

2004

Lynn G. Foster v. Evelyn L. Saunders; Saunders & Saunders; Gary Couillard; and Cathie I. Foster : Reply Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Lynn G. Foster v. Evelyn L. Saunders*, No. 20040527 (Utah Court of Appeals, 2004).
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IN THE UTAH COURT OF APPEALS

LYNN G. FOSTER,

Plaintiff and Appellant,

-vs-

EVELYN L. SAUNDERS; SAUNDERS &
SAUNDERS; GARY COUILLARD; and
CATHIE I. FOSTER,

Defendants and Appellees.

Appeal No. 20040527-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENTS AND ORDERS OF THE HONORABLE
WILLIAM B. BOHLING, THIRD JUDICIAL DISTRICT COURT JUDGE

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UTAH COURT OF APPEALS
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DOCKET NO. 20040527-CA

FILED
UTAH APPELLATE COURTS
FEB 17 2005

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ARGUMENT

Appellees/Defendants Evelyn L. Saunders and Saunders & Saunders filed their Appellees' Brief on December 15, 2004 [hereinafter "Lawyers' Brief"]. Appellee/Defendant Cathie I. Foster filed her Appellee's Brief also on December 15, 2004 [hereinafter "Cathie's Brief"]. Appellee/Defendant Gary Couillard filed no brief. The arguments in the Lawyers' Brief and Cathie's Brief often overlap and in those circumstances, to the extent possible, they will be replied to in a single argument. It is important to remember, when reviewing the arguments in both briefs, that this case is being reviewed, on Counts I-III of the Amended Complaint, for a Rule 12(b)(6) dismissal, and on Counts IV-V, on a Rule 56 grant of summary judgment, so the standards of review are as set forth in Appellant Lynn Foster ("Lynn's") Opening Brief.

I. DEFENDANTS ESSENTIALLY IGNORE THE CONTROLLING LAW THAT ESTABLISHES THAT LYNN HAS ADEQUATELY PLEADED A CLAIM UNDER THE TORT OF WRONGFUL INITIATION, USE AND/OR CONTINUATION OF CIVIL PROCEEDINGS, NAMELY, *GILBERT* AND THE RESTATEMENT OF TORTS (SECOND) § 674(a).

The Lawyers' Brief and Cathie's Brief each incorrectly argue that the tort cause of action pleaded in Count I of the Amended Complaint, for Wrongful Initiation, Use And/Or Continuation of Civil Proceedings, R. 17-28, exists in the state of Utah strictly to remedy a wrongful initiation of a lawsuit, and no other litigation abuses. See Lawyers' Brief at 7-15, Cathie's Brief at 9-10. As shown below, these arguments entirely miss the very purpose of the tort, as discussed by the most recent, and controlling, Utah Supreme Court decision, *Gilbert v. Ince*, 1999 UT 65, 981 P.2d 841 [hereinafter "*Gilbert*"], namely, to provide redress for acts of abusive litigation, not sustainable by

probable cause and engaged for an improper purpose.

Lynn prevailed against Cathie in the divorce proceeding on Cathie's claim that she was entitled to payments of alimony even after Lynn died, a claim that is unheard of in divorce law. The claim was not asserted for a proper adjudication of its merits. Defendants argue that Lynn is exempted from relief under the tort because Cathie filed for, and the parties were granted, a divorce, despite Lynn's success in defeating such claim that his alimony obligation continues beyond his death. That is one among many claims that would be subject to his pleaded claim herein, which claims in the divorce were unsupported by probable cause and asserted for an improper purpose.

