

2000

Mary Wheeler and Petra Srbova v. Mark Mcpherson and Kane County : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

MARY WHEELER and PETRA SRBOVA,	:			
Plaintiffs/Appellants,	:	Appellate	Case	No.
	:	20000795-SC		
vs.	:			
MARK MCPHERSON and KANE COUNTY,	:	Argument priority 15		
Defendants/Appellees	:			

BRIEF OF APPELLEES

APPEAL FROM JUDGMENT OF THE FIFTH DISTRICT COURT HONORABLE G.
RAND BEACHAM PRESIDING

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FILED

APR 16 2001

CLERK SUPREME COURT
UTAH

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PARTIES TO THE PROCEEDINGS

The caption of this case on appeal contains the names of all parties.

TABLE OF CONTENTS

<u>STATEMENT OF JURISDICTION</u>	.1
<u>STATEMENT OF THE ISSUE</u>	1
<u>STANDARD OF REVIEW</u>	.1
<u>DETERMINATIVE STATUTES AND CASES</u>	.1
<u>STATEMENT OF THE CASE</u>	.1
<u>SUMMARY OF THE ARGUMENT</u>	.1
<u>ARGUMENT</u>	.4
I. PLAINTIFFS' CLAIM IS BARRED AS A MATTER OF LAW BECAUSE THEY DID NOT COMPLY WITH THE UTAH GOVERNMENTAL IMMUNITY NOTICE REQUIREMENTS.	4
Plaintiffs' Delivery Of The Notice Of Claim Was Not Legally Sufficient.	6
The County Attorney Did Not Have The Authority To Confirm The Person To Possess And Act Upon The Notice.	.12
II. IT WAS PROPER FOR THE TRIAL COURT TO NOT ALLOW PLAINTIFFS' REQUEST FOR ADDITIONAL DISCOVERY SINCE THE CLAIM WAS DISMISSED DUE TO THE COURT'S LACK OF JURISDICTION.	.13
III. STRICT COMPLIANCE IS THE LAW IN THE STATE OF UTAH.	15
<u>CONCLUSION</u>	.19
<u>CERTIFICATE OF SERVICE</u>	20

TABLE OF AUTHORITIES

Cases:

<u>Bellonio v. Salt Lake City Corp.</u> , 911 P.2d 1294 (Utah Ct. App. 1996)	5,7,9,12,17,18
<u>Bischel v. Merit</u> , 907 P.2d 275 (Utah Ct. App. 1995)6,7,8
<u>Brittain v. State by and through Utah Department of Employment</u> , 882 P.2d 666 (Utah Ct. App. 1994)6,7
<u>Great West Casualty v. Utah Department of Transportation</u> , 415 Utah Adv. Rep. 26 (Utah Ct. App. 2001)	6,16
<u>Lamarr v. Utah State Dept. of Transp.</u> , 828 P.2d 535 (Utah Ct. App. 1992)	1,14
<u>Madsen v. Borthick</u> , 769 P.2d 245 (Utah 1988)14
<u>Rushton v. Salt Lake County</u> , 977 P.2d 1201 (Utah 1999)5
<u>Scarborough v. Granite School District</u> , 531 P.2d 480 (Utah 1975)5,16
<u>Stahl v. Utah Transit Authority</u> , 618 P.2d 480 (Utah 1980)6,8
<u>State v. Vigil</u> , 842 P.2d 843 (Utah 1992)5
<u>Thimmes v. Utah State University</u> , 417 Utah Adv. Rep. 4 (Utah Ct. App. 2001)	1,6,16,17

Statutes, Rules and Regulations:

Utah Code Ann. § 63-30-114,5
Utah Code Ann. § 63-30-13	4,5

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(j) (1996).

STATEMENT OF THE ISSUE

Defendants agree with Plaintiffs' "Statement of the Issue" in this case.

STANDARD OF REVIEW

In the present case, Defendants agree with Plaintiffs' statement of the "Standard of Review."

DETERMINATIVE STATUTES AND CASES

In the present case, Defendants assent that the cases and statutes cited in Plaintiffs' "Determinative Statutes and Cases" are relevant and must be considered. In addition, Defendants incorporate two other cases which also must be heeded, Lamarr v. Utah State Dept. of Transp., 828 P.2d 535 (Utah Ct. App. 1992) and Thimmes v. Utah State University, 417 Utah Adv. Rep. 4 (Utah Ct. App. 2001), attached hereto as Addendum.

