1974

# CORALEE GREENHALGH, individually and as Guardian Ad Litem for the minor PATRICK GREENHALGH and WILLIAM T. GREENHALGH v. DOCTOR ROBERT HOGAN and PAYSON CITY HOSPITAL through its Board of Directors and PAYSON CITY as the sole owner and proprietor of PAYSON CITY HOSPITAL : Brief of Respondent

Utah Supreme Court



Glenn C Hanni; Attorney for Dr Robert Hogan; Ray R Christensen; Attorney for Payson City and Payson City Hospital.

Frank N Karras; Attorney for Plaintiffs .

# IN THE SUPREME COURT
## of the
# STATE OF UTAH



CORALEE GREENHALGH, individually and as Guardian Ad Litem for the minor PATRICK GREENHALGH and WILLIAM T. GREENHALGH,

*Plaintiffs-Appellants,*

vs.

DOCTOR ROBERT HOGAN and PAYSON CITY HOSPITAL through its Board of Directors and PAYSON CITY as the sole owner and proprietor of PAYSON CITY HOSPITAL,

*Defendants-Respondents.*

Case No. 13695

## BRIEF OF RESPONDENTS PAYSON CITY HOSPITAL AND PAYSON CITY

Appeal from an Order of Dismissal with Prejudice of the Fourth Judicial District Court, in and for Utah County, Honorable Allen B. Sorensen, Judge.

FRANK N. KARRAS
Attorney at Law
321 South Sixth East
Salt Lake City, Utah
*Attorney for Plaintiffs*

GLENN C. HANNI
Attorney at Law
604 Boston Building
Salt Lake City, Utah
*Attorney for Dr. Robert Hogan*

RAY R. CHRISTENSEN
Attorney at Law
900 Kearns Building
Salt Lake City, Utah
*Attorney for Payson City Hospital and Payson City*

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## STATEMENT OF THE CASE

This is a malpractice action against defendant doctor and defendant hospital for alleged negligent care of plaintiffs Coralee Greenhalgh and her infant son, Patrick Greenhalgh, during their confinement in defendant hospital for childbirth and postnatal care, for damages allegedly sustained by all of the plaintiffs as a result of the alleged negligence upon the part of the defendants.

## DISPOSITION IN LOWER COURT

Motions of defendants Payson City and Payson City Hospital to dismiss the complaint were granted for failure upon the part of plaintiffs to comply with the notice requirements of Section 63-30-13, U.C.A., 1953, as amended.

## RELIEF SOUGHT ON APPEAL

These defendants seek an affirmance of the judgment below.

## STATEMENT OF FACTS

This action was commenced by the filing of a complaint in the District Court of Utah County on December 18, 1973. (R. 3.) It is alleged in the complaint that the defendant Payson City Hospital is a separate entity and wholly owned proprietorship of Payson City and operated for profit. (R. 3-4, 8, 15.) It is further alleged that plaintiff Coralee Greenhalgh entered defendant hospital for childbirth on January 14, 1970, and that her infant son, plaintiff Patrick Greenhalgh, was born at the hospital on the same date (R. 4, 8, 11, 15.); and that defendant hospital was negligent in incorrectly blood-typing the two plaintiffs, and that by reason thereof, and by reason of failure timely to discover this error, both plaintiffs sustained serious personal injuries. (R. 9, 10, 16.) It is further alleged that this error was discovered on or about January 18, 1970, four days after the date of birth, and that the infant plaintiff was transferred to Utah County [sic] Hospital for further treatment on that date. (R. 16.) There is

no allegation that any notice of claim was ever given to defendant hospital or to defendant city. Nor have plaintiffs claimed, in any subsequent proceedings, that any notice was ever given to these defendants prior to the filing of this action.

For this failure to comply with the notice provisions of the Governmental Immunity Act, and also by reason of the statute of limitations applicable to cities and applicable to malpractice actions, this defendant moved to dismiss the plaintiffs' complaint. (R.30.) This motion was supported by a memorandum of authorities. (R.32-37.)

This motion was argued before Judge Sorensen and was taken under advisement. (R. 58.) Subsequently, after an exchange of letter memoranda, (R. 59-62), this defendant's motion was granted. (R. 64, 66-67.) This appeal followed. (R. 74-75.)

## ARGUMENT

### PRELIMINARY STATEMENT

Prior to 1965, Utah adhered to the traditional rule of governmental immunity. The state and its subdivisions were immune from suit for tort liability except in situations where there had been a consent to suit or immunity had been waived. An exception was in the case of municipal corporations where it was held that cities were subject to tort liability for torts committed in the performance of proprietary acts, but not in the performance of governmental acts. This rule also was in accord with the general law prevailing at that time. However, there were

no precise definitions as to what functions were considered governmental, and what functions were considered proprietary. With respect to certain types of activities, there were conflicts among the decisions of the courts as to whether a particular activity was considered to be governmental or proprietary, some courts holding one way and some another. In some instances, determinations were made on the basis of whether admission fees were charged, or whether the activity resulted in profit to the municipality, or whether private enterprise was engaged in the same type of activity. These determinations were made on a case by case basis. Even under this rule, persons seeking to sue cities for alleged tort liability were required to give notice as required by Section 10-7-77, U.C.A., 1953. *Dahl* v. *Salt Lake City*, 45 U. 544, 147 P. 622; *Hamilton* v. *Salt Lake City*, 99 U. 362, 106 P. 2d 1028.

