

1993

# Loretta Penfold Records v. Gary M. Briggs : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

930776-CA

LORETTA PENFOLD RECORDS, aka, \*  
LORETTA GALLENT \*

Plaintiff/Appellee \*

vs. \*

GARY M. BRIGGS \*

Defendant/Appellant \*

**APPELLANT'S REPLY BRIEF**

Case No. 930776-CA

Priority No. 15

APPEAL FROM AN ORDER OF THE FIRST JUDICIAL DISTRICT COURT  
OF CACHE COUNTY, STATE OF UTAH  
JUDGE GORDON J. LOW

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**FILED**

FEB 7 1994

**COURT OF APPEALS**

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**APPELLANT'S REPLY BRIEF**

Case No. 930776-CA

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**STATUTES CITED**

§78-12-45 Action Barred in Another State Barred Here.

"When a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, an action shall not be maintained against him in this state, except in favor of one who has been a citizen of this state and who has held the cause of action from the time it accrued."

**ARGUMENT**

**POINT I**

**PLAINTIFF'S CLAIM IS BARRED BY THE  
APPLICABLE STATUTES OF LIMITATIONS.**

The Standard of Review in a case of statutory construction and/or a question of law requires that the reviewing court give no particular deference to the Trial Court's interpretations. The same can be said for counsel's interpretations<sup>1</sup>.

The questions to be addressed are as follows:

(1) Is the action brought by Plaintiff a contract or tort action and is the distinction of any relevance as it relates to the statute of limitations issue?

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<sup>1</sup> The fact that Defendant's counsel has, on one or more occasions, changed, modified or even reversed a position is of no importance. It is not relevant to the decision to be made by this Court.

(2) What specific act or fact triggered the running of the statute of limitations?

(3) Taking into consideration Issues 1 and 2 what is the appropriate state statute of limitations? and

(4) Does the exclusion found in 78-12-45 UCA apply in this case?

### **Analysis Issue I**

Plaintiff's Complaint sounds in a mixture of contract and tort. However, the prayer for relief seeks recovery of personal property, to-wit: Stock Certificate No. 2939 for 32,190 shares of Digitran stock. The Plaintiff delivered to the Defendant the certificate and an irrevocable stock power (Ex. 6) in the State of Louisiana. Plaintiff claims this was a pledge agreement. Defendant claims the transfer was outright and unconditional<sup>2</sup>. Whether this is an action in contract or tort need not be decided.

The Trial Court erred in holding this case as one in contract.

In Holm v. B & N Service, Inc., 661 P.2d 951 (Utah 1983) the Utah Supreme Court stated:

Neither the form of the proceeding nor the name applied to it can change the nature of the wrong or injury. It is the wrongful act which results in injury and damage which gives the right of action, and, if the injuries are to personal property, the statute fixes the time within which such an action must be brought, and the name of the action can have no effect upon the question of what statute controls.

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<sup>2</sup> For purposes of this portion of the brief the Defendant concedes for argument sake only that such a pledge relationship existed nonetheless any action seeking recovery or damages is barred by the Statute of Limitations as a matter of law. A significant portion of the prior brief and this brief are devoted to the Parole Evidence Rule and law surrounding the Statute of Frauds, however, the Defendant denies any such pledge relationship and has strongly resisted such below.

See also Utah Poultry & Farmers Co-op v. Utah Ice and Storage, 187 F.2d 652 (10th Cir. 1951). In the Holm case the Court ruled that the three-year statute of limitation for the recovery of personal property was controlling regardless of whether or not the action was tort or contract.

### **Analysis Issue 2**

Relative to the second issue, when Digitran issued its stock certificates to the Defendant in Texas on November 8, 1988, Plaintiff claims, in her affidavit, she was entitled to the return of her personal stock as of that date. (See the record pg. 203) The Statute of Limitations started to run as of November 8, 1988, when Plaintiff had the right to ask for and demand the return of her shares which she claims were held as security. The Statute of Limitations begins to run at the moment that a cause of action arises. Fredericksen v. Knight Land Corporation, 667 P.2d 34 (Utah 1983). Holloway v. Butler, 662 S.W.2d 688 (Texas).