The language of the very sections of the RESTATEMENT (SECOND) OF TORTS [hereinafter "RESTATEMENT"] expressly adopted by the Utah Supreme Court in *Gilbert*, as well as the comments to the RESTATEMENT¹ and the case law cited by Plaintiff, to which Defendants have offered no response, all disavow Defendants' contentions as to the limitations of the abusive litigation torts. The candor of the entire Lawyers' Brief is called into question by the fact that they relegate the controlling *Gilbert* Utah Supreme Court decision – which is where the Utah Supreme Court expressly adopts the RESTATEMENT's formulation of the torts – to an offhand reference in a single footnote, and then only for the proposition that the torts have, in Utah, "historically been known variously as either 'abuse of process' or 'malicious prosecution.'" Lawyers' Brief at 11 n. 2. Since the *Gilbert* adoption of the RESTATEMENT formulation establishes the current

¹The Utah Supreme Court expressly did not adopt the comments to the RESTATEMENT, leaving the analysis of those matters for another day. See *id.* ¶ 19, 981 P.2d at 846 n. 11.

law on this tort in Utah, such discounted treatment of *Gilbert*, and the RESTATEMENT, is a telling commentary on the hollowness of the Lawyers' Brief's presentation of argument about non-controlling, pre-*Gilbert* , *i.e.*, pre-RESTATEMENT cases.

Cathie's Brief at least acknowledges that *Gilbert* adopted the RESTATEMENT's formulation of the tort. See Cathy's Brief at 10-11. Cathie then candidly concedes that, under *Gilbert*, a plaintiff must allege that the defendant "has brought **claims** without probable cause." Cathie's Brief at 11 (emphasis added). Cathie then reverts to a pre-*Gilbert* definition of probable cause as requiring a "showing of purposeful harassment or annoyance and, in most cases, malice." *Id.* at 11 (citing *Baird v. Intermountain School Federal Credit Union*, 555 P.2d 877 (Utah 1976)). The RESTATEMENT, as adopted in *Gilbert*, makes clear that such element is in fact met by pleading that a claim is brought "for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based," *Gilbert*, 1999 UT 65, ¶ 19, 981 P.2d 841, 845-46 (quoting RESTATEMENT § 674 and equating to *Baird*). Lynn has expressly pleaded these elements in Amended Complaint ¶¶ 21-26 R. 22.

Both the Lawyers' Brief and Cathie's Brief argue that the semantic difference between a "theory" of recovery and a claim for relief is so significant at the pleading stage that Lynn's use of the word "theories," as used by Judge Hilder in the divorce action, see Amended Complaint ¶ 11 R. 20, precludes any possible claim from being stated. Lynn has been unable to find any authority from any jurisdiction holding that such a semantic difference in those terms could preclude any set of facts upon which relief could be granted, and Defendants here cited no such holding.

Indeed, if only one theory of recovery sustains a claim for relief, the two necessarily collapse into each other. However, even if, for the sake of argument only, there were some technical distinction of semantics,² such a consideration would not be a proper basis to dismiss at the pleadings stage. UTAH R. CIV. P. 8(e) expressly abolished any technical forms of pleading. See *Sears v. Riemersma*, 655 P.2d 1105, 1110 (Utah 1982) (“Utah has adopted what is generally referred to as ‘notice pleading.’ Rule 8(e), Utah R. Civ. P., specifically provides that ‘no technical forms of pleadings or motions are required.’”) See generally *Whipple v. American Fork Irrigation Co.*, 910 P.2d 1218, 1221-22 (Utah 1996) (refusing dismissal on grounds of semantic error in pleading).

Thus, the fact that Lynn chose to use Judge Hilder’s language is not dispositive, nor is Judge Hilder’s own choice of words. Lynn’s pleaded claims are adequate.³ The efforts of the defendants to argue that the entire divorce lawsuit must, in its entirety, have been brought without probable cause and for a purpose other than the just adjudication of an entitlement to divorce, see Lawyers’ Brief at 7-12 and Cathie’s Brief at 10-12, is simply unsupported under *Gilbert* or the RESTATEMENT. First, the Utah Supreme Court in *Gilbert* recognized that it was dealing with classes of torts “involving

²Any such claimed distinction seems unlikely to exist. “Claim” is defined as: “To demand as one’s own or as one’s right; to assert; to urge; to insist. A cause of action.” BLACK’S LAW DICTIONARY at 247 (West 1991).

