants have been in the forefront of implementing and advocating what they call "verified response." In so doing, Defendants have not been content to tout the claimed benefits of their preferred public policy approach; they have instead resorted to demonizing private security providers and their employees as fundamentally crooked.

Defendants' campaign culminated in the citation and prosecution of Jeff Howe ("Mr. Howe"), the Central Station Manager of Peak Alarm Company, Inc. ("Peak"), for allegedly making a "false alarm" in violation of Utah Code Ann. § 76-9-501. Mr. Howe's "crime"? Reporting to Salt Lake City police dispatch a burglary in progress after

multiple alarms went off at West High School on the morning of June 27, 2003 and a school employee called Peak to report that the alarm was triggered by unknown intruders.

The criminal prosecution was dismissed on a directed verdict with a finding the prosecution had presented "no evidence" to show Mr. Howe committed the offense. Plaintiffs thereafter timely filed a notice of claim which, as this Court has previously ruled, complied in all respects with the Utah Governmental Immunities Act (the "UGIA"). After the 90 days allowed under the UGIA for Defendants to respond to the notice of claim passed with no response, Plaintiffs initiated this action.

B. The Course of Proceedings and Disposition in the Court Below.

This 2005 case has a tortuous procedural history. This is the second appeal. The first appeal followed the trial court's dismissal of all of Plaintiffs' claims on Defendants' motion for summary judgment. Defendants' arguments in support of that first motion included the very same argument they advance now – that Plaintiffs' state law claims are barred by statutes of limitations that apply when such claims are made against private actors. The trial court granted Defendants' motion for summary judgment but did not address Defendants' statute of limitations arguments; instead, it dismissed Plaintiffs' state law claims on the ground that Plaintiffs failed to comply with the UGIA.

Plaintiffs appealed. In their opening brief, Defendants argued that the trial court was correct in dismissing Plaintiffs' state law claims for failure to comply with the UGIA, but that even if the trial court erred in that regard this Court should affirm on the

alternative statute of limitations grounds. This Court concluded that Plaintiffs complied with the UGIA, and expressly held that Plaintiffs' state law claims were timely given Plaintiffs' compliance with what it called the UGIA's "one-year statute of limitations."[4] The Court did not expressly address Defendants' argument that the trial court's decision should be affirmed on the alternative statute of limitations grounds; it simply remanded Plaintiffs' state law claims for further proceedings. *Id.* at ¶ 35.

Defendants petitioned this Court for rehearing, once again arguing that this Court should not remand Plaintiffs' state law claims, but affirm the trial court's decision on the alternative statute of limitations grounds. This Court denied Defendants' petition for rehearing without comment by Order dated June 28, 2010. Defendants then filed a Petition for Writ of Certiorari to the United States Supreme Court, which was denied.

On remand, Defendants renewed their motion for summary judgment based on various arguments, including the statute of limitations arguments they had previously made to the trial court and to this Court in their appeal brief and in their a petition for rehearing. After some additional procedural back-and-forth, the trial court rejected Defendants' renewed statute of limitations arguments, and this second appeal followed.

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[4] *See Peak Alarm v. Salt Lake City*, 2010 UT 22, ¶ 34, 243 P.3d 1221 ("Given our holding that Mr. Howe's notice of claim sufficiently alleged malice on the part of Ms. Werner and Sgt. Bryant, the proper date from which to apply UGIA's one-year statute of limitations is the earlier date of June 25, 2004. Therefore, to be timely under the UGIA, Mr. Howe's claim must have arisen within the single year preceding the June 25, 2004 [notice of claim] filing. All of the events giving rise to Mr. Howe's claims occurred within one year of that date.").