The Defendant's transfer of the stock into his own name has nothing to do with the Plaintiff's right to reclaim her stock certificate and therefore the transfer of the stock on the corporate books is not an act which triggers the running of the statute of limitations. Plaintiff's interpretation of the commencement of the right of action clearly benefits Plaintiff's argument but is unsupported by case law.

At the time of the delivery of the stock to Gary Briggs by Digitran in fulfillment of Digitran's agreement found in Exhibit No. 4, Plaintiff could have and should have, under her own theory, sought redelivery of her stock certificate situated in Texas. The Plaintiff's lack of diligence in seeking return of her stock does



not affect the times for the commencement of the limitation period. Plaintiff's cause of action arose in Texas.

### **Analysis Issue 3**

To address the third issue set forth above, on November 8, 1988, the Defendant was a resident of Texas; the stock certificate which is the subject of this action was situated in Texas.

Under the Defendant's theory, Plaintiff's cause of action arose when Plaintiff voluntarily parted with the stock certificate and delivered the stock power to Defendant. Plaintiff claims she can use parole evidence and extrinsic evidence to prove a contract or pledge agreement. However, even under the Plaintiff's theories the statute of limitations for the recovery of personal property commenced to run no later than November 8, 1988. Plaintiff's cause of action arose in Texas where Defendant and the certificate were located. This action is barred under the two-year Texas statute<sup>3</sup>, the three-year Utah statute<sup>4</sup> or a one-year Louisiana statute<sup>5</sup>.

### **Analysis Issue 4**

The fourth issue is whether or not the exception in 78-12-45 UCA of the Utah Statute applies to Plaintiff. The statute states that a Plaintiff cannot maintain an action in the State of Utah when the cause of action has arisen in another state or territory and is barred in that state. The statute excepts a situation where a person has been a citizen of this state and who has held the cause of action from the time it accrued. The case of Allen v. Greyhound Lines, Inc., 583 P.2d 613 (Utah 1978) addressed the issue

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<sup>3</sup> Addendum A Appellant's Brief - Texas.

<sup>4</sup> Addendum A Appellant's Brief - Utah.

<sup>5</sup> Addendum A Appellant's Brief - Louisiana.

and the Court said:

"The more reasonable interpretation of the exclusive language of the statute is that it affords the protection of Utah Law only to its residents who incur causes of action while outside this state. Such an interpretation serves the legitimate purposes of protecting a limited class (Utah residents) as of the date their cause of action arises although they have since chosen a new state of residence. Most importantly, it does no violence to the (borrowing statute) which stands on the books for the purpose of preserving the worthwhile concepts of comity".

Plaintiff brought this cause of action into Utah from elsewhere. Defendant has no contacts with the State of Utah nor is he a resident of the State of Utah. If the cause of action accrued when Plaintiff claims she was entitled to the return of her stock on November 8, 1988, her cause of action is clearly against the Defendant in the State of Texas. Plaintiff is not a citizen of Utah who has held the cause of action from the time it accrued as required by the exception found in the Utah Statute<sup>6</sup>.

Plaintiff delayed the commencement of this action from October 7, 1987 to the 3rd day of January, 1992, a period of approximately five years. The Plaintiff alleges neither fraud nor misrepresentation yet seeks the return of 32,190 shares of corporate stock. Defendant contends the statute of limitations started to run at the time of the delivery of the stock on October 7, 1987. Plaintiff, on the other hand, by affidavit, claims her right of action started when Digitran issued 40,192 shares of its stock to Gary Briggs on November 8, 1988. Either way the Plaintiff has failed to timely bring this action whether the court applies the Utah, Texas or Louisiana Statute of Limitations.