³Cathie’s claim that she was entitled to receive alimony after Lynn was dead, her claim that she owned real property that she had long ago conveyed by quit-claim deed to separate legal entities, in one of which neither she nor Lynn even had any ownership interest, and various other claims asserted, see R. 647-654, on all of which Lynn prevailed, are all subject to the tort’s remedies.

abusive manipulation of public judicial resources.” *Gilbert*, 1999 UT 65 ¶ 16, 981 P.2d at 845. Such a broad characterization of the reach of the torts belies the narrow interpretation of their reach, as argued by defendants.

In adopting the RESTATEMENT, the Utah Supreme Court specifically sought to bring analytical clarity to litigation abuse torts: “To preserve analytical clarity with respect to the species of torts permitting suit for misuse of judicial proceedings, we apply the RESTATEMENT’S formulation of wrongful use of civil proceedings.” *Id.* ¶ 19, 981 P.2d at 846. In order to preserve such analytical clarity, one must do what defendants avoid, namely, focus on *Gilbert* and the RESTATEMENT itself, neither of which counsel the restrictions that defendants argue.

The defendants’ arguments simply seek a reversion to analytical confusion. If the defendants’ proffered arguments about the scope of the abusive litigation torts were correct, the Utah Supreme Court in *Gilbert*, would have found unnecessary its analytical statement⁴ that: “*Gilbert* likewise failed to negate probable cause on Gunnoe’s **allegation** that she acted under a conflict of interest.” *Id.* ¶ 25, 981 P.2d at 847 (emphasis added). A “theory” of “conflict of interest” would not be subject to a probable cause analysis under the tort as argued by defendants, yet the Utah Supreme Court found it essential to determine such issue as part of its rationale for holding that *Gilbert*’s claim against Ince, founded upon a conflict of interest theory, failed.

Indeed, the Utah Supreme Court itself described its analysis as directed to a

⁴*Gilbert* was decided during a jury trial, on a motion for directed verdict. See 1999 UT 65 ¶ 13, 981 P.2d at 844. It was therefore decided under a different standard of review than is applicable to this case. See *id.* ¶ 14.

single “allegation” of a “claim.” “Although the information upon which Ince acted *in alleging conflict of interest* was somewhat tenuous, it cannot be said that the inference provided insufficient probable cause *for the claim.*” *Id.* ¶ 26, 981 P.2d at 848 (emphasis added). Thus, all of the Lawyer Brief’s parsing of other cases’ gratuitous references to “proceedings,” “lawsuits,” “suits,” “civil actions,” and the like, *see, e.g.* Lawyers’ Brief at 8-9 & n.1, is for naught, especially when, contrary to the apparently-desired impression offered by their citations, **not one** of the cited cases holds that individual claims or, as the Utah Supreme Court analyzed in *Gilbert*, “allegations” was immune from the abusive litigation torts. The Lawyers’ Brief, at 11-2 & n. 4, also cites *Karenius v. Merchants’ Protective Association*, 65 Utah 183, 235 P. 880 (1925), claiming that it stands for the proposition that the abusive litigation torts may not be applied in multiple-claim actions if a single claim is valid. This case predates the adoption of the RESTATEMENT in *Gilbert* by three quarters of a century. More significant, however, is the fact omitted from the Lawyers’ Brief, namely, that Karenius’ own attorney acknowledged that Karenius’ claim “[was] not one for malicious abuse of process, nor for malicious prosecution without probable cause.” *Karenius*, 235 P. at 883. Since the pleaded claim was conceded by Karenius’ counsel not to be one of the abusive litigation torts, the case could have no bearing here.

