

2006

# William York v. Richard Gardiner : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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WILLIAM YORK	)	
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Plaintiff/Appellant,	)	
	)	
v.	)	Appellate Case No.: 20060349-CA
	)	
RICHARD GARDINER,	)	
	)	
	)	
Defendant/Appellee.	)	

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BRIEF OF APPELLEE RICHARD GARDINER

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ORAL ARGUMENT REQUESTED

FILED  
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## **JURISDICTION**

The Supreme Court had original appellate jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(3)(j), and transferred it to this Court pursuant to Utah Code Ann. § 78-2-2(4). Jurisdiction in this Court is pursuant to Utah Code Ann. § 78-2a-3(2)(j) by transfer from the Supreme Court.

## **ISSUE FOR REVIEW**

1. Did the trial court correctly rule, as a matter of law, that Mr. York failed to file his complaint within the four year statute of limitations and that U.C.A. Section 78-12-35 did not toll the limitations period as Mr. Gardiner was at all times amenable to personal jurisdiction within the State of Utah? This issue is reviewed for correctness, affording no deference to the trial court's conclusions of law. See Alder v. Bayer Corp., 61 P.3d 1068, 1075 (Utah 2002).

## **DETERMINATIVE STATUTORY PROVISIONS**

1. Utah Code Ann. § 78-12-25, entitled “Within four years,” provides, in relevant part:

An action may be brought within four years:

...

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

U.C.A. § 78-12-25(3).

2. Utah Code Ann. § 78-12-35, entitled “Effect of absence from state,” provides in full:

Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

U.C.A. § 78-12-35.

### **STATEMENT OF THE CASE**

#### **A. NATURE OF THE CASE:**

Plaintiff Mr. York is the president of Interport, Inc. (“Interport”), a company that imports firearms into the United States. (R.10.) Defendant Mr. Gardiner is an attorney practicing law in Fairfax, Virginia. (See id.) On two separate occasions in the mid-1990's, Mr. Gardiner was engaged by Interport to represent it in two lawsuits involving Interport's importation of machine guns into the United States. (See id.) While Mr. York was actively involved in both lawsuits as a representative of Interport, Mr. York was not a party to either of the two lawsuits and Mr. Gardiner was never engaged to represent Mr. York's separate individual interests. (See id.) Mr. Gardiner's representation of Interport came to an end no later than February of 2000. (See id.)

Despite the fact that Mr. Gardiner never represented Mr. York in any individual capacity, and while there was no attorney-client relationship between Mr. York and Mr. Gardiner, Mr. York filed breach of contract and legal malpractice claims against Mr. Gardiner in Utah's Fourth Judicial District Court. (See id.) Mr. York did not file his complaint until April 12, 2005. (R.1-6.)

In response to Mr. York's complaint, Mr. Gardiner filed a Motion for Summary Judgment which challenged Mr. York's claims on two points. (R.9-23.) First, Mr. Gardiner argued that because there was no contract or attorney-client relationship between Mr. Gardiner and Mr. York, Mr. Gardiner owed no duty to Mr. York and Mr. York had no standing to bring breach of contract and legal malpractice claims against Mr. Gardiner. (See id.) Second, Mr. Gardiner argued that Mr. York's claims were barred by the four year statute of limitations. (See id.)

The trial court initially granted Mr. Gardiner's Motion for Summary Judgment on the issue of duty and standing, but denied the motion as to the statute of limitations.<sup>1</sup> (R.128-42.) Following the filing of a motion to reconsider and clarify, the trial court granted the motion and ruled that Mr. Gardiner was entitled to summary judgment on the basis of the statute of limitations. (R.233-35.) Mr. York only appeals the trial court's decision on the statute of limitations issue.

## **B. COURSE OF PROCEEDINGS:**

Mr. York filed his Civil Complaint in Utah's Fourth Judicial District Court on April 12, 2005. (R.1.) The Honorable Judge Donald J. Eyre was assigned to the case. (R.1.) Mr. Gardiner filed his Motion for Summary Judgment on July 15, 2005 on the

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<sup>1</sup> The trial court's initial decision provided that although Interport had failed to properly assign its alleged breach of contract and legal malpractice claims against Mr. Gardiner to Mr. York, Interport could still make such an assignment which Interport, through Mr. York, proceeded to do. Hence, whether the claims are barred by the statute of limitations applies to Interport's assigned claims.

issues of duty, standing and the four year statute of limitations. (R.7-63.) Mr. York opposed the Motion for Summary Judgment by way of an opposition brief.<sup>2</sup> (R.85.) The trial court held oral argument on the Motion for Summary Judgment on October 25, 2005.<sup>3</sup> (R.126.) On November 29, 2005, the trial court issued a Memorandum Decision granting Mr. Gardiner's Motion for Summary Judgment on the issues of duty and standing, but denying the motion as to the statute of limitations. (R.128.)