C. Facts Relevant to the Issue Presented for Review.[5]

1. On June 27, 2003, Mr. Howe, who was then the Central Station Manager for Peak, called Salt Lake City dispatch to report a burglary in progress at West High School after several alarms were triggered at the school and a school employee called Peak and verified that the alarms were set off by two intruders. *Peak Alarm*, 2010 UT 22, ¶¶ 6, 7; *R. not numbered between 813& 814, 814-18, 840, 871-875, 894-95, 2054-55.*

2. Salt Lake City police officers dispatched to the scene confirmed that unknown intruders had entered the building. *R. 832, 871-875, 894-95.*

3. The intruders were never apprehended, but Jeff Howe was. After conferring with Shanna Werner, Salt Lake City's Alarm Coordinator, Sgt. James Bryant went to Peak Alarm's main office, announced that he was there to "arrest" Mr. Howe,

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[5] Not all of Defendants' facts are relevant to the legal issue presented for review, and some are contrary to this Court's prior ruling in this case. Thus Defendants continue to suggest that Plaintiffs did not file their notice of claim within one year of any defamatory statements by Ms. Werner, and that Sgt. Bryant did not "seize" Jeff Howe. *See* Appellants' Brief, Statement of Facts ¶¶ 2-4, 8-11. This Court specifically addressed both of these points. *See Peak Alarm*, 2010 UT 22, ¶ 35 ("All of the events giving rise to [Plaintiffs'] claims occurred within one year" of Plaintiffs' June 25, 2004 notice of claim), and ¶ 46 (noting the "dispute in the record about what occurred next. Sgt. Bryant claims to have immediately told Mr. Howe that he would be released on a citation 'if that was his preference.' Mr. Howe claims Sgt. Bryant repeated the statement and the two began arguing about the merits of the citation before Sgt. Bryant told him that he could avoid going to jail by signing a citation. Since we must take the facts as alleged by Mr. Howe as true at this stage, we conclude that those facts support a claim that Sgt. Bryant seized Mr. Howe for a brief period before beginning the process of issuing Mr. Howe a citation."). Defendants are also wrong, as set forth in the following statement of facts.

and charged him with making a false alarm in violation of Utah Code Ann. § 76-9-501. *Peak Alarm*, 2010 UT 22, ¶¶ 10; *R. 860-63, 930, 931, 936.*

4. This charge was made against the backdrop of a sustained campaign by Ms. Werner, abetted by Sgt. Bryant, against the private alarm industry generally and Peak and Mr. Howe specifically. In the course of that campaign, among other things:

a. Ms. Werner characterized the "whole alarm business" as a "scam" in a Wall Street Journal article published April 28, 2000. *R. 2434-36.*

b. Ms. Werner complained in a letter to the Utah Attorney General dated April 30, 2003, that Peak Alarm and other alarm companies were engaged in a criminal conspiracy. *R. 2344, 2465-66, 2468.*

c. Ms. Werner told participants at an alarm industry conference that she was "'looking to make a case against someone' in the alarm industry for making a false alarm to police dispatch, and [that she] was determined to have an alarm company employee arrested and prosecuted to send a message to the industry." *R. 2577; see also R. 2574-78.*

d. During Salt Lake City's criminal prosecution of Mr. Howe, on November 11, 2003 Ms. Werner is quoted as saying: "I'm hoping **for the sake of our ordinance** that [the criminal prosecution of Mr. Howe] goes well. If the jury lets **Peak Alarm** off the hook, to me that's a signal to other alarm

companies to call Salt Lake City police and tell them whatever they want." *R. 2523* (emphases added).

e. In an internal communication dated January 20, 2004, published to Chief Dinse and several assistant chiefs, Ms. Werner stated: "I receive more complaints from Peak Alarm customers, than all the other alarm companies put together." *R. 2470.* Ms. Werner admitted in her deposition that this statement was false, that she has not received more complaints regarding Peak than all the other alarm companies put together, and that she could not even point to any period of time during which that was true. *R. 2391 at 288-89.*

f. After Mr. Howe's acquittal, in an official police department email communication dated April 12, 2004, she referred to Jeff Howe as "That Peak Alarm weasel," and in the body, she continued to suggest that he was guilty of a crime, writing that "[Salt Lake police spokesman Dwayne Baird] said we should have charged him with 'public nuisance.' It is always easier to be an arm chair quarterback." *R. 2447-48.*