Neither the Lawyers’ Brief nor Cathie’s Brief even attempts to address the *Greenberg v. Wolfberg*, 890 P.2d 895, 904 (Okla. 1995) decision cited in Lynn’s Opening Brief at 18 n.3, which supports exactly what the Utah Supreme Court did in *Gilbert*, in analyzing the allegation of conflict of interest as the predicate for a breach of

fiduciary duty claim. The defendants, in their arguments, also ignore the plain language of the RESTATEMENT, itself, as adopted by the Utah Supreme Court, which uses the phrase “the claim” as the specific object of what has been brought forth for adjudication: “he **acts** without probable cause, and primarily for a purpose other than that of securing the proper **adjudication of the claim in which the proceedings are based . . .**”

RESTATEMENT § 674(a)(emphasis added).⁵ Such resounding silence on these important citations speaks to the lack of merit in defendants’ arguments.⁶

The Lawyers Brief, makes note that the state of California has a bright line policy rule, created by the courts, against applying the abusive litigation torts in the area of family law, citing to *Bidna v. Rosen*, 19 Cal.App.4th 27, 35 23 Cal.Rptr.2d 251 (Cal. Ct.

⁵This RESTATEMENT section was expressly adopted as the law of Utah in *Gilbert*, ¶ 19, 981 P.2d at 845-46, yet not one word about this section appears in either of defendants’ briefs. The plain language of this section brings within reach of the tort a litigant’s **acts** undertaken without probable cause. In other words, it could be initiation of a lawsuit, the continuation in asserting a particular claim or any other act of litigation abuse that fits the elements of the tort – there is no limitation beyond the expressed elements.

⁶Defendants instead seek to distinguish Lynn’s citation of the en banc decision of the California Supreme Court in *Crowley v. Katleman*, 8 Cal. 4th 666, 694, 881 P.2d 1083, 1099, 34 Cal. Rptr. 2d 386, 402 (Cal. 1994)(en banc), arguing that a decision by the First District of Division 2 of the California Court of Appeals “explains” the Supreme Court’s en banc decision. See Lawyers’ Brief at 13 (citing *Merlet v. Rizzo*, 64 Cal. App. 4th 53, 75 Cal.Rptr.2d 83 (1998)). The *Merlet* Court purported to know better than the en banc California Supreme Court, the importance of the Supreme Court’s pronouncements on the abusive litigation tort in its reversal of a dismissal in *Crowley*. In *Zamos v. Stroud*, 32 Cal.4th 958, 87 P.3d 802, 12 Cal.Rptr.3d 54 (2004), the California Supreme Court explained that *Merlet* “simply involved application of the familiar rule that subsidiary procedural actions cannot be the basis for malicious prosecution claims.” *Zamos*, 32 Cal. 4th at 969 n.8, 87 P.3d at 809 n.8, 12 Cal.Rptr.3d at 63 n.8. So the true issue for decision in *Merlet* was not even broad enough for the *Merlet* Court to be offering any explanation of the *Crowley* rationale, and its “explanation,” lacks any value compared to the express pronouncements and expressed rationale of the *Crowley* decision in reversing a dismissal upon demurrer.

App. 1993). *Bidna*, for its rationale, relied entirely on imaginary effects of abusive tort litigation over divorce cases. See 19 Cal. App. 4th at 30. There was no empirical evidence before the Court to support its ruminations. Indeed, although the abusive litigation tort has been around for scores of years, the veritable dearth of reported decisions concerning its application to family law matters counsels a contrary conclusion. The Oregon Court of Appeals, addressing that very defect in *Bidna*'s logic rejected any such hard and fast rule. After exposing the lack of any basis in fact to support *Bidna*'s sweeping policy declaration, the Oregon court reversed the dismissal of an abusive litigation complaint that arose out of family law proceedings. See *Vazquez v. Reeves*, 138 Or.App. 153, 159, 907 P.2d 254, 257 (Or. Ct. App. 1995).⁷ If such a

⁷The Oregon Court of Appeals refuted *Bidna*'s rationale as follows:

Perkins urges us to adopt the reasoning of *Bidna v. Rosen*, 19 Cal.App.4th 27, 23 Cal.Rptr.2d 251 (1993). There, the court declined to extend the tort of wrongful use of civil proceedings to family law cases for three reasons: (1) because of the underlying bitterness and emotional distress involved in many family law disputes, the task of distinguishing between "ordinary" suits and "malicious" suits is extremely difficult; (2) attorney fee awards sufficiently discourage frivolous litigation and adequately ameliorate the effects of such litigation; and (3) extending wrongful use of civil proceedings claims to family law disputes could have a chilling effect on the commencement of meritorious actions. *Id.* 23 Cal.Rptr.2d at 257.