STATEMENT OF THE CASE

Defendants agree with a majority of Plaintiffs' "Statement of the Case." It must be noted that Plaintiffs **never directed and delivered** their notice of claim to the Kane County Clerk.

SUMMARY OF THE ARGUMENT

The bottom line in this case, is that Plaintiffs **did not** strictly comply with the statutory requirements of the Utah

Governmental Immunity Act, thus, the trial court's dismissal of Plaintiffs' claim was proper and required.

In their brief, Plaintiffs **do not** deny that they failed to direct and deliver the notice of claim to the county clerk as required by Utah Code Ann. § 63-30-13. In fact, Plaintiffs have admitted that they have only substantially complied. Rather, Plaintiffs have attempted to argue that although they did not follow the explicit language of the statutes and directed and delivered their notice of claim to the county clerk, it was eventually received by the county clerk's office, and substantial compliance with § 13 was sufficient.

It is clear that the rule regarding the notice requirements of the Utah Governmental Immunity Act is that of strict compliance. As in this case, where § 13 of the Utah Governmental Immunity Act is clear on its face as to who the notice of claim should be directed and delivered to, there is no need to interpret and manipulate legislative intent. Section 13 specifically states that when bringing a claim against a county, the notice of claim must be **directed and delivered** to the **county clerk**.

Plaintiffs submit that because the Kane County's retained counsel corresponded with them even though their notice was deficient, they met the overall purpose of § 63-30-13, and that Defendants should have been estopped from moving for dismissal,

Plaintiffs are wrong. Defendants' actions do not bring rise to estoppel. First, Defendants' counsel specifically stated that correspondence with her neither confirmed, accepted, or validated sufficiency of their notice. Second, Defendants never acknowledged or instructed Plaintiffs that the service of the notice of claim to the commissioners was sufficient. Third, the county attorney never represented that he had the authority to instruct, nor did he do so, or even indicate that the deliverance of the notice to the commission was sufficient to satisfy the statutory requirements.

Further, this Court has been very explicit in declaring that strict compliance is the law. In fact, as recently as March, 2001, it has been proclaimed so. Plaintiffs have only two cases on which they reach to rely. However, the court stated, even in those cases, that strict compliance is the law and that only because of very specific facts, did they reach what seems to be a more flexible holding of the law. Plaintiffs' reliance on these cases and facts are misplaced.

Additionally, Defendants motion to dismiss was based on the fact that Plaintiffs failed to follow the statutory procedures which are **required** in order to commence a suit. Plaintiffs assert that further discovery should have been allowed. However, Plaintiffs' argument is inappropriate as Defendants moved the trial court to dismiss based on lack of subject matter

jurisdiction, therefore, Rule 56(f) is inappropriate. Again, the trial court was correct in dismissing Plaintiffs' suit and in not approving additional discovery.

Finally, Plaintiffs have argued that this Court should now adjust the law to make it one of "substantial compliance." Again, this Court has declared over and over again that strict compliance is the law and Plaintiffs have not offered any compelling reason to deviate from what has advanced justice for over twenty-five years. Furthermore, this is not the correct forum in which to seek an adjustment of the statute. Any change must be legislatively mandated.

The trial court properly dismissed Plaintiffs claims for lack of subject matter jurisdiction, and this Court should affirm its holding.

ARGUMENT

I. PLAINTIFFS' CLAIM IS BARRED AS A MATTER OF LAW BECAUSE THEY DID NOT COMPLY WITH THE UTAH GOVERNMENTAL IMMUNITY ACT'S NOTICE REQUIREMENTS.

Utah Code Ann. §§ 63-30-11 and 63-30-13 explicitly state, in relevant part:

§ 13: A claim against a political subdivision, or against its employee . . . , ***is barred*** unless notice of claim is filed with the ***governing body*** of the political subdivision ***according to the requirements of Section 63-30-11*** within one year after the claim arises, . . .
§ 11: (b) The notice of claim shall be:

- (ii) **directed and delivered** to:
- (B) the **county clerk**, when the claim is against a county; (Emphasis added).
See Appellants' Addendum A

The Utah Supreme Court has consistently held that strict compliance of the Utah Governmental Immunity Act is required. Rushton v. Salt Lake County, 977 P.2d 1201, 1203 (Utah 1999), (see Scarborough v. Granite School District, 531 P.2d 480, 482 (Utah 1972) (The Court stated "[w]e have consistently held that where a cause of action is based upon a statute, full compliance with its requirements is a condition precedent to the right to maintain a suit.")).