5. These and other such statements, which both preceded and followed Mr. Howe's arrest and prosecution, were all part of Ms. Werner's effort to advance a public policy initiative she had pioneered and implemented via a Salt Lake City ordinance known as "verified response" and, as part of those efforts, to disparage and discredit Peak

Alarm and others who advocate a different policy. *R. 1004-1007, 1015, 2439, 2452-2453, 2261-63, 2282-83, 2574-78.*

6. Mr. Howe was not found guilty. Instead, on April 12, 2004, the charges against him were dismissed on a directed verdict following the presentation of Salt Lake City's case, with the Justice Court Judge concluding there was "no evidence" that Mr. Howe "knowingly or intentionally made . . . a false alarm." *Peak Alarm*, 2010 UT 22, ¶ 11; *R. 954-59.*

7. On June 25, 2004, Plaintiffs filed a Notice of Claim under the Utah Governmental Immunity Act with the Salt Lake City Recorder's office, alleging unlawful and unconstitutional conduct by the City, Ms. Werner, Sgt. Bryant and others. *Peak Alarm,* 2010 UT 22, ¶ 12.

8. On April 7, 2005, having had no response Plaintiffs commenced this lawsuit, asserting (among other claims) false arrest and defamation claims. *Peak Alarm,* 2010 UT 22, ¶ 12.

SUMMARY OF ARGUMENT

The UGIA expressly provides that a claim against the government arises when the statute of limitations that would apply if the claim were against a private person begins to run. It further expressly provides that such a claim must first be presented to the government via a notice of claim, and that a notice of claim must be filed within one year

after the claim arises. Finally, it provides that a claimant has one year after actual or constructive denial of the claim to file suit in the district court.

There is no dispute that Plaintiffs filed their notice of claim, and upon denial of the claim filed this lawsuit, within the time frames prescribed in the UGIA. Defendants argue, however, that in addition to meeting the requirement of strict compliance with the UGIA, a party with a claim against the government must also comply with the statute of limitations that would apply to the underlying substantive claim if it were made against a private actor.

Defendants' argument is contrary to the plain language of the UGIA and the statute of limitations that applies to actions involving claims against the government, which says that such actions must be brought within one year after the government has rejected the claim. It is also contrary to *Rushton v. Salt Lake County,* 1999 UT 36, 977 P.2d 1201, where this Court stated in straightforward fashion and without qualification the rule Plaintiffs believe is found in the plain language of these statutes: "Once the claim [that is the subject of a notice of claim under the UGIA] is denied, a party has one year in which to initiate an action." *See infra* pp. 12-15.

Defendants' approach, which would impose the shortest of any potentially applicable limitations period, runs contrary to this Court's longstanding general rule that where substantial doubt exists about whether one of two limitations periods applies, the longer rather than the shorter period is preferred. The trial court reached the right result

in this case. This Court should affirm the trial court's holding and clearly restate the rule so that future courts and claimants can proceed expeditiously to try claims against the government. *See infra* pp. 15-20.

The trial court has twice heard Defendants' statute of limitations arguments. This Court has also twice heard the same arguments. The "law of the case doctrine" precludes repeatedly making the same arguments at different stages of the same litigation. This Court would be justified in rejecting Defendants' arguments on that basis alone. But whether it reiterates and clarifies the applicable rule governing actions against government actors or simply reiterates its prior holding, Plaintiffs respectfully request that the Court allow them, at long last, to present their remaining claims to a jury. *See infra* pp. 21-26.

ARGUMENT

A. The Relevant Statutes Expressly Provide That An Injured Party With A Claim Against The Government Has One Year After The Government's Rejection Of The Claim To Bring Suit.