Although *Bidna*'s rationales seem initially plausible, they are ultimately unpersuasive. To begin with, we do not believe that the potential difficulty of sorting out malicious, from ordinary, litigation in the family law context is materially greater than in other species of litigation to which the tort has been applied. See, e.g., *Patapoff v. Vollstedt's, Inc.*, 230 Or. 266, 369 P.2d 691 (1962) (claim predicated on initiation of involuntary bankruptcy); *Hill v. Carlstrom*, 216 Or. 300, 305, 338 P.2d 645 (1959) (claim predicated on initiation of insanity proceedings).

(continued...)

⁷(...continued)

Nor do we accept *Bidna's* second assumption, that awards of attorney fees and sanctions adequately deter the prosecution of baseless and bad faith family law litigation and adequately compensate for losses from such litigation. Here, for example, plaintiffs sought damages for emotional distress and loss of comfort and companionship caused by the allegedly wrongful removal of the children from their mother's care. Moreover, the availability of attorney fees and sanctions, see ORS 20.105; [FN5] ORCP 17, [FN6] is hardly unique to *158 family law litigation. If *Bidna* were correct, the same considerations would, logically, warrant the wholesale abolition of the tort of wrongful use of civil proceedings.

FN5. ORS 20.105 provides, in part:

"In any civil action, suit or other proceeding in a district court, a circuit court or the Oregon Tax Court, or in any civil appeal to or review by the Court of Appeals or Supreme Court, the court shall award reasonable attorney fees to a party against whom a claim, defense or ground for appeal or review is asserted, if that party is a prevailing party in the proceeding and to be paid by the party asserting the claim, defense or ground, upon a finding by the court that the party willfully disobeyed a court order or that there was no objectively reasonable basis for asserting the claim, defense or ground for appeal."

FN6. ORCP 17 provides, in part:

"A. Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record * * *. The signature constitutes a certificate that the person has read the pleading, motion or other paper, that to the best of the knowledge, information and belief of the person formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument * * *, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

" * * * * *

"C. If a pleading, motion or other paper is signed in violation of this rule, the court upon motion or upon its own initiative shall impose upon the person who signed it, * * * an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney fee."

Finally, unlike the court in *Bidna*, we do not believe that the potential for tort liability will chill the prosecution of meritorious family law claims. The rigorous
(continued...)

sweeping public policy exception to a recognized tort were to come from any source in this state, it properly would be the prerogative of the Legislature, not the Courts, to examine empirical data and ascertain whether any negative policy effect in fact exists in this state from the application of the abusive litigation torts to divorce actions.

The remaining arguments of defendants concerning the abusive litigation torts were anticipated and have already been fully addressed by Lynn in his Opening Brief, so will not be repeated here.⁸ Lynn has properly pleaded a claim under the requirements of Rule 8 and the tort at issue, and the dismissal should be reversed.

II. THE OWNERSHIP OF REAL PROPERTY BY FOSTER FAMILY PROPERTIES, L.C. AND FOSTER RENTALS, L.C. WAS IN NO WAY IN ISSUE IN THE DIVORCE ACTION.

In an effort to avoid slander of title liability to Foster Family Properties, L.C. and Foster Rentals, L.C., both the Lawyers' Brief and Cathie's Brief apparently suggest that a dispute over whether Lynn and Cathie owned the real property or whether Foster Family Properties and Foster Rentals owned the real property was at issue in the

⁷(...continued)

requirements for pleading and proving wrongful use claims, especially the requirements of malice and lack of probable cause in prosecuting the underlying action, adequately shield those who act in good faith.

