

1990

Madsen v. Borthick : Unknown

Utah Supreme Court

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Recommended Citation

Legal Brief, *Madsen v. Borthick*, No. 900262.00 (Utah Supreme Court, 1990).
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UTAH SUPREME COURT

BRIEF

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Geoffrey Butler
Clerk of the Utah Supreme Court
332 State Capitol Bldg.
Salt Lake City, UT 84114

Dear Mr. Butler:

RE: Madsen v. Borthick
Case No. 900262

The following are pertinent and significant authorities which have come to the attention of the depositors after their brief was filed. The authorities respond to footnote 2 of the commissioners' brief. Please distribute this letter to the court pursuant to Rule 24(j) of the Utah Rules of Appellate Procedure.

The commissioners, not the depositors are required to plead the statute of limitations upon which they rely. De Vas v. Noble, 13 Utah 2d 133, 369 P.2d 240 (1962); Kimball v. McCornick, 259 P. 313 (Utah 1927). In fact, if the commissioners fail to plead the specific statute of limitations that forms the basis of their affirmative defense, there is no statute of limitations issue to review on appeal. Wasatch Mines Co. v. Hopkinson, 24 Utah 2d 70, 465 P.2d 1007 (1970); Westerfield v. Coop., 6 Utah 2d 262, 311 P.2d 787 (Utah 1957).

In contrast, the rules do not allow a plaintiff to plead in response to a statute of limitations defense. Rather, a statute of limitations defense is denied by the plaintiff as a matter of law. Tate v. Rose, 35 Utah 229, 99 P. 1003 (1909); Thomas v. Glendinning, 13 Utah 47, 44 P. 612, 613 (1896); c.f., Hansen v. Morris, 3 Utah 2d 310, 314 283 P.2d 188 (1955):

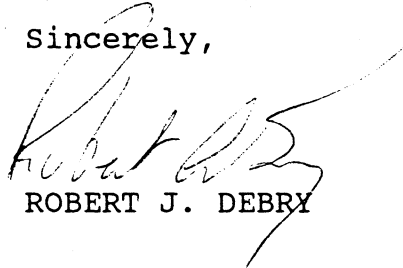
"[I]t is obvious that Rule 8(c), in logic and good sense cannot hold a plaintiff seeking to assert a statute to knock out a defense, to the same strict accountability that it can a defendant seeking to knock out a claim."

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Similarly, the commissioners have the burden of proving that a statute of limitations alleged by the commissioners is the applicable statute. De Vas, supra; McCornick, supra; c.f., Hansen, supra.

In summary, the commissioners, not the depositors, have the burden of pleading and proving which statute of limitations applies. The issue before the lower court and this court is the same, i.e., whether the statutes of limitations alleged by the commissioners bar the depositors' claims. Madsen II. And of course, the lower court's conclusion that they do, is a question of law and reviewed for correctness with no deference to the lower court. Klinger v. Kightly, 791 P.2d 868 (Utah 1990); Madsen II.

Sincerely,

A handwritten signature in dark ink, appearing to read "Robert J. DeBry", is written over the typed name.

ROBERT J. DEBRY

RJD/jn

cc: counsel of record