Further, this Court has held that when interpreting a statute, the plain language is first examined. State v. Vigil, 842 P.2d 843, 845 (Utah 1992), Bellonio v. Salt Lake City Corp., 911 P.2d 1294, 1296 (Utah Ct. App. 1996). This Court stated that "[w]e will resort to other methods of statutory interpretation only if we find the language of the statutes to be ambiguous." Vigil, at 845. In Bellonio, regarding § 13 of the Utah Governmental Immunity Act, the Court of Appeals of Utah found they need look no further than the statute's plain language. Bellonio, at 1296. "The plain meaning of section 13 is that a claim against a political subdivision is "barred" unless notice is filed with the "governing body," which is enumerated in § 63-30-11, within one year of the claim arising." Id. As recently as this year, courts have already declared twice, that the notice

provisions of the Governmental Immunity Act are to be strictly construed and full compliance with its requirements is a condition precedent to the right to maintain a suit. Thimmes v. Utah State University, 417 Utah Adv. Rep. 4 (Utah Ct. App. 2001), Great West Casualty v. Utah Department of Transportation, 415 Utah Adv. Rep. 26 (Utah Ct. App. 2001).¹

Plaintiffs' Delivery Of Their Notice Was NOT Legally Sufficient.

In their Brief, Plaintiffs' basis for this appeal is that the trial court was estopped from dismissing their case and was incorrect in doing so because their notice was eventually received by employees of the county clerk's office, and such action fulfilled the overall purpose and intent of § 63-30-13. Plaintiffs argument is premised on three cases, Brittain v. State by and through Utah Department of Employment, 882 P.2d 666 (Utah Ct. App. 1994), Bischel v. Merit, 907 P.2d 275 (Utah Ct. App. 1995), and Stahl v. Utah Transit Authority, 618 P.2d 480 (Utah 1980). However, Plaintiffs' reliance on the above cases is misplaced and the facts are distinguishable to the facts of the case at hand.

In Brittain, the court determined that where the plaintiff directed and delivered their notice of claim to Risk Management

¹It must be noted that in the Great West Casualty decision, Judge Orme expressed frustration that any change to the state's "immunity scheme" cannot be resolved in this forum, and is an issue for the legislature, not the courts. See Appellees' Argument III in this Brief.

and the attorney general, the requirements of § 63-30-12 were satisfied. At the time of Brittain's holding, § 12 provided:

A claim against the state, or against its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority is barred unless notice of claim is filed with the attorney general and the agency concerned within one year after the claim arises. Brittain, at 669 (quoting Utah Code Ann. § 63-30-12 (1993))

However the court the court in Bellonio distinguished Brittain in one respect, because it was a case involving § 12 rather than § 13. Bellonio, at 1297. The case was further distinguished facts by reasoning that while the court found it "reasonable" to construe Risk Management as the "agency concerned" as set forth in § 12, § 13 contained no language that the city's legal counsel was entitled to the notice. Id.

In Bischel, the court found a notice of claim sufficient where the plaintiff directed and delivered notice to the county attorney as opposed to the county commission. The plaintiff did not know who serve, so she called the commission to ask. In response the plaintiff was instructed to direct and deliver her notice to the Salt Lake County Attorney. It must be noted that at the time of Bischel, the notice requirements of the Utah Governmental Immunity Act were more ambiguous than they are under the present code. When Bischel was decided, § 13 stated that a claim against a political subdivision "is barred unless notice is

filed with the *governing body* of the political subdivision within one year after the claim arises." Bischel, at 277 (quoting Utah Code Ann. § 63-30-13 (1993)). The court stated in its distinguishing, that,

Thus, the end result in Bischel was not based upon a substantial compliance or constructive notice theory, but rather was founded upon the apparent agency of the commission employee. Bischel at 1298.