⁸Lynn does wish to address one palpable misstatement in the factual statement of the Lawyers' Brief, at 6, ¶ 10. The Lawyers' Brief argues in that factual statement that "Lynn moved to alter or amend Judge Bohling's order on April 8, 2004, **arguing that** a California decision issued almost ten years before oral argument on Saunders' motion, *Crowley v. Katleman*, 881 P.2d 1083 (Cal. 1994), **constituted intervening and controlling authority justifying reversal.**" *Id.* (emphasis added). Lynn did cite such case in his Rule 59 motion, for the purpose of demonstrating the "error in law" justifying an amended judgment under Rule 59(a)(7). The false contention in the Lawyers' Brief that Lynn argued that such case was "intervening and controlling authority" is inexplicable, in light of the plain absence of any such statements in Lynn's memorandum. See R. 642-643.

divorce action. See Lawyers' Brief at 17-19; Cathie's Brief at 13-16. That is certainly not pleaded anywhere in the Amended Complaint and also is simply not true.

The defendants cite several cases to the effect that divorce courts retain jurisdiction over properties fraudulently transferred or acquired long before the divorce. That may be, but those were not the circumstances in the Foster divorce. Cathie had signed quit claim deeds many years before the divorce, to independent legal entities. She did not challenge those deeds in the divorce and did not seek to bring in the transferees, Foster Family Properties and Foster Rentals, as parties, to assert any legal or equitable challenge to their ownership. Indeed, both entities were successful in quiet title actions against Lynn and Cathie. The respective ownership interests of Cathie and Lynn in the entity Foster Rentals were clearly subject to the divorce court's jurisdiction, but the property of non-party Foster Rentals clearly was not.

First, neither Lynn nor Cathie even owned any portion of Foster Family Properties, L.C., R. 295, so ownership of that entity and real estate owned by that entity **could not** touch upon a division of the marital estate in the divorce. The slander of title contained in Cathie's affidavit concerning Foster Family Properties' good and marketable title to real property could not be covered by the judicial privilege. While Foster Family Properties, L.C. released Cathie Foster from any slander of title claim for any publications she made of her affidavit, however, and so no suit was brought against her in this case on that claim, no such release was granted to defendant Saunders or the law firm for their own publications of that slander of Foster Family Properties' good and marketable title. The release of Cathie and dismissal with prejudice of claims based on her commission of a tort also cannot release, or act as claim preclusion

concerning, the separate torts committed by defendant Saunders in publishing the slander of title.

As to Foster Rentals, L.C., Lynn and Cathie owned portions of the company, as to which other person owned portions as well. While the ownership of that portion of Foster Rentals, L.C. that was owned by Lynn and by Cathie was subject to division in the divorce proceeding, the ownership of the remaining portion of Foster Rentals, L.C. was completely unrelated to the divorce. Similarly, while a valuation of Foster Rentals, L.C. as a business might have been relevant to assigning a value to each of Lynn and Cathie's percentage of ownership of the company, Cathie's affidavit stating that she and Lynn owned real property that she in fact had quit-claimed to the company many years earlier, which transfers were not challenged, is a slander of the company's good and marketable title in real property utterly unrelated to the divorce. No order of the divorce court could take away the real estate owned by Foster Family Properties or Foster Rentals, L.C. Cathie's contention to the contrary in her affidavit was simply a knowingly false statement that slandered the title of non-parties and caused them to incur special damages to obtain decrees quieting title. A claim has clearly been stated and judicial privilege as an affirmative defense is not proven by the Amended Complaint's allegations.