In 1965, the legislature adopted the Governmental Immunity Act. Section 63-30-1, et seq., U.C.A., 1953, as amended. This statute took away the cloak of governmental immunity over a broad area of tort liability, including the negligence field. In enacting this statute, the legislature made no specific provision with regard to the former doctrine of proprietary functions. We do not suggest that it was the intent of the legislature to eliminate or take away any rights which had previously existed, but rather to enlarge and expand concepts of civil liability in tort of governmental agencies, and also to spell out a uniform procedure by which such claims could be enforced.

In the new statute, the legislature provided clearly and explicitly for the time and kind of notice of claim as

a necessary prerequisite to an action in tort. Under the Governmental Immunity Act, the claimant has 90 days in which to present a claim. The only exception provided is that for claims arising under Section 63-30-8, U.C.A., 1953, (which is wholly inapplicable here). Section 63-30-13, U.C.A., 1953.

It is undisputed that plaintiffs have wholly failed to comply with the notice requirements of Section 63-30-13. Recognizing the infirmity of their position, they have sought to avoid its fatal consequences, by claiming that they are proceeding, not under the Governmental Immunity Act, but under the common law. However, under either theory, the language of Section 63-30-13 mandates a notice as follows: "A claim against a political subdivision shall be forever barred unless notice thereof is filed within ninety days after the cause of action arises . . ." Even if it can be said that the Governmental Immunity Act did not procedurally affect rights of action against municipal corporations acting in their proprietary capacity, plaintiffs have still failed to comply with the notice requirements of Section 10-7-77, U.C.A., 1953, and are, therefore, in any event barred from pursuing this action as against the defendant city.

One further point must be noted. It is alleged that defendant hospital is a separate entity. While we recognize that allegations well plead must be accepted as true, this allegation is clearly incorrect. Payson City Hospital was and could have been created only under the provisions of Section 10-8-90, U.C.A., 1953, authorizing cities and towns "to construct, *own* and *operate* hospitals." (Emphasis added.) Section 10-8-91 authorizes cities and towns

to levy taxes for the purpose of operating such hospitals. There is no statutory authority for creation of a hospital as a separate entity, nor was there any attempt in this case to create the hospital as a separate entity. Neither is there any statutory authority for hospitals created under these statutes to sue and be sued. This point has come before the Supreme Court of our sister state of Nevada in several recent cases. It has consistently held that where a hospital is created under a statute similar to the Utah act, that it is not a separate entity and is not subject to suit as such, although the municipal corporation which owns and operates it is subject to suit. *McKay* v. *Washoe General Hospital*, (Nev.), 33 P. 2d 755, (1934); *Bloom* v. *Southern Nevada Memorial Hospital,* (Nev.), 275 P. 2d 885, (1954); and *King* v. *Baskin*, (Nev.), 511 P. 2d 1115, (1973). We submit, therefore, that the Payson City Hospital is not an entity and is not subject to suit under any theory, and that any claim against it must be asserted and pursued as against Payson City, the owner and operator of the hospital. The case of *Nestman* v. *South Davis County Water Improvement District*, 16 Ut. 2d 198, 298 P. 2d 203, cited and relied upon by plaintiffs is wholly inapplicable here. The water district was created under an entirely different statute giving it status as an autonomous and individual entity with the right to "sue and be sued". Section 17-6-3.4, U.C.A., 1953. No such provisions are found in Sections 10-8-90, et seq.

## POINT I

## THE ACTION IS BARRED FOR FAILURE TO COMPLY WITH THE NOTICE REQUIREMENTS OF SECTION 63-30-13.

That the Governmental Immunity Act applies to cities is specifically provided in Section 63-30-2 (2), U.C.A., 1953. Section 63-30-13, U.C.A., 1953, provides that a claim against a political subdivision "shall be forever barred unless notice thereof is filed within 90 days after the cause of action arises". There is no allegation in the complaint of the filing of any notice of claim within 90 days after the cause of action arose. It appears that the alleged cause of action arose in January, 1970, and such a claim would have to have been filed no later than April of that year. The mere fact that one of the plaintiffs is a minor would not relieve either the minor or any of the other plaintiffs from the necessity of filing notice of claim as required by the act. *Gallegos* v. *Midvale City*, 27 Ut. 2d 27, 492 P. 2d 1335; *Varoz* v. *Sevey*, 29 Ut. 2d 158, 506 P. 2d 435; *Whitaker* v. *Salt Lake City,*_____Ut. 2d_____, 522 P. 2d 1252.

Assuming that a notice was timely filed and the fact simply not alleged in the complaint, defendant city would have had 90 days thereafter in which to act upon it, and if it had not acted within 90 days the claim would have been deemed denied. Section 63-30-14, U.C.A., 1953. This would have been no later than July, 1970. Plaintiffs would have had one year thereafter within which to commence action. Sec. 63-30-15, U.C.A., 1953. This period would have expired in July, 1971. The claim is therefore clearly barred by these provisions.