In Stahl, the statute at issue was not even the Utah Governmental Immunity Act. Rather, the issue was whether or not the plaintiff had fulfilled the thirty day notice as required by the Utah Public Transit Act, Utah Code Ann. § 11-20-56. Stahl, at 480-81. This Court denied the defendant's motion to dismiss because the Utah Public Transit Act did not contain an express bar against maintaining an action for noncompliance and found the plaintiff's substantial compliance sufficient. Id. at 481-82. This Court declared that "generally a direction in a statute to do an act is considered "mandatory" when consequences are attached to the failure to act. Id. at 481-82. Taken conversely, this statement means that the legislature intended to bar actions for noncompliance with the Utah Governmental Immunity Act's notice requirements.²

²It must be noted that Stahl, a 1980 case, is neither binding or controlling.

A binding and more factually similar case is that of Bellonio. In Bellonio, the plaintiff argued that constructive notice, coupled with substantial compliance was sufficient but the court disagreed. Bellonio, at 1296. In the Bellonio case, the plaintiff tripped and fell in the parking terrace at the Salt Lake Airport on June 14, 1992. Bellonio's first attorney informed the insurance carrier that he was plaintiff's counsel, this information was forwarded to Robert M. Kern, the airport's legal counsel. Mr. Kern instructed that any further correspondence should come to his office. Id. at 1295.

Bellonio retained a second attorney who engaged in a number of correspondences between the plaintiff and Mr. Kern, and then on March 24, 1993, directed and delivered a notice of claim to Mr. Kern. Mr. Kern acknowledged receipt and indicated that he was awaiting further reports. On July 11, Bellonio directed and delivered his notice of claim to the Utah Attorney General, the Salt Lake City Attorney, and the Airport Director, but not upon Salt Lake City's Mayor or the Salt Lake City Council. Id.

On June 14, 1993, Bellonio's third attorney filed a complaint against Salt Lake City and the Airport. The trial court dismissed Bellonio's claim against the airport but not against Salt Lake City. The City brought an interlocutory appeal seeking dismissal because Bellonio failed to strictly comply with

the notice of claim requirements of the Utah Governmental Immunity Act. Id.

As in this case, Bellonio attempted to rely on Brittain and Bischel and argued that since Mr. Kern had told him to direct all correspondence to him, that dismissal would be inappropriate. However the court relied on the fact that while the airport's attorney did request that all communication be sent to him, he never indicated that he was the proper agent to receive the notice of claim. The court further held that Bischel was not persuasive because Mr. Kern was never the agent of the mayor of the city or the council. Regarding Bellonio's reliance on Brittain and Bischel, the court declared that:

[w]hile . . . it may seem to indicate a flexible rule of constructive notice to governmental entities, this ***is not the general rule in this state.*** Bellonio, at 1297 (emphasis added).

Further, the court set forth:

[T]he precedential effect of [these] cases is limited by their unique factual underpinnings and therefore, ***neither should be construed as an indication that we are prepared to abrogate the longstanding rule requiring strict compliance with all aspects of the Governmental Immunity Act.*** Id. (emphasis added).

The court also noted that Bellonio "never even attempted to direct his notice of claim to the proper party, i.e., the mayor of the city council." Bellonio, at 1298. In their holding, the

court found that Bellonio's claim was barred since he did not file the required notice of claim set forth in § 63-30-13.

In the instant case, the explicit language of §§ 63-30-11 and 63-30-13 state that the notice of claim must be directed and delivered to the county clerk when a county is being sued. See Appellants' Brief, Addendum A. In correspondences dated February 11, 1999, Plaintiffs directed and delivered their notice of claim to the Kane County Commissioners: Stephen R. Crosby, Joe C. Judd, and Norman Carroll. See Plaintiffs' Appellate Brief, Addendum C. Plaintiffs **never directed and delivered** or even attempted to direct and deliver a notice of claim to the Kane County Clerk, nor do they dispute that they did so. Also, Defendants never instructed or even indicated to the Plaintiffs that the Kane County Commission was the proper agent to receive their notice of claim. Further, Plaintiffs never inquired if their notice was sufficient. Moreover, a letter from Linette Hutton, Defendants' counsel, dated March 8, 1999, was exact in stating that their receipt of the notice of claim did not accept, deny, confirm or verify sufficiency of the claim. See Plaintiffs' Brief, Addendum D. In light of this language, it is incredulous to contend that Ms. Hutton represented herself or the commission as Kane County's agent for purposes of the notice requirements.

Thus, the trial court was correct in finding that