III. SLANDER OF TITLE IS AN INJURY TO REAL PROPERTY.

On the issue of the applicable limitations period for slander of title, defendants again cite many cases from other jurisdictions. Those jurisdictions, however, do not have a decided Supreme Court case, as we do in Utah, distinguishing slander of title from the personal tort of slander, and plainly defining the tort as one of injury caused to

real property. See Lynn's Opening Brief at 30-32. The effort in Cathie's Brief to distinguish *Bass v. Planned Management Servs., Inc.*, 761 P.2d 566 (Utah 1988), and the United States Court of Appeals for the Ninth Circuit's decision in *Howard v. Hudson*, 259 F.2d 29, 32 (9th Cir. 1958), see Lynn's Opening Brief at 32, is based on a misreading of *Bass*. Cathie argues, wrongly, that *Bass* "stated that slander of title actions are different than slander of a person because slander of title relates to the economic injury to an individual caused by defamation rather than a person's reputation." Cathie's Brief at 21. This characterization of the language of *Bass*, is simply wildly at variance with the actual language of the case, which, in discussing the "economic injury" that defendants vaguely gloss over, plainly required "a specific monetary loss flowing from a slander **affecting the saleability or use of the property**, [or else] there is no damage." *Bass*, 761 P.2d at 568. Injury to the value of the property is the gravamen of the action. There is therefore no analytical basis to distinguish *Howard*, and Utah's specific, three-year, injury to property limitations period must apply.⁹

IV. CLAIM PRECLUSION CANNOT BE DECIDED ON THE PLEADINGS.

Defendants bear the burden to prove to this court that claim preclusion applies.¹⁰

⁹Defendants are correct that no Utah case, *Bass* or later, has specifically had to hold on that issue. The fact that those courts properly refrained from issuing advisory dicta does not change the clear and logical result of what *Bass* did hold, when a Court, like this Court, must hold on the issue.

¹⁰In *Miller v. USAA Casualty Insurance*, 2002 UT 6, 44 P.3d 663, the Utah Supreme Court made this burden clear:

The party moving a court to dismiss on claim preclusion grounds bears the
(continued...)

The judgment in the quiet title action in the *Foster Rentals, L.C. v. Foster*, after quieting title in *Foster Rentals, L.C.*, as against both Lynn and Cathie, dismissed the remaining claim for slander of title without prejudice. To prove otherwise, defendants would have had to produce a judgment that said so, and they did not. Nor does the Amended Complaint plead any adjudication on the merits of the slander of title claim. Therefore, defendants cannot prove the necessary third element.¹¹ No other set of facts, other than that there was no adjudication on the merits, may be inferred from the Amended Complaint.

As to the Foster Family Properties case, a stipulated order quieting title and releasing Cathie was entered, dismissing the slander of title claim **against her**, with prejudice. That is why no claim was pleaded against Cathie for slandering Foster Family Properties' title. There was no release of any claims against Saunders or law firm for their own commission of the tort of slander of title and there can be no inference

¹⁰(...continued)

burden of establishing three elements, *Macris & Assocs.*, 2000 UT 93 at ¶ 20, 16 P.3d 1214 which are:

"First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a *final judgment on the merits*."

Id. (emphasis added) (quoting *Madsen v. Borthick*, 769 P.2d 245, 247 (Utah 1988)); see also *Culbertson*, 2001 UT 108 at ¶ 13, 44 P.3d 642. All three elements must be established for claim preclusion to apply. See *Madsen*, 769 P.2d at 247.

Miller, 2002 UT 6 ¶ 58, 44 P.3d at 678.

¹¹"According to the third element, '[a]n adjudication upon the merits is ... required [to establish] claim preclusion.'" *Id.* ¶ 59.

against Lynn that they did not commit their own acts in slander of Foster Family Properties title. They are liable for their own acts, regardless of what Cathie did or did not do. They were not parties to any prior action and no claims were asserted against them previously. Thus, they cannot meet their burden on their own torts, regardless of what Cathie did for which she was released.