On December 5, 2005, Mr. York filed a pleading entitled "Addendum To: Motion to Disqualify, Affidavit of Bias & Prejudice & Certificate of Good Faith" in which he argued, for a second time, for the recusal of Judge Eyre. (R.144.) On December 7, 2005, Judge Eyre ruled that while he "had previously thought he was not biased or prejudiced against the plaintiff, William York, given the very personal, mean spirited and false allegations made by the plaintiff in his recently filed Addendum, the Court believes that it can not now put aside those allegations and not be affected by what appears to be the personal animosity that Mr. York appears to have against the Court."

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<sup>2</sup> In addition, on August 2, 2005, Mr. York filed a "Motion to Intervene" in which he informed the trial court that the subject case was related to another pending case in which Mr. Gardiner had filed suit to recover his unpaid legal fees from Interport. (R.64-65.) It was unclear what relief Mr. York sought as part of this Motion. In any event, while it was opposed by Mr. Gardiner, it was never submitted to the trial court for decision and was therefore never determined by the trial court.

<sup>3</sup> Immediately prior to the hearing, Mr. York also filed a "Motion to Disqualify, Affidavit of Bias & Prejudice & Certificate of Good Faith" in which he sought to disqualify Judge Eyre on the basis that he was biased against Mr. York. (R.109.)

(R.155.) The case was then transferred to the Honorable Judge Fred D. Howard on December 15, 2005. (R.159.)

On December 23, 2005, Mr. Gardiner filed a Motion to Reconsider and/or Clarify in which he asked the trial court, *inter alia*, to reconsider the ruling regarding the statute of limitations. (R.165.) Mr. York did not respond to the motion in any way and Mr. Gardiner filed a Request to Submit for Decision on January 19, 2006. (R.231.) On February 16, 2006, the trial court entered a Ruling Re: Defendant's Motion to Reconsider and/or Clarify in which it granted Mr. Gardiner summary judgment on the statute of limitations. (R.233.) An order entitled Judgment of Dismissal was submitted to the Court and was signed on March 14, 2006. (R.239.)

On March 13, 2006, Mr. York filed a pleading entitled Request for Due Process & Constitutional Rights in which he argued that he should have been accorded a hearing on Mr. Gardiner's Motion to Reconsider and/or Clarify. (R.237.) Mr. York also filed a Motion for Default Judgment on March 13, 2006, in which he argued that he was entitled to a default judgment because Mr. Gardiner had not filed an answer to his complaint. (R.242.) Mr. Gardiner responded to both of these motions, but they were never submitted to the trial court for decision and were therefore never ruled upon by the trial court. Mr. Gardiner next filed his Notice of Appeal on April 12, 2006. (R.266.)

### **C. DISPOSITION IN THE TRIAL COURT:**

All of Mr. York's claims against Mr. Gardiner were dismissed as a matter of law in a Judgment of Dismissal signed March 14, 2006. (R.239.) A copy of the

Judgment of Dismissal is attached hereto as Appendix A. Mr. Gardiner appeals the trial court's Judgment of Dismissal as it relates to the trial court's determination that the statute of limitations bars his claims. (See App. Br. pp. 2-8.)

### **STATEMENT OF FACTS**

1. Mr. Gardiner is an attorney who resides and practices in Fairfax, Virginia. (R.1.)

2. Interport is a Nevada Corporation. Mr. York is the President of Interport. (R.26.)

3. The primary business of Interport is importing firearms and firearm parts into the United States. (R.28.)

#### **A. THE DISTRICT OF COLUMBIA LAWSUIT:**

4. In May of 1986, Interport submitted forms to the Bureau of Alcohol, Tobacco and Firearms ("ATF") seeking to register 911 Sten machine guns so they could be sold privately without certain restrictions required by federal law. (R.36.) In October of 1986, the ATF informed Interport that the machine guns were not eligible for unrestricted private sale and that the machine guns could only be sold subject to certain federal restrictions. (R.37.)

5. In response to the ATF's placement of restrictions upon the sale of the machine guns, Interport passed a Corporate Resolution to retain the services of Mr. Gardiner to represent it in litigation against the ATF to remove the restrictions. (R.40.)

6. The Corporate Resolution specifically indicated that Mr. Gardiner was to represent Interport. The Corporate Resolution stated as follows:

IT IS HEREBY RESOLVED that Richard Gardiner be authorized to pursue the removal of the mentioned restrictions by negotiation and/or litigation with the [ATF] for and behalf of Interport, Inc.

(Id.)

7. Shortly thereafter, Interport and Mr. Gardiner entered into an oral agreement whereby Mr. Gardiner agreed to represent Interport, and Interport only, in a civil action against the United States in the United States District Court for the District of Columbia. (R.42.)

8. Subsequently, Mr. Gardiner filed an action on behalf of Interport in the United States District Court for the District of Columbia captioned Interport, Inc. v. National Firearms Act Branch, Bureau of Alcohol, Tobacco and Firearms, Civil Action No. 99-174 (SS) (the “District of Columbia lawsuit”). (R.2.)