Resolution of this appeal must begin, and Plaintiffs believe it can also end, with an analysis of the relevant statutory language.[6] First, the UGIA expressly provides that a claim against the government arises when the statute of limitations that would apply if the

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6 "When examining a statute, we first look to its plain language." *State v. Laycock*, 2009 UT 53, ¶ 19, 214 P.3d 104. "We read the plain language of a statute as a whole and interpret its provisions in harmony with other statutes in the same chapter and related chapters." *Id.* (internal quotation marks and alteration omitted).

claim were against a private person begins to run. Utah Code Ann. § 63-30-11(1).[7] It further expressly provides that such a claim must first be presented to the government via a notice of claim, *id.* § 63-30-11(2), (3),[8] and that a notice of claim must be filed within one year after the claim arises. *Id.* § 63-30-13.[9] Finally, it provides that a claimant has one year after denial of the claim to file suit in the district court. Utah Code Ann. § 63-30-15.[10]

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[7] This subsection provides that, for purposes of the UGIA, "a claim arises when the statute of limitations that would apply if the claim were against a private person begins to run."

[8] These subsections contain the detailed and mandatory substantive requirements for a notice of claim. This Court's prior opinion in this case held that Plaintiffs' notice of claim met these substantive requirements.

[9] This section provides in pertinent part: "A claim against a political subdivision, or against its employee for an act or omission occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the governing body of the political subdivision according to the requirements of Section 63-30-11 within one year after the claim arises . . . regardless of whether or not the function giving rise to the claim is characterized as governmental."

[10] This section provides:

> (1) If the claim is denied, a claimant may institute an action in the district court against the governmental entity or an employee of the entity.
>
> (2) The claimant shall begin the action within one year after denial of the claim or within one year after the denial period specified in this chapter has expired, regardless of whether or not the function giving rise to the claim is characterized as governmental.

A straightforward reading of this plain statutory language leads to the conclusions this Court already reached in this case: (1) the UGIA contains its own "one-year statute of limitations," which is the only relevant statute for purposes of analyzing the timeliness of a lawsuit based on state law claims against the government; and (2) Plaintiffs' state law claims were timely given Plaintiffs' compliance with that "one-year statute of limitations." *Peak Alarm v. Salt Lake City*, 2010 UT 22, ¶ 34.

Those conclusions are bolstered if one looks outside the UGIA to the general statute of limitations provision and the most directly applicable specific statute of limitations. The general statute of limitations provision, Utah Code Ann. § 78-12-1, provides: "Civil actions may be commenced only within the periods prescribed in this chapter, after the cause of action has accrued, **except in specific cases where a different limitation is prescribed by statute**." (Emphasis added.) The specific statute of limitations governing actions against the government, Utah Code Ann. § 78-12-30, provides: "Actions on claims against a county, city, or incorporated town, which have been rejected by the county executive, city commissioners, city council, or board of trustees, as the case may be, shall be brought within one year after the first rejection thereof by such board of county commissioners, city council or board of trustees."

The plain language of these statutes, which Defendants never analyze, supports Plaintiffs' position. The UGIA is a "specific case where a different limitation is prescribed by statute," namely the one-year statute of limitations in the UGIA itself. If

there were any doubt that the one-year limitations period in that statute applies, and not the more general statutes of limitations applicable to claims against private actors, that doubt is resolved by the specific statute of limitations governing actions against the government, which clearly provides one year from the denial of a notice of claim to file suit.

B. Case Law and Policy Considerations Support Plaintiffs' Position That A Claimant Has One Year After Denial Of Claim To Initiate A Lawsuit.

No Utah case has specifically analyzed the plain language of the UGIA and/or the statute of limitations applicable to claims against the government. Prior decisions of this Court, however, support Plaintiffs' reading of the statutes and the straightforward rule that results.[11]

In *Rushton v. Salt Lake County*, the plaintiff filed an action concerning real property against Salt Lake County. *Id.* at ¶ 13. The County moved to dismiss the action, claiming that the plaintiff failed to file a proper notice of claim under the UGIA, and that the action was barred by the statute of limitations. *Id.* at ¶ 14. After concluding that the plaintiff's notice did not meet the substantive requirements of the UGIA, this Court analyzed the timeliness of his action without reference to the statute of limitations, even though the County had raised it as a defense. Instead, the Court focused on the time period for filing suit as set forth in the UGIA:

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[11] The cases discussed below both involved the same version of the UGIA that applies to this action.