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<sup>6</sup> No Allegation of citizenship exists in the record.

## POINT II

### **PLAINTIFF CLAIMS THE DEFENDANT HAS NO TENABLE BASIS ON WHICH TO ASSERT A BAR TO THE INTRODUCTION OF EXTRINSIC EVIDENCE.**

The Trial Court erred in granting the summary judgment by considering evidence in violation of the parole evidence rule. As cited in the Defendant-Appellant's Brief parole evidence is only available to the Plaintiff when the Plaintiff demonstrates that the agreement between the parties is ambiguous.

The Plaintiff asks this Court to literally discard the parole evidence rule and accept the uncorroborated testimony of Plaintiff to prove what she claims to be a pledge agreement between the Plaintiff and the Defendant.

The Plaintiff then proffers to the court a document (Ex. 34) authored solely by the Plaintiff which has no nexus or connection with the Defendant. It's authenticity is not proved nor admitted by the Defendant. The Plaintiff would have this Court find that there is a conditional pledge agreement between the Plaintiff and Defendant based upon the Plaintiff's affidavit and Ex. 34. The parole evidence rule and the statute of frauds bar Plaintiff's ability to prove any other agreement between the parties other than the unconditional delivery of stock coupled with an irrevocable stock power for its transfer. Colonial Leasing Co. v. Larsen Bros. Const., 731 P.2d 483 (Utah 1986).

## POINT III

### **PLAINTIFF CLAIMS THE DISTRICT COURT'S RULING IS SOUND AND IS BASED UPON UNDISPUTED FACTS IN THE RECORD.**

Summary Judgment must be based upon competent admissible evidence not in violation of the parole evidence rule, the statute of frauds, and not creating a contested issue of fact. Plaintiff

cites discoverable evidence as a grounds for justifying the court's granting of Plaintiff's Motion for Summary Judgment. Plaintiff and the Trial Court erred. In Norton v. Blackham, 669 P.2d 857 (Utah 1983) and Rainford v. Rytting, 22 Utah 2d 252 451 P.2d 769 (Utah 1969), the Supreme Court struck an affidavit consisting of inadmissible parole evidence submitted for the purpose of varying the terms of a written agreement.

Plaintiff relies solely on inadmissible testimony to attempt to prove an agreement between the parties. Lastly should this court find that the parole evidence rule nonetheless allows the admission of the conditions in evidence, the Trial Court ignored the issue of the payment of royalties which was a further condition. Creation of a material issue of fact requires a trial.

The Trial Court and Plaintiff completely ignores the issue of the payment of royalties as a further condition for the retaining of the stock. However, the bottom line is that the stock transferred by the Plaintiff to the Defendant was irrevocable and was concluded on the date of the transfer as of October 7, 1987.

#### **POINT IV**

##### **PLAINTIFF CLAIMS THE TRIAL COURT'S RULING NOT TO JOIN INDISPENSABLE PARTIES WAS NOT AN ABUSE OF DISCRETION.**

Should this Court determine that the unconditional stock power is ambiguous and allows parole and extrinsic evidence to prove a conditional delivery by the Plaintiff of the 32,190 shares of stock to the Defendant, then it is obvious that other parties are involved, such as the corporation whose obligation is to issue to the Defendant stock under the terms of the agreement to prepay Class A or Class B notes (see Exhibit 4). Also the same corporation has the obligation to pay royalties to the general

partner of the limited partnership. This would then require the inclusion of the general partner in the limited partnership to be present in court for the determination of the issue as to receipt and payment of royalties. The inclusion of these parties is not difficult because the Plaintiff is the President of Digitran, Inc. and is the major shareholder of the corporation which is the general partner of the limited partnership. Therefore, the only way a complete determination of the issues raised is to have before the court all parties interested in the transaction. The Utah Statutes cited by the Defendant in Defendant's Brief authorize just this sort of litigation.