9. Mr. York was not a named party in the District of Columbia lawsuit and Mr. Gardiner did not represent Mr. York’s individual interests in any way in that lawsuit. Interport was the only named plaintiff in the District of Columbia lawsuit and was the only party represented by Mr. Gardiner. (R.2; R.36; R.42.)

10. During the course of the District of Columbia lawsuit, the ATF filed a motion for summary judgment seeking dismissal of Interport’s claims based on the six-year statute of limitations applicable to claims against the United States as found in 28 U.S.C. Section 2401. (R.37.)

11. On July 28, 1999, the United States District Court for the District of Columbia granted the ATF's motion for summary judgment and dismissed Interport's claims. The court found that the action had not been commenced within the six-year statute of limitations. The court found that an ATF letter of October, 1986 put Interport on notice of any potential cause of action against the ATF and that the matter should have been commenced within six years of that date. (R.38.)

12. Interport appealed the dismissal of the District of Columbia lawsuit to the United States Court of Appeals for the District of Columbia Circuit. On December 27, 1999, the Court of Appeals granted a motion for summary affirmance filed by the ATF and summarily affirmed the dismissal of Interport's claims in the District of Columbia lawsuit. (R.44.)

13. On February 20, 2000, a substitution of counsel was filed with the United States Court of Appeals for the District of Columbia Circuit substituting Lisa Freiman in place of Mr. Gardiner as counsel of record for Interport. (R.46.)

#### **B. THE UTAH FEDERAL COURT ACTION:**

14. On October 28, 1994, Interport submitted to the ATF an "Application and Permit for Importation of Firearms, Ammunition and Implements of War" (R.29-30.)

15. On November 22, 1994, the ATF approved Interport's application and issued Permit No. 94-13811. The Permit indicated that "NO FIREARMS,



FRAMERS, RECEIVERS OR ACTIONS FOR FIREARMS ARE AUTHORIZED FOR IMPORTATION UNDER THE PERMIT.” (R.29.)

16. In January of 1995, 1,100 sets of AKM<sup>4</sup> machine gun components were imported into the United States by Interport under Permit No. 94-13811. (See id.)

17. When the 1,100 sets of machine gun components were received in Salt Lake City, they were inspected by the United States Customs Service (“Customs”). Customs requested an opinion from ATF as to whether the 1,100 sets of machine gun components qualified as “receivers”<sup>5</sup> in violation of Permit No. 94-13811. (See id.)

18. ATF provided an opinion to Customs that the 1,100 sets of machine gun components were in fact “receivers” in violation of Permit No. 94-13811. On January 30, 1995, Customs seized the 1,100 machine gun receivers as merchandise being introduced into the United States in violation of law. (See id.)

19. On June 25, 1997 the United States commenced an *in rem* proceeding seeking forfeiture of the 1,100 machine gun receivers imported by Interport (hereinafter “Utah Federal Court lawsuit”). (R.48.)

20. In July 1997, Interport and Mr. Gardiner entered into an oral agreement whereby Mr. Gardiner agreed to represent Interport as a claimant in the Utah Federal Court lawsuit. (R.42.)

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<sup>4</sup> The AKM is a variation of the Russian shoulder-mounted AK machine gun.

<sup>5</sup> A receiver houses a gun’s firing mechanism including the hammer, bolt and firing pin.

21. Mr. York was not a named party to the Utah Federal Court lawsuit and was not represented by Mr. Gardiner in any individual capacity. (R.4.)

22. Mr. Gardiner represented Interport, and Interport only, in pretrial hearings and at a two-day bench trial held July 15-16, 1999. (R.4, 48.)

23. On August 26, 1999, the Honorable Judge Tena Campbell entered Findings of Fact and Conclusions of Law and ordered that the 1,100 machine gun receivers be forfeited as Interport knowingly and willingly imported the receivers in violation of the Permit issued by the ATF. (R.33-34.)

24. On October 12, 1999, the Honorable Judge Campbell ordered that “[a]ny and all right, title or interest of Interport [with respect to the 1,100 machine gun receivers] is forever barred . . .” (R.60.)

25. Interport then proceeded to terminate its attorney-client relationship with Mr. Gardiner. (R.62.) For that reason, on November 9, 1999, Mr. Gardiner filed a Motion to Withdraw as Counsel from the Utah Federal Court lawsuit. (See id.; R.48.) Mr. Gardiner then ceased his representation of Interport in the Utah Federal Court lawsuit. (See id.)

26. On April 12, 2005, Mr. York commenced this legal malpractice action on his own behalf against Mr. Gardiner. (R.6.)

27. Mr. Gardiner filed his Motion for Summary Judgment on July 15, 2005 on the issues of duty, standing and the four year statute of limitations. (R.7-63.)