> Rushton's action fails because he did not file it within the time period prescribed in Utah Code Ann. §§ 63-30-14 & -15. After a valid notice of claim is filed, the governmental entity or its insurance carrier has ninety days in which to approve or deny the claim. See Utah Code Ann. § 63-30-14. If at the end of the ninety days the claim has not been approved or denied, it is deemed to be denied. See id. **Once the claim is denied, a party has one year in which to initiate an action.** See id. § 63-30-15. In the present case, Rushton argues he filed a valid notice of claim in September of 1994. However, Rushton did not file his action until March 13, 1996, one and a half years later. Therefore, even assuming there was a valid notice of claim, Rushton did not file his action within one year after the claim was either denied or deemed to be denied. Therefore, his action must fail.

Id., 1999 UT 31, ¶ 22 (emphasis added).

Similarly, in *Patterson v. American Fork City*, 2003 UT 7, 67 P.3d 466, this Court analyzed the timeliness of the plaintiff's state law claims solely under the UGIA, and stated the rule in the same clear terms as it had in *Rushton*:

> Section 63-30-13 of the UGIA bars a claim against a political subdivision unless a notice of claim is filed "within one year after the claim arises." Utah Code Ann. § 63-30-13. Under section 63-30-14, the municipality then has ninety days to notify the claimant of the approval or denial of the claim. If a claim is denied, the claimant may bring an action in district court against the municipality, but such a claim must be brought within one year after denial of the claim, or within one year after the ninety- day denial period has expired. Utah Code Ann. § 63-30-15.

Patterson, 2003 UT 7, ¶ 10.

The results of this Court's prior cases are rooted in and consistent with the relevant language of the UGIA. Although the cases do not address the general statute of

limitations for claims against the government, they are consistent with the language of that statute as well. They reflect a straightforward, comprehensible rule: so long as an action is filed in district court within one year of the denial of a notice of claim properly filed with the governmental agency, it is timely.

Defendants do not have any contrary authority from this Court, or indeed any authority from any court that thoroughly analyzes the relevant statutory language, and they do not themselves discuss or analyze that language. Instead, they rely principally on *Cline v. State*, 2005 UT App 498, 142 P.3d 127. In that case, the Court of Appeals did not analyze the relevant statutory language, and did not even discuss whether the plaintiff's notice of claim complied with the separate filing deadlines set forth in the UGIA.[12] To the extent it suggests that general statutes of limitations apply to claims against state actors even where the plaintiff has fully complied with the UGIA, that result appears inconsistent with the statutory language and this Court's simple statement of the relevant rule in *Rushton* and *Patterson*.

Defendants also cite a medical malpractice case, *Carter v. Milford Valley Hospital*, 2000 UT App 21, 996 P.2d 1076. That case stands for the proposition that where the Legislature has specified a limitations period for a statutory cause of action,

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[12] The facts indicate the relevant claim arose no later than November 2002; the Notice of Claim was served in April 2003; and the Complaint was filed in June 2004. This could, but does not necessarily, indicate that the Complaint was filed within one year of the denial of the claim, which is the relevant deadline in the UGIA, since the decision does not state whether the claim was denied before June 2003 or was denied by operation of law in July 2003 through inaction.

that specific limitations period applies. To the same effect is the other case cited by Defendants, *Thorpe v. Washington City*, 2010 UT App 297, 243 P.3d 500 (applying the Utah Whistleblower Act's 180-day limitations period to a claim arising under that Act). That proposition is consistent with the general statute of limitations provision, but these cases do not control here, because no competing limitations period for a specific statutory cause of action exists here.

Defendants argue that had the legislature intended the time periods set forth in the UGIA to supplant the statutes of limitations that would apply if the underlying claims were made against private actors, it would have said so. Plaintiffs respectfully submit that the legislature **did** say so, in the plain language of not only the UGIA but also the statute of limitations that applies to claims against the government, which Defendants ignore. Moreover, it is equally true that, had the legislature intended the UGIA to impose the **shorter** of its own time frame or the statute of limitations otherwise applicable to the underlying claim, it could have said so in clear and unambiguous terms.