#### **CONCLUSION**

The Plaintiff would like this Court to believe that the Defendant is an opportunist who having received 32,190 shares of the Plaintiff's shares of stock of Digitran Inc. from Plaintiff, now refuses to return the stock to Plaintiff. The Defendant claims there are other unsolved issues such as the payment of royalties. As a practical matter this case is easily resolved by the obvious determination that the Plaintiff's action is barred by the Statute of Limitations in any state including the State of Utah where Plaintiff seeks the recovery of personal property.

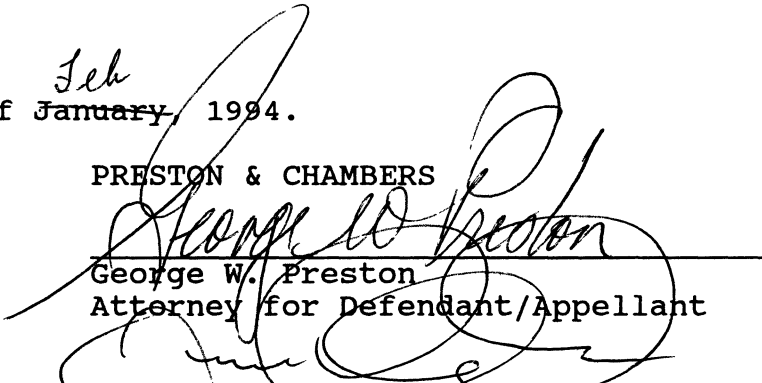
If this case is not resolved by the Statute of Limitations this Court must then examine closely the contested evidence by which Plaintiff seeks to prove a conditional delivery of stock or a pledge agreement and then determine whether or not the conditional delivery and pledge agreement are proved by competent admissible evidence or whether the Parole Evidence Rule and Statute of Frauds, in the absence of any allegation of fraud or

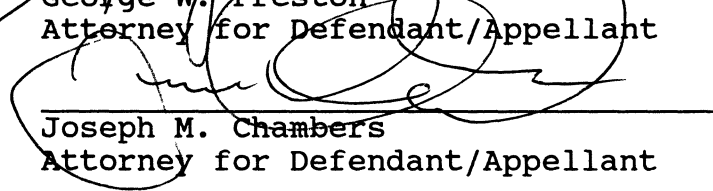
misrepresentation precludes the use of such non-evidence. If the Court thereafter concludes that notwithstanding there is a pledge or conditional delivery, the court must then determine whether or not additional parties should be brought in relative to royalties and send the matter back to the District Court for trial.

The Defendant urges this Court to reverse the Trial Court on the issues of the Statute of Limitations and to dismiss Plaintiff's action.

DATED this 7<sup>th</sup> day of <sup>Feb</sup>~~January~~, 1994.

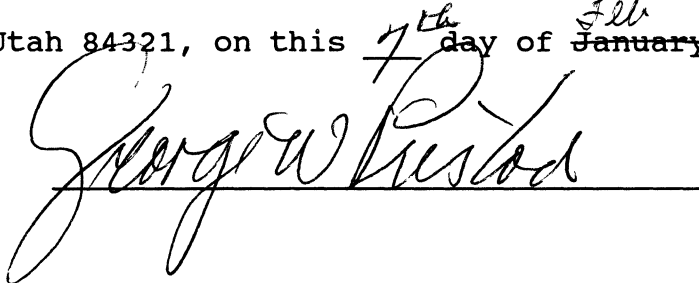
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#### MAILING CERTIFICATE

I hereby certify that I mailed two (2) true and correct copies of the above and foregoing **APPELLANT'S REPLY BRIEF** to the Plaintiff's Attorney, Gary N. Anderson, Hillyard, Anderson & Olsen, 175 East 100 North, Logan, Utah 84321, on this 7<sup>th</sup> day of <sup>Feb</sup>~~January~~, 1994.

  
George W. Preston