28. The trial court held oral argument on the Motion for Summary Judgment on October 25, 2005. (R.126.)

29. The trial court issued a Memorandum Decision granting Mr. Gardiner's Motion for Summary Judgment on the issues of duty and standing, but denying the motion as to the statute of limitations. (R.128.)

30. On December 5, 2005, Mr. York filed a pleading entitled "Addendum To: Motion to Disqualify, Affidavit of Bias & Prejudice & Certificate of Good Faith" in which he argued, for a second time, for the recusal of Judge Eyre. (R.144.)

31. On December 7, 2005, Judge Eyre ruled that while he "had previously thought he was not biased or prejudiced against the plaintiff, William York, given the very personal, mean spirited and false allegations made by the plaintiff in his recently filed Addendum, the Court believes that it can not now put aside those allegations and not be affected by what appears to be the personal animosity that Mr. York appears to have against the Court." (R.155.) The case was then transferred to the Honorable Judge Fred D. Howard on December 15, 2005. (R.159.)

32. On December 23, 2005, Mr. Gardiner filed a Motion to Reconsider and/or Clarify November 29, 2005 Memorandum Decision in which he asked the trial court to reconsider, *inter alia*, the ruling regarding the statute of limitations. (R.165.)

33. Mr. York did not respond to the motion in any way and Mr. Gardiner filed a Request to Submit for Decision on January 19, 2006. (R.231.)

34. On February 16, 2006, the trial court entered a Ruling Re: Defendant's Motion to Reconsider and/or Clarify in which it granted Mr. Gardiner summary judgment on the statute of limitations. (R.233.)

35. An order entitled Judgment of Dismissal was submitted to the Court. The Court signed and filed the Judgment on March 14, 2006. (R.239-40.)

36. On March 13, 2006, Mr. York filed a pleading entitled Request for Due Process & Constitutional Rights in which he argued that he should have been able to have a hearing on Mr. Gardiner's Motion to Reconsider and/or Clarify. (R.237.)

37. Mr. York also filed a Motion for Default Judgment on March 13, 2006 in which he argued that he was entitled to a default judgment because Mr. Gardiner had not filed an answer to his complaint. (R.242.)

38. Mr. Gardiner responded to both of these motions, but they were never submitted to the trial court for decision and were therefore never ruled upon by the trial court. Mr. Gardiner then filed his Notice of Appeal on April 12, 2006. (R.266.)

### **SUMMARY OF ARGUMENTS**

This Court should affirm the lower court's grant of summary judgment in favor of Mr. Gardiner because Utah Code Ann. § 78-12-35 did not toll the four year statute of limitations applicable to Mr. York's claim, including any claim assigned to Mr. York by Interport. Although § 78-12-35 does provide that the statute of limitations should be tolled when a defendant is out of state, the tolling statute does not apply so long as the defendant is still subject to personal jurisdiction within the state. Applying the

tolling statute to out-of-state defendants who remain amenable to service would frustrate the purpose of statutes of limitations by preserving claims indefinitely. Therefore, because Mr. Gardiner was amenable to service of process through Utah's long arm statute despite his absence from the state, the statute of limitations was not tolled. (R.234A.)

Mr. York's claim, raised for the first time on appeal, that the four year statute of limitations set forth in Utah Code Ann. § 78-12-25 violates the open courts provision is also clearly erroneous. Courts have consistently held that the four year statute of limitations applicable to civil actions in Utah is constitutional. Furthermore, the statute was reasonable in its application to Mr. York because he was aware of his alleged injury at the time it occurred and had ample opportunity to bring his claim before its expiration. (R.4, 54-55.)

Finally, Mr. York's "secondary" contentions, which have no affect on this appeal, also fail for the following reasons: (1) the record indicates he was sent copies of the court's Memorandum Decision which granted the motion for summary judgment and of the proposed Judgment of Dismissal, (R.241), and even if he was not, he suffered no prejudice; (2) Mr. York has had the same access to the case file as has Mr. Gardiner, which has been sufficient; (3) Mr. York was not entitled to a hearing on Mr. Gardiner's Motion to Reconsider and/or Clarify because the issue had already been authoritatively decided by the Utah Supreme Court, (R.233-34A), and in any event, he failed to request such a hearing; (R.233); and (4) Mr. York was not entitled to a hearing or decision on his

pending motions because they were improper and he failed to submit them to the court for decision.

## ARGUMENT

### **I. THE TRIAL COURT CORRECTLY FOUND THAT U.C.A. SECTION 78-12-35 DID NOT TOLL THE FOUR YEAR STATUTE OF LIMITATIONS WHERE MR. GARDINER WAS AT ALL TIMES AMENABLE TO PERSONAL JURISDICTION WITHIN THE STATE OF UTAH.**

Appellee Richard Gardiner respectfully requests that this Court affirm the lower court's grant of summary judgment because Judge Howard correctly held that Utah Code Ann. Section 78-12-35 did not toll the four year statute of limitations.<sup>6</sup>

Section 78-12-35 states that if a person departs from the state after a cause of action has accrued against him, "the time of his absence is not part of the time limited for the commencement of the action." However, under Utah law, the statute of limitations will not be tolled even when a defendant is out-of-state, so long as he is still amenable to personal jurisdiction within Utah. See Lund v. Hall, 938 P.2d 285, 290 (Utah 1997). To hold otherwise would lead to the indefinite delay of claims and would frustrate the very purpose of statutes of limitations. As such, because Mr. Gardiner remained amenable to

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<sup>6</sup> Mr. Gardiner notes that Mr. York's brief is deficient under Utah R. App. P. 24 in that it fails to set forth the appropriate standard of review; sets forth little legal analysis on the issues; contains a Summary of Arguments section but is entirely devoid of an Arguments section; and fails to cite to the record or to legal authority in support of the arguments. As such, Mr. York has inadequately briefed the issues he raised and this Court may decline to consider his arguments. See Spencer v. Pleasant View City, 2003 UT App 379, ¶¶20-21, 80 P.3d 546; State ex rel C.Y. v. Yates, 834 P.2d 599, 602 (Utah Ct. App. 1992).

personal jurisdiction through Utah's long-arm statute after he left Utah, the trial court correctly found that the statute of limitations was not tolled.

In Lund, a plaintiff injured in a car accident filed a complaint against the defendant more than four years after the accident. 938 P.2d at 286. The plaintiff asserted that the four year statute of limitations applicable to her claim should be tolled under Section 78-12-35 because the defendant had been out of state during the four years prior to her complaint. See id. at 287. In affirming the trial court's denial of plaintiff's motion to reconsider the summary judgment granted in favor of the defendant, the Utah Supreme Court held that "under section 78-12-35, the statute of limitations will not be tolled when a defendant is out of state, as long as he is still amenable to service of process in the state of Utah." Id. at 290. Indeed, the plaintiff had alleged in her complaint that the defendant was "at all times pertinent herein" a resident of Utah. Id. at 291. The court also noted that its holding was consistent with the majority of states which take the position "that the statute of limitations will not be tolled against a defendant who leaves the state after the cause of action arose but who is still amenable to process within the state." Id. at 290.

In reaching its conclusion, the Utah Supreme Court discussed several other cases involving the tolling issue including Van Tassell v. Shaffer, 742 P.2d 111 (Utah App. 1997). In Van Tassell, this Court followed precedent set by three earlier Utah cases and affirmed the trial court's application of the tolling provision to a defendant outside the state of Utah, despite the fact that the defendant maintained a residence in the state. However, in so doing this Court observed "that the majority view, which holds that

defendant's absence does not toll the statute of limitations *where defendant is amenable to personal jurisdiction*, would be preferred by this Court as the Utah law, as we find it to be more consistent with the purposes of statutes of limitations.” Id. at 113 (emphasis added). The Utah Supreme Court later agreed that the majority view was the correct interpretation. See Lund, 938 P.2d at 290.

One of the out-of-state majority cases adhering to this same view, cited with approval by the court in Lund, is Lipe v. Javelin Tire Co., 536 P.2d 291 (Idaho 1975). The Idaho Supreme Court's reasoning and holding is directly applicable to the instant case.

The plaintiff in Lipe filed an action against Javelin Tire Company (“Javelin”) after the two year statute of limitations had expired. Javelin was a foreign corporation doing business in Idaho. The plaintiff argued that the out-of-state tolling statute applied to toll the running of the statute of limitations because Javelin was a foreign corporation.

The Idaho Supreme Court disagreed, holding that the statute was not tolled because, pursuant to Idaho's long-arm statute, Javelin was amenable to jurisdiction in the State of Idaho and subject to service of process in pursuit of that jurisdiction. In reaching its conclusion, the Lipe court cited Fullmer v. Sloan's Sporting Goods, Co., 277 F. Supp. 995 (S.D.N.Y. 1967), which said:

[T]he defendant [a New York corporation] was never physically present in Idaho, its only presence being that it was subject to service under the Idaho long arm statute in an action commenced in that state. To apply the Idaho tolling provisions to the defendant would be to reach the absurd conclusion that the statute of limitations would never run. Such a



conclusion was rejected by the Supreme Court of Arizona in *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732 (1966). Arizona has a tolling provision similar to that in Idaho. In *Phillips*, the court held:

For a foreign corporation to be "without the state" or "absent" within the meaning of a statute providing for the tolling of limitations during the absence of a defendant, *it must be out of the state in the sense that it could not be served with process.* (Citations omitted). Since we have held that defendant can be properly served, the statute of limitations is not tolled. (413 P.2d at 738, 739) 277 F. Supp. at 998.

Lipe, 536 P.2d at 293-94 (emphasis added).

The fact that the Utah Supreme Court in Lund cited Lipe with approval is a strong indication that it did not intend to limit its holding to circumstances where an out-of-state defendant is physically subject to service within Utah's geographical borders. Rather, the defendant need only be "in the state" in the sense that he or she is amenable to service of process even though not physically within the State of Utah.

The policy behind this application of Section 78-12-35 was summarized by the Lund court as follows:

Interpreting section 78-12-35 as tolling the statute of limitations regardless of whether defendant remained amenable to service of process could lead to claims being filed many years after the cause of action arose and would be contrary to the rationale behind the statutes of limitations. Furthermore, applying the tolling provision in all cases would result in extensive discovery inquiring as to each and every day that a defendant was out of state for personal or business reasons.

938 P.2d at 291.

Just as the statute of limitations applicable in Lund was not tolled because the defendant remained amenable to service despite his absence from the state, the statute of

limitations should not be tolled in the instant case because Mr. Gardiner was amenable to service despite his absence from Utah. Furthermore, as in Lipe, it is irrelevant that Mr. Gardiner may not have been available for service within the geographical boundaries of Utah because Utah's long-arm statute provided a means of obtaining personal jurisdiction over him and he therefore was subject to service of process. (R.234A.) In light of Lund, and Van Tassell, this is also clearly the interpretation accepted in Utah.

By Mr. York's own assertions, Mr. Gardiner was amenable to service of process while he was out of the State because of the long-arm statute's jurisdictional scope and also because York knew where Mr. Gardiner resided and could be served. Specifically, Mr. York claimed in his Response to Motion for Summary Judgment that the trial court had personal jurisdiction over Mr. Gardiner pursuant to Utah's long-arm statute, Utah Code Ann. Sections 78-27-22 et. seq., based on the legal representation provided by Mr. Gardiner as counsel for Interport in the Utah litigation. (R.86-87.)

Policy considerations clearly weigh against adopting Mr. York's position. As indicated by Judge Howard in his Ruling Re: Defendant's Motion to Reconsider and/or Clarify, "[t]olling the statute of limitations regardless of whether Mr. Gardner was subject to the personal jurisdiction of Utah courts through Utah's long-arm statute would effectively nullify the statute of limitations . . . ." (R.234A.) Indeed, as noted in Fullmer, tolling the statute of limitations despite the fact that a defendant is subject to service under a long arm statute would result in "the absurd conclusion that the statute of limitations would never run." This is also precisely the concern cited by the Utah

Supreme Court in Lund when it stated that applying the tolling statute to defendants despite their amenability to service “could lead to claims being filed many years after the cause of action arose and would be contrary to the rationale behind the statutes of limitations.” Such would be the result if Mr. York’s position were adopted.

Although Mr. Gardiner was not physically present in the State of Utah during much of the statute of limitations period applicable to this case, he was subject to service through Utah’s long-arm statute that entire time. As such, under Utah law, the trial court correctly found that the statute of limitations was not tolled under Section 78-12-35.

## **II. THE FOUR YEAR STATUTE OF LIMITATIONS EMBODIED IN U.C.A. SECTION 78-12-25 DOES NOT VIOLATE THE OPEN COURTS PROVISION OF THE UTAH CONSTITUTION.**

The four year statute of limitations set forth in Utah Code Ann. Section 78-12-25 does not violate the open courts provision of the Utah Constitution because it provided Mr. York with a reasonable period of time in which to bring suit.

Mr. York has alleged that the statute of limitations applicable to this case is unconstitutional because it puts a time limit bar on civil actions. He raises this argument under UTAH CONST. Art. I, § 11, also known as the open courts provision. Although Mr. York has improperly raised this argument for the first time on appeal justifying its rejection on that basis alone, Mr. Gardiner will nevertheless explain why the argument has no substantive merit.

A statute of limitations “is constitutionally sound if it should allow a reasonable, not unlimited, time in which to bring suit.” Avis v. Bd. of Review of the Indus. Comm’n,

837 P.2d 584, 587 (Utah Ct. App. 1992) (citing McHenry v. Utah Valley Hosp., 724 F. Supp. 835, 837 (D. Utah 1989)). What amounts to a reasonable time is decided by the state's legislature and, therefore, state statutes of limitations "are presumptively constitutional." Avis, 837 P.2d at 587. Utah's four year statute of limitations applicable to civil actions has been consistently upheld as constitutional. See id., at 588; McHenry, 724 F. Supp. at 837. In fact, at least one court has imposed sanctions against a party for arguing that such a statute was unconstitutional because the argument "was not warranted by existing law." McHenry v. Utah Valley Hosp., 927 F.2d 1125 (10th Cir. 1991).

Although "[c]ourts have recognized exceptions to alleviate the harsh effects of statutes of limitations", those "exceptions involve cases where 'plaintiff[s] had no way of knowing the injury had occurred until after the statute had run . . . .'" Avis, 837 P.2d at 587 (quoting McHenry, 724 F. Supp. at 839.) Furthermore, a court need not even inquire into the propriety of the limitations period if it was reasonable as applied to the particular plaintiff. See Colosimo v. Roman Catholic Bishop of Salt Lake City, 104 P.3d 646, ¶37 (Utah App. 2004) (declining to inquire into the wisdom of various limitation periods applicable to the plaintiffs because they were aware of their injury during those periods and could have brought suit before their expiration).

The four year statute of limitations applicable to Mr. York's claim is not unconstitutional as a violation of Utah's open courts provision. As discussed above, this statute has previously been upheld and, as noted in McHenry, a challenge to such a statute is "not warranted by existing law."

Furthermore, the statute was clearly reasonable with regard to Mr. York's situation, as he was aware of his injury well before the expiration of the statute of limitations. Mr. York cannot assert that he did not know about the claimed cause of action against Mr. Gardiner as Mr. York was involved as the corporate representative in all of the acts complained of in the Complaint. For example, Mr. York indicates in his Complaint that he attended the bench trial which he claims was not properly handled by Gardiner. (R.4.) Moreover, after Mr. Gardiner withdrew as counsel in the Utah Federal Court lawsuit, Mr. York began filing various motions and requests with the court as early as December 13, 1999. (R.54-55.) Interport filed appeals in both the District of Columbia lawsuit and the Utah Federal Court lawsuit, both of which were dismissed. (R.44, 54.) It is therefore very clear from the record that Mr. York and Interport knew of the adverse decisions in the District of Columbia and Utah Federal Court lawsuits as soon as they happened.

The four year statute of limitations applicable to Mr. York's claim has been upheld as valid under the Utah Constitution. Furthermore, the statute as it applies to Mr. York's situation allowed him a reasonable time to respond because he was aware of his alleged injury at the time it occurred. As such, the statute of limitations set forth in Section 78-12-25 does not violate the open courts provision of the Utah Constitution.

### **III. MR. YORK WAS NOT DENIED DUE PROCESS WITH RESPECT TO NOTICE AND OPPORTUNITY TO BE HEARD IN THE PROCEEDINGS BELOW.**

In the addendum to his opening brief, Mr. York listed several "issues for secondary review" that he requested this Court to address. Mr. York asserts that he was

denied due process with regard to each of the following issues: (1) the alleged failure of Judge Eyre and Judge Howard to send him a copy of their final orders; (2) the alleged failure of Judge Howard to make his case file available; (3) the dismissal of his case without a hearing; and (4) the dismissal of his case without ruling on his pending motions.

None of these issues should affect this appeal, which solely concerns the statute of limitations issue that was the source of the trial court's ruling. Nevertheless, Mr. Gardiner will address each of Mr. York's "secondary" contentions in turn.

**A. The Record Indicates A Copy Of The Trial Court's Final Order Was Mailed to Mr. York And, In Any Event, Mr. York Incurred No Prejudice.**

Mr. York asserts he was not sent copies of the final orders of Judge Eyre or Judge Howard and claims such failures were intentional. See Opening Br. of Appellant, pp. 8-9. He even goes so far as to allege that Judge Howard's failure to provide a copy of his final order was "an underhanded attempt" at causing Mr. York to miss the deadline for filing his notice of appeal.

However, the record indicates that on December 1, 2005, Mr. York was mailed a copy of Judge Eyre's Memorandum Decision, dated November 29, 2005. (R.143.) On February 16, 2006, a copy of Judge Howard's Ruling Re: Defendant's Motion to Reconsider and/or Clarify was mailed to Mr. York. (R.233-37.) And on February 27, 2006, Mr. York was sent copy of the proposed Judgment of Dismissal which Judge Howard signed on March 14, 2006. (R.239-41.) As such, it appears as though Mr. York

should have received copies of these orders and it is certain that neither judge intentionally decided not to provide Mr. York with a copy.

Furthermore, even if Mr. York had not been provided a copy of Judge Howard's final order, he has suffered no prejudice. He complains that this failure could have caused him to miss the appeal deadline, but Mr. York obviously did not miss that deadline. As such, Mr. York has incurred no harm and therefore is not entitled to a remedy.

**B. Mr. York Has Had Equal Access To The Record.**

Mr. York has also charged Judge Howard with secreting the case file from him since last December, when he was assigned the case. See Opening Br. of Appellant, pp. 9-10. It is difficult to determine what Mr. York is alleging with regard to this issue, or how it affects this appeal. He repeats his claim that he was not able to see the final order which he is appealing, but as was discussed in the previous section, the record indicates he was sent a copy. He has also cited Utah Code of Judicial Administration Rule 4-205(3), which pertains to the security of court records. This rule states that “[c]ourt records shall not be removed from the courthouse without permission of the court” and that records which are removed “shall be returned within two days . . . .” This rule does not seem to support Mr. York's argument. Moreover, access to the record has obviously been sufficient for Mr. York to pursue his appeal.