Finally, this Court has long held that, where there is "substantial doubt" about what limitations period governs, that doubt should be resolved in favor of applying the longer limitations period. *See Hardinge Co. v. Eimco Corp.*, 266 P.2d 494, 496 (Utah 1954) ("The general rule . . . is . . . [i]f a substantial doubt exists as to which is the applicable statute of limitations, the longer rather than the shorter period of limitations is

to be preferred."). In this case, to the extent the interplay between the UGIA and Utah statutes of limitations is less than clear, this general rule should apply.[13]

On Defendants' reading, the filing deadlines set forth in the UGIA would be rendered all but meaningless for any state law claims having general statutes of limitations that would run before the UGIA's filing deadlines expire, and injured persons with claims against the government not only have would have to run the gauntlet of strict compliance with the UGIA but also would have to comply with the shortest potentially applicable period. That is contrary to the policy inherent in the preceding authority. The uncertainty and unfairness inherent in such an approach led the United States Supreme Court to interpret 42 U.S.C. Section 1983 to impose a separate, single limitations scheme on federal constitutional claims, because otherwise "multiple periods of limitations would often apply to the same case" – a result the Supreme Court said could hardly have been intended. *See Wilson v. Garcia*, 471 U.S. 261, 275 (1985).

By contrast, on Plaintiffs' reading the general statutes of limitations are not rendered meaningless or superfluous; they continue in full force and effect for claims

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[13] Plaintiffs note that the 2004 amendments to the UGIA included the following provision: "This single, comprehensive chapter governs all claims against governmental entities or against their employees or agents arising out of the performance of the employee's duties, within the scope of employment, or under color of authority." Utah Code Ann. § 63-30d-101(2)(b) (2004), currently codified at Utah Code Ann. § 63G-7-101(2)(b) (Renumbered and Amended by Chapter 382, 2008 General Session). This language merely underscores what Plaintiffs believe has been evident all along, which is that the UGIA governs all aspects of claims against government actors, including at least supplanting **shorter** statutes of limitations in district court actions based on such claims.

brought against private actors. Plaintiffs' reading does not detract at all from the salutary purpose of the UGIA, which is "to give timely notice . . . so that the state or one of its political subdivisions may conduct an investigation." *Moreno v. Board of Educ. Of Jordan Sch. Dist.*, 926 P.2d 886, 892 (Utah 1994) (Howe, J.). Imposing shorter statutes of limitations could actually frustrate that purpose, requiring plaintiffs to file suit precipitously with adequate opportunity to investigate, put forward and hopefully resolve short of litigation claims involving government actors.

Questions may remain to whether the UGIA's one-year statute of limitations supplants **longer** statutes of limitations, or whether the *Hardinge* preference for applying the longer of two potentially applicable limitations periods prevails. Other state courts that have addressed that question have reached different conclusions.[14] To resolve the issue presented by this appeal, it is sufficient to conclude that the UGIA provides the **minimum** time period within which actions against government actors must be brought to be timely.

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[14] *Compare Griffin v. Willoughby*, 867 N.E.2d 1007, 1013-14 (Ill. App. Ct. 2006) (analyzing the Illinois Tort Immunity Act and concluding that the Illinois Legislature intended it to apply "**broadly to any possible claim** against a local governmental entity and its employees" and that the "comprehensive protection afforded by [the Illinois Tort Immunity Act] necessarily controls over other statutes of limitation or repose," and therefore that the one-year limitations period in the immunity statute prevailed over the two-year limitations period applicable to personal-injury actions against private actors) (emphasis in original), *with Dawson v. Reider*, 872 P.2d 212, 214-16 (Colo. 1994) (analyzing the interplay between a statute providing a one-year limitations period for actions against sheriffs and the a three-year limitations period for actions under Colorado's No-Fault Act in action against a deputy sheriff arising out of an automobile accident and concluding that the longer period applies).

C. This Court's Prior Ruling In This Case Is The Law Of The Case.

One final point. This Court has already declined not once, but twice, to accept Defendants' arguments that it should affirm the trial court's prior dismissal of Plaintiffs' state law claims on statute of limitation grounds the trial court did not reach. Defendants' appeal is the third bite at the same apple. The "law of the case" doctrine precludes it.

