

1995

Audrey Lynne Athay Dow v. Frank Kenneth Gilroy : Reply Brief

Utah Court of Appeals

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Phillip Kent Card; Attorney for Appellee, Audrey Lynne Athay Dow.

Cass C. Butler; Callister, Nebeker & McCullough; Attorneys for Appellant, Frank. K. Gilroy.

Recommended Citation

Reply Brief, *Dow v. Gilroy*, No. 950095 (Utah Court of Appeals, 1995).

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DOCKET NO. 950095 CA

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

* * * * *

AUDREY LYNNE ATHAY DOW,)	Case No. 950095-CA
)	
Plaintiff and Appellee,)	District Court No.
)	940904441
vs.)	
)	Honorable Glenn K.
FRANK KENNETH GILROY,)	Iwasaki
)	Priority: Rule 29(b)(10)
Defendant and Appellant.)	Category

* * * * *

INTERLOCUTORY APPEAL FROM THE THIRD DISTRICT COURT

* * * * *

REPLY BRIEF OF APPELLANT

* * * * *

Cass C. Butler (4202)
 CALLISTER NEBEKER &
 McCULLOUGH
 900 Kennecott Building
 Salt Lake City, Utah 84133
 Telephone: (801) 530-7300

Attorneys for Appellant,
 Frank K. Gilroy

Phillip Kent Card
 960 West 2100 South
 Salt Lake City, Utah
 84119-1530
 Telephone: (801) 973-0091

Attorney for Appellee,
 Audrey Lynne Athay Dow

FILED

AUG 16 1995

COURT OF APPEALS

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Appellant Frank K. Gilroy, through his counsel of record, submits this Reply Brief in support of his appeal.

ARGUMENT

I.

UTAH'S "CATCH-ALL" STATUTE OF LIMITATIONS APPLIES TO PETITIONS FOR PATERNITY.

Appellee argues, in a complete breakdown of logic, that the two specific statutes of limitations applicable to suits for support and education of a child should somehow result in no statute of limitations for an "action solely for paternity." (Appellee's brief, pg. 10). Appellee contends that this Court should not apply the four year "catch-all" statute of limitation (Utah Code Ann. §78-12-25(3)), because "the legislature already provided its own, different types of limitation in the Paternity Act" and "if the Utah State Legislature intended to limit a petition based solely to establish paternity, certainly such a statute would be enacted." Id. However, Appellee not only ignores the clear language of section 78-12-25(3) by asking this Court to render application of the statute an impossibility, she has attempted to side step (1) the clear dicta and ruling in Szarak v. Sandoval, 636 P.2d 1082 (Utah 1981), (2) the long and extensive application of the "catch-

all" statute of limitations in other cases by this Court, and (3) case law in other jurisdictions.

A. Dicta in Utah Case Law Clearly Establishes that a Petition for Paternity is Subject to the Four Year Statute of Limitations.

In the case of Szarak v. Sandoval, supra, Justice Oaks writing for a unanimous Court stated that it was unnecessary to rule on the issue of whether the "catch-all" statutes were considered by the Court in Nielson v. Hansen, 564 P.2d 1113 (Utah 1977). Rather than deciding the issue of whether a paternity action is governed by the three year statute of limitations "for liability created by the statutes of this State" (section 78-12-26), or the four year statute for any "action for relief not otherwise provided by law" (section 78-12-25(3)), Justice Oaks simply reasoned that section 78-12-36 tolled the applicable statute of limitations "during the period of the child's minority." 636 P.2d at 1085. However, at no time did the Court even hint that no statute of limitation applies to paternity actions. Moreover, the Court's holding that tolling occurred during minority could only result if there was an underlying statute of limitation. Without a statute of limitations, there would be absolutely nothing to toll. Appellee's argument completely fails to address how the Court in Szarak v.

Sandoval could toll a non-existent or non-applicable statute of limitations, as Appellee suggests.

Throughout Justice Oaks' opinion, the Court referenced no fewer than 5 times the existence of a statute of limitations applicable to paternity actions¹; yet, no reference was ever made by the Court that if the Utah State Legislature intended to limit a petition for paternity, it would have done so. Therefore, consistent with the dicta and tolling result of Szarak v. Sandoval, as well as the "public policy considerations" regarding support of minor children voiced in Nielson v. Hansen, 564 P.2d at 1114, this Court should reverse the Trial Court's denial of Appellant's Motion to Dismiss the Complaint because Appellee is an adult and over 20 years have passed since the four year statute ran and the commencement of her suit.

¹ The five references are: (1) . . . "another statute precludes the application of any period of limitation against the plaintiffs in the circumstances of this case." 636 P.2d at 1084; (2) ". . . § 78-12-36 would clearly prevent the statute of limitations from barring a paternity and child support action . . ." 636 P.2d at 1084; (3) "While the child's action to establish paternity and enforce child support is not barred by the statute of limitations until after the child attains majority . . ." 636 P.2d at 1084-1085; (4) "Is the statute of limitations also tolled during the child's minority for a paternity and child support action . . ." 636 P.2d at 1085; and (5) "Consequently, we hold that any statute limiting the time within which a paternity action must be commenced under the Uniform Act on Paternity is tolled . . ." 636 P.2d 1085.

B. Utah Courts Have Consistently the Four Year Statute of Limitations Where No Specific Statute of Limitations Could be Found.