V. CATHIE'S ARGUMENTS ON DUTY, LEGAL CAUSE AND ECONOMIC RELATIONS ARE GROUNDLESS, CONCERNING SUMMARY JUDGMENT IN FAVOR OF CATHIE AND COUILLARD ON COUNTS IV AND V.

Cathie's argument that her filing of a purportedly joint tax return with the Internal Revenue Service that contained materially false statements about Lynn's deductions and individual filing status was not a legal cause of the audit he endured is difficult to fathom. Her conduct hardly seems to be so removed from Lynn's injury, a la *Palsgraf*, that it could be deemed unforeseeable. Indeed, the IRS seems to publicize in the newspapers the various investigations they undertake due to red flags that are raised, and it hardly seems that reporting false information to the IRS would not be deemed a red flag. Of course, whether the false information was the cause-in-fact of the audit might be open to debate, but the trial court's refusal to grant relief under Rule 56(f) to allow discovery of the IRS to make that factual link, when discovery had not yet been allowed to commence, was a clear abuse of discretion. Cathie also does not explain how, having undertaken to make representations to the IRS about Lynn, she escapes any duty to make those representations in a non-negligent fashion so as not to trigger an audit of Lynn.

Of course, Count IV deals with negligent breach of duty. Count V deals with an

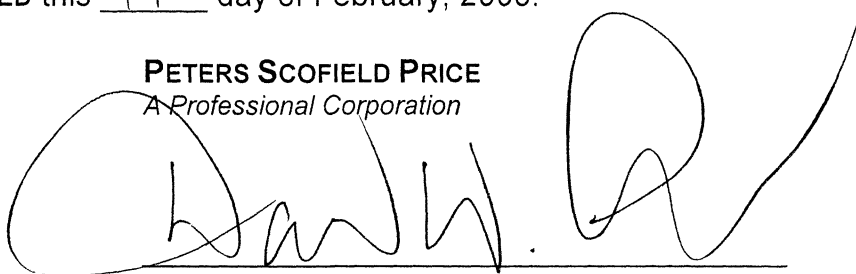
intentional interference with Lynn's prospective economic relations. While Cathy argues that those relations must be "business relations," she offers no explanation of why the delay in receiving a refund that resulted in lost investment income is not a "business relation." The right to invest in securities, or even certificates of deposit, most certainly are business relations as to which Lynn was deprived and he is entitled to recover his resulting investment loss under the tort of intentional interference with prospective economic advantage. Again, the issue of cause-in-fact could not be proven without discovery from the IRS, and the trial court abused its discretion in refusing to uphold the rule 56(f) objection to summary judgment.

CONCLUSION

The Rule 12(b)(6) dismissal and Rule 56 judgment of the trial court should be reversed, as should its refusal to allow discovery, and the entire case should be reinstated and remanded to allow discovery and further proceedings.

RESPECTFULLY SUBMITTED this 17th day of February, 2005.

PETERS SCOFIELD PRICE
A Professional Corporation

A large, stylized handwritten signature in black ink, likely belonging to David W. Scofield, is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

DAVID W. SCOFIELD
Attorneys for the Appellants

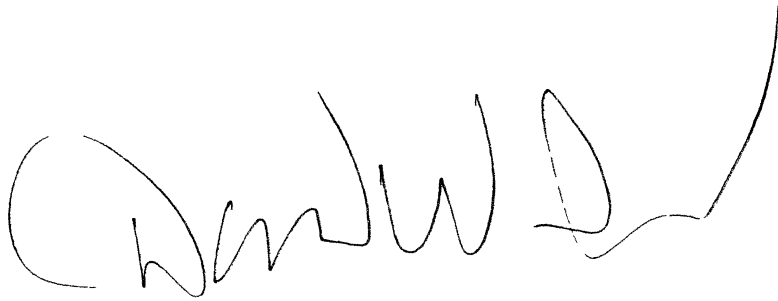
CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the above and foregoing Appellants' Reply Brief were mailed, postage prepaid, this 17th day of February, 2005, to the following:

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