"The 'law of the case' is a legal doctrine under which a decision made on an issue during one stage of a case is binding in successive stages of the same litigation." *Thurston v. Box Elder County*, 892 P.2d 1034, 1037 (Utah 1995). The doctrine applies to issues expressly resolved by an appellate court in an earlier stage of the case, and also to issues resolved by "necessary implication." *Utah Dept. of Transp. v. Ivers*, 2009 UT 56, ¶ 20, 218 P.3d 583 (Utah 2009) (holding that the law of the case doctrine precluded the re-argument of an issue the resolution of which was "implicit" in a prior appellate decision in the case) (emphasis added). *Accord*, *Dobbs v. Anthem Blue Cross Blue Shield*, 600 F.3d 1275, 1280 (10th Cir. 2010) ("the law of the case doctrine applies to issues previously decided, either explicitly or by necessary implication") (quotation marks, citation omitted); *Crowe v. Smith*, 261 F.3d 558, 563 (5th Cir. 2001) (law of the case doctrine applies to issues resolved "by necessary implication" in a prior appellate decision in the case).

A review of the procedural history of Defendants' renewed statute of limitations argument shows that it has already been addressed, if not explicitly, then by necessary

implication. In their first summary judgment motion, Defendants argued that Plaintiffs' state law claims were barred by their alleged failure to provide the notice required by the UGIA. Defendants also argued that, assuming Plaintiffs provided adequate UGIA notice, all of Plaintiffs' state law claims failed on the merits and were otherwise barred on limitations grounds ("Alternative Arguments"). Granting Defendants' first motion for summary judgment, the trial court held that Plaintiffs' had not provided timely and adequate UGIA notice. The court gave little consideration to Defendants' Alternative Arguments, suggesting that it viewed the UGIA's own one-year statute of limitations as the only relevant period.

On Plaintiffs' appeal, Defendants contended in their opening brief that Plaintiffs' state-law claims were barred on UGIA grounds, and also on the grounds set forth in their Alternative Arguments. Focusing, as the trial court had, on what it called the UGIA's "one-year statute of limitations," this Court held that Plaintiffs' state law claims were timely. *See Peak Alarm*, 2010 UT 22, ¶¶ 34-35, 88. This Court declined to affirm this Court's dismissal based on the Alternative Arguments. Defendants then petitioned this Court for rehearing. In doing so, they once again specifically argued that this Court should not remand the state law claims case to the trial court, on the ground that their Alternative Arguments required dismissal of those claims notwithstanding this Court's ruling on the UGIA issue. This Court denied Defendants' petition for rehearing.

On remand, for at least the fourth time, Defendants again contended that they are entitled to dismissal of Plaintiffs' state law claims based on their Alternative Arguments. Those arguments were then, and are now, precluded by the law of the case doctrine, since this Court at least implicitly rejected Defendants' Alternative Arguments as to why Plaintiffs' remanded state law claims should be dismissed. Otherwise this Court's remand, and its denial of rehearing, makes no sense. For if Defendants' Alternative Arguments were correct, this Court was obliged to affirm the dismissal of all of Plaintiffs' state law claims, and not to remand the case.

The application of the "law of the case" doctrine in circumstances such as these is amply supported in the case law. In *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031 (10th Cir. 2000), the defendant sought summary judgment on the plaintiff's breach of employment contract claim, which claim was based on defendant's employee manual. The defendant argued that as a matter of law its employee manual did not give rise to an enforceable contract, and that in any event it had not breached any such contract. Reversing, the appellate court held that genuine issues of material fact existed with respect to the question of whether the defendant breached an employment contract with the plaintiff. The appellate court did not expressly rule on the defendant's alternative argument that its employee manual did not give rise to an enforceable contract.