## POINT II

## ANY CLAIM BY PLAINTIFFS AGAINST THESE DEFENDANTS APART FROM THE GOVERNMENTAL IMMUNITY ACT IS BARRED FOR FAILURE TO GIVE NOTICE AS REQUIRED BY SECTION 10-7-77.

As we have previously attempted to demonstrate, it appears to have been the intent of the legislature to establish one system of procedural law equally applicable to all claims against governmental subdivisions, whether arising out of governmental or proprietary activities. If the court finds that we are correct in this position, it is clear that plaintiffs' action is barred, since there has been no compliance with the provisions of Section 63-30-13. However, even if the court takes a different view of the matter and concludes that previously existing rights of action for tortious acts performed in a proprietary capacity are actionable under the former procedural system, it is equally clear that the plaintiffs have failed to comply even with the former law. Plaintiffs apparently labor under the misapprehension that prior to the enactment of the Governmental Immunity Act, notice to the defendant city was not a necessary prerequisite to maintenance of an action. This is clearly erroneous.

Section 10-7-77, U.C.A., 1953, appears to have been on the statute books since 1898. After providing that claims against cities and towns for damages alleged to have been caused by defective streets, alleys, sidewalks, etc., must be presented within 30 days, the statute goes on to provide as follows:

> ". . . Every claim, other than claims above mentioned, against any city or town must be presented,

> properly itemized or described and verified as to correctness by the claimant or his agent, to the governing body within one year after the last item of such account or claim accrued, and if such account or claim is not properly or sufficiently itemized or described or verified, the governing body may require the same to be made more specific as to itemization or description, or to be corrected as to the verification thereof."

Section 10-7-78, U.C.A., 1953, insofar as material here, provides as follows:

> "It shall be a sufficient bar and answer to any action or proceeding against a city or town in any court for the collection of any claim mentioned in section 10-7-77, that such claim had not been presented to the governing body of such city or town in the manner and within the time specified in section 10-7-77; . . ."

The language of the foregoing statute, and the decisions of this court thereunder, make clear that compliance with this provision is mandatory, and a necessary prerequisite to maintenance of an action, even on a theory of proprietary acts. *Dahl* v. *Salt Lake City*, 45 Ut. 544, 147 P. 622; *Hurley* v. *Town of Bingham*, 63 Ut. 589, 228 P. 213; and *Hamilton* v. *Salt Lake City*, 99 Ut. 362, 106 P. 2d 1028.

As said in *Dahl* v. *Salt Lake City, supra,:*

> ". . . It will be noticed that *the statute is comprehensive and sweeping in its terms respecting the claims that must be presented to the city* council before an action can be brought and successfully maintained thereon . . . That the Legislature may, by statute, prescribe conditions upon which suits

> may be brought and maintained against a municipality is conceded. It being admitted that the claims here involved were not presented to the city authorities within the time fixed by section 312, it necessarily follows that the action is barred by section 313 and cannot be maintained. The case is therefore reversed, with directions to the district court to vacate the judgment and dismiss the action. . . " (Emphasis added.)

Plaintiffs misconceive the holding of this case. The city was not engaged in a governmental act, as asserted by plaintiffs on page 11 of their brief. Had the city been engaged in a governmental act, that would have been a sufficient defense in that action. Prior to the Governmental Immunity Act of 1965 there was no right of action against a city for tortious acts committed in its governmental capacity.

In a final last ditch effort to avoid the consequences of their failure to comply with Section 10-7-77, plaintiffs suggest that since they allege that expenses arising from the claimed negligence are continuing to accrue, the time period has not yet started to run. Carrying this logic to its ultimate conclusion, the time would never start to run in the case of a claimant who was permanently injured and required continuing care. Nothing is more clear in our statutes than that cities are entitled to prompt notice of claims, so that they can make a reasonable investigation into their validity. The statute refers to "accounts" and "claims" as separate items. Accounts would refer to contractual obligations for goods or services furnished. Claims would refer to tort claims which accrue when the accident or injury occurs, not when the last medical bill is paid.

## POINT III

## THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

Although we believe this point to be superfluous, we also observe that Section 78-12-30, U.C.A., 1953, provides for a one year statute of limitations on actions or claims against cities and Section 78-12-28 (3), U.C.A., 1953, as amended by the laws of 1971, provides a two year statute of limitations as against both doctors and hospitals. This action was filed more than two years after the effective date of the statute last cited and is barred by both of the above cited statutes.

## CONCLUSION

Plaintiffs have admittedly failed to comply with the notice requirements necessary to perfect any claim they may have against defendant Payson City arising out of the operation or management of its hospital, and accordingly, the trial court correctly dismissed their action as against these defendants and the judgment below should be affirmed.

Respectfully submitted,

CHRISTENSEN, GARDINER,
JENSEN & EVANS
RAY R. CHRISTENSEN
*Attorneys for Respondents Payson City Hospital and Payson City*
900 Kearns Building
Salt Lake City, Utah 84101