**C. Mr. York Failed To Oppose Mr. Gardiner's Motion To Reconsider And Clarify And Failed To Request A Hearing And Therefore Cannot Complain That He Did Not Get A Hearing.**

Mr. York also did not suffer any constitutional injury with respect to the fact that he was not afforded the opportunity to present his arguments in opposition to Mr. Gardiner's Motion to Reconsider and/or Clarify at a hearing. Under Rule 7(e) of the Utah Rules of Civil Procedure, a party is not entitled to a hearing on a dispositive motion, even if oral argument is requested, if the court finds that the issue has been authoritatively decided. In ruling on Mr. Gardiner's Motion, Judge Howard held that the issue of whether the statute of limitations should be tolled had already been authoritatively decided by the Utah Supreme Court. (R.233-34A.) As such, no hearing was required.

Furthermore, Mr. York failed to file any response to said motion and likewise did not request a hearing. (R.233.) Therefore, he cannot now argue that the court denied him an opportunity to present his argument because he is solely responsible for missing that opportunity.

**D. Mr. York's Three Subsequent Motions Were Not Proper Under The Rules And Were Never Submitted To The Court For Decision Before Dismissal Of The Case.**

Finally, Mr. York alleges that his rights have been violated because he has filed three motions which were not scheduled for hearings or decided by the trial court. (See App. Br. p. 10.) As with Mr. York's other "secondary issues," this argument has no effect upon this appeal. Furthermore, it is clear that Mr. York was not entitled to a hearing or decision on any of those motions.



Each of the three motions was improper under the Utah Rules of Civil Procedure for various reasons. For example, the motions were not accompanied by memoranda, as required by Utah R. Civ. P. 7(c). (R.64-65; 237-38; 242-43.) Furthermore, two of those motions, the Request For Due Process & Constitutional Rights and Motion for Default Judgment, were filed after Judge Howard ruled on Mr. Gardiner's Motion to Reconsider and/or Clarify. (R.233-35.) Mr. York's motions were not objections to the form of the Judgment of Dismissal submitted by Mr. Gardiner's counsel as allowed under Rule 7(f)(2) of the Utah Rules of Civil Procedure. There being no objections to the form, the court properly signed the Judgment of Dismissal on March 14, 2006. Consequently, not only were both of Mr. York's motions improper, they were also untimely.

Not only were those three motions improper, they were without merit. Plaintiff's Motion to Intervene requested that he be allowed to intervene as a joint defendant in a case separate from the one before the trial court. As such, the Motion was filed in the wrong case. (R.104.) As discussed above, the Request For Due Process & Constitutional Rights lacked merit because no hearing was required inasmuch as the issue had been authoritatively decided and Plaintiff had not even responded or asked for a hearing on the matter. And finally, the Motion for Default Judgment was off-base because Defendant was not required to file an answer where he filed a successful Motion for Summary Judgment in response to Plaintiff's Complaint. (R.248-55.)

In addition, Utah R. Civ. P. 7(d) establishes that after the briefing on a motion has been completed, either party may file a "Request to Submit for Decision." "If no party

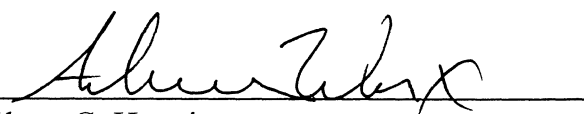
files a request, the motion will not be submitted for decision.” Id. Mr. Gardiner filed a response to each of Mr. York’s three motions. (R.104, 248, 257.) Thus, even if Mr. York were entitled to a hearing or decision on his three motions, which he was not, he never followed the proper procedure under Rule 7 and filed a Request to Submit for Decision. Instead, he filed his notice of appeal. He cannot now complaint that the trial court did not hold a hearing or render decisions on motions which he never submitted for decision.

### **CONCLUSION**

For the reasons set forth above, this Court should hold that the trial court correctly granted Mr. Gardiner’s Motion for Summary Judgment when it found that Utah Code Ann. § 78-12-35 did not toll the four year statute of limitations applicable in this case. The Court should reject all of Mr. York’s “secondary issues” as well.

DATED this 5<sup>TH</sup> day of September, 2006.

STRONG & HANNI

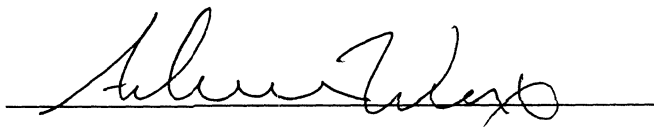
By   
Glenn C. Hanni  
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Attorneys for Appellee

### CERTIFICATE OF SERVICE

I hereby certify that on this 5<sup>TH</sup> day of September, 2006 a true and correct copy of the foregoing **BRIEF OF APPELLEE** was served by the method indicated below, to the following:

William York  
Box 1000  
Delta, UT 84624-1000

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ E-filed

A handwritten signature in black ink, appearing to read "William York", is written over a horizontal line.

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