Appellee has ignored the long line of Utah cases applying the four year "catch-all" statute where there was no specific statute of limitations. Olsen v. Hooley, 865 P.2d 1345, 1347 fn.1 (Utah 1993) ("intentional infliction of emotional distress ... is not subject to a specific statutory limitations period [and therefore] is governed by the residual four-year limitations period found in section 78-12-25(3)"); Atwood v. Sturm, Ruger's Co., 823 P.2d 1064 (Utah 1992) (products liability claim against manufacturer for injury by pistol was subject to the general four-year statute of limitations); Stevensen v. Monson, 856 P.2d 355, 1357 (Utah Ct. App. 1993) (an action against a county is not subject to a 6 month statute of limitations but is subject to the four year catch all statute); Whatcott v. Whatcott, 790 P.2d 578 (Utah Ct. App. 1990) (psychological injury from alleged sexual abuse during childhood was subject to the general four-year statute of limitations); See also, Parker v. Weber County Irr. Dist., 251 P. 11 (Utah 1926), applying Comp. Laws Utah §6474 (1917), later codified as Utah Code Ann. §104-2-30 (1943), the predecessor "catch-all" statute of limitations to section 78-12-85(3), which read, "An action for relief not otherwise provided for must be

commenced within four years after the cause of action shall have accrued."; Branting v. Salt Lake City, 153 P. 995 (Utah 1915); Fullerton v. Bailey, 53 P. 1020 (Utah 1898).

Furthermore, in American Turret Corp. v. City of W. Jordan, 840 P.2d 757 (Utah 1992), the Utah Supreme Court reviewed the long history of applying the "catch-all" statute and reaffirmed that the catch all statute of limitations " to all actions, both legal and equitable, in which affirmative relief is sought." 840 P.2d at 760. The Court next concluded that before applying the "catch-all" statute it must first satisfy itself that "Utah's current statutes of limitation do not contain a more specific provision." Id. Finding no specific statute of limitation, the Court held that the four year "catch-all" statute .

Therefore, this Court should follow the long line of cases applying section 78-12-25(3) and its predecessor to actions for relief where no specific statute of limitations applies. Because Appellee's claim for "affirmative relief" was filed more than 20 years after the four year statute had run, this Court should reverse the Trial Court's ruling and direct the Trial Court to dismiss Appellee's complaint with prejudice for failing to file timely her action.

C. Case Law in Other Jurisdictions Supports a Holding that Appellee's Paternity Action is Governed by the Catch-all Statute of Limitations.

Courts which have addressed the issue of whether a general statute of limitations applies to an action to establish paternity where no specific statute of limitation existed generally involved children under the age of majority. See generally, 59 A.L.R. 3rd 685 (1974) "Statute of Limitations and Illegitimacy or Bastardly Proceedings". See also, Payne v. Prince George Dept. of Social Services, 507 A.2d 641 (Md. App. 1986) (the three-year catch-all statute of limitation, but tolled the statute during the minority of the child); Ortega v. Portales, 307 P.2d 193, 195 (Colo. 1957) (Court refused to apply three year statute of limitations during minority of child, finding that there was a "continuing liability" upon the father "until said child has attained the age of eighteen years."); State v. Steinbaugh, 138 N.E.2d 252 (Ohio 1939) (Court held that statute of limitations had no bearing and the Court had continuing jurisdiction at any time "while the child is still of an age that requires support."); Miller v. Townsend, 514 N.E.2D 325 (Ind. App. 1987) (tolled the statute during the minority of the child); Spada v. Pauley, 385 N.W.2d 746 (Mich. App. 1984) (tolled the statute during the minority of the child).

However, in the case of Torres v. Cautino's Heirs, 185 F.2d 788 (1st Cir. 1950), the First Circuit Court of Appeals considered a paternity action brought by an adult and upheld the dismissal of his claim for untimely filing. In that case the plaintiff, a 37 year old man, filed suit in the Federal Court for Puerto Rico seeking that he be declared and acknowledged as a legitimate son or acknowledged natural son of Genar Cautino-Insua. The plaintiff was born January 10, 1909, and filed his suit on August 8, 1946. The District Court concluded that since there was no specific statute of limitations, the plaintiff's complaint was subject to a "catch-all" statute of limitation providing for a term of 15 years. The District Court further ruled that the 15 years statute was tolled during the age of minority of the plaintiff. Accordingly, the District Court ruled that because the 37 year old adult plaintiff had obtained majority on January 10, 1930, the 15 year period expired on January 10, 1945, over a year before the action was commenced. This decision was ultimately affirmed by both the Supreme Court of Puerto Rico and the First Circuit.

Therefore, this Court should follow the logic and holding of the First Circuit in Torres v. Cautino's Heirs, supra, and reverse Judge Iwasaki's denial of Appellant's

Motion to Dismiss and remand this matter for entry of an Order dismissing Ms. Dow's petition with prejudice.

CONCLUSION

Appellee's argument that her paternity action should not be dismissed as untimely filed pursuant to section 78-12-25(3) fails to overcome the dicta and holding in Szarak v. Sandoval, supra, the long and extensive application of the "catch all" statute of limitations by this Court and case law from other jurisdictions holding that the statute of limitations commences to run upon the majority age of the child. Therefore, this Court should reverse the Trial Court's denial of Appellant's Motion to Dismiss and order that Appellee's complaint be dismissed with prejudice under the four year statute of limitations in section 78-12-25(3) because the statute has long since expired and Appellee's stale claim was filed over 20 years late.

Respectfully submitted this 16th day of August, 1995.



CASS C. BUTLER
CALLISTER NEBEKER & McCULLOUGH
10 East South Temple, Suite 900
Salt Lake City, Utah 84133
Attorneys for Appellant,
Frank G. Gilroy

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing **Reply Brief of Appellant** was mailed, postage prepaid, on this 16th day of August, 1995, to the following:

Phillip Kent Card
Attorney for Appellee
960 West 2100 South
Salt Lake City, Utah 84119-1530

Can Butcher