On remand, a trial resulted in judgment for the plaintiff. On appeal from that judgment, the defendant again argued that its employee manual did not create an

enforceable contract. The appellate court held that the law of the case doctrine precluded its consideration of this argument, which had impliedly been rejected by its prior opinion. Otherwise, observed the court, on the prior appeal it would have "affirm[ed] rather than reverse[d] the grant of summary judgment" to defendant. *Id.* at 1036. Precisely the same is true here; had this Court agreed with Defendants' Alternative Arguments, it would have affirmed the trial court's grant of summary judgment to Defendants, instead of reversing in part and remanding.

In *Globe Savings Bank v. United States*, 74 Fed. Cl. 736 (Ct. Cl. 2006), in a second appeal the defendant raised an argument it had raised on a petition for rehearing of the appellate court's prior ruling against it, which petition had been denied without any discussion of the issue. The court held that the law of the case doctrine precluded the defendant from again raising this argument, which the court had impliedly resolved against the defendant in denying its petition for rehearing. The court stated: "a trial court acting on a remand order, may not reexamine any issues that were addressed either explicitly or implicitly by the appellate court. No litigant deserves an opportunity to go over the same ground twice." *Id.* at 740 (quotation marks, citation omitted). Here, as in *Globe*, this Court's denial of Defendants' petition for rehearing implicitly rejected the arguments Defendants presented in that petition. Defendants should not be allowed to present those arguments again for the fourth or fifth time.

In *Dobbs v. Anthem Blue Cross Blue Shield*, 600 F.3d 1275 (10th Cir. 2010), the trial court dismissed the plaintiff's state law claims against the defendant health insurer on the ground that they were preempted by the federal ERISA law. Reversing and remanding, the appellate court ruled that the plaintiff's state law claims would not be preempted if the insurance plan at issue qualified as a "governmental plan" under a recently amended statutory definition. On remand, the trial court held that such amended definition did not apply retroactively, and again dismissed the plaintiff's state law claims. Reversing for the second time, the appellate court held that the law of the case doctrine precluded the defendant's argument that the amended statutory definition did not have retroactive effect. Although the appellate court's first ruling did not expressly hold that the amended definition applied retroactively, it did so impliedly; otherwise, there would have been "no logical reason" for the court to have remanded the case. *Id.* at 1280-1281. Similarly, there would have been "no logical reason" for this Court to have remanded this case to this court, had Defendants' Alternative Arguments possessed merit. *See also In re Felt*, 255 F.3d 220, 225 (5th Cir. 2001) ("The law of the case doctrine applies not only to issues decided explicitly, but also to everything decided by necessary implication ... and, though not expressly addressed in an initial appeal, those matters that were fully briefed to the appellate court and were necessary predicates to its ability to address the issue or issues specifically discussed are deemed to have been decided tacitly or implicitly, and their disposition is law of the case") (quotation marks, citation omitted).

The law of the case doctrine "rests on good sense and the desire to protect both court and parties against the burdens of repeated re-argument by indefatigable diehards." *Thurston v. Box Elder County*, 892 P.2d 1034, 1037 (Utah 1995). In advancing arguments for at least the fourth time, Defendants amply demonstrate that they are such "indefatigable diehards," but Plaintiffs at long last should be allowed to present their claims to a jury at trial.

CONCLUSION

A straightforward interpretation and application of the relevant language of the UGIA and Utah's statute of limitation governing claims against the government make it clear that one who has such a claim has one year after the denial of a notice of claim to commence a lawsuit in district court on the claim. This Court's prior decisions are consistent with this straightforward approach. Defendants, and the Court of Appeals cases on which they rely, fail to address or analyze the statutory language. Plaintiffs respectfully ask that the trial court's ruling rejecting Defendants' statute of limitations defense be affirmed.

DATED this 27th day of July, 2012.

JONES WALDO HOLBROOK & MCDONOUGH PC

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Utah R. App. P. 24(f)(1)(C), that the foregoing brief complies with the type-volume limitation of Rule 24(f)(1)(A). This certificate is based on the word count of the word processing system used to prepare the brief, which indicates a total of 6,586 words.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 2012, two true and correct copies of the foregoing BRIEF OF APPELLEES were sent by United States Mail, postage prepaid, addressed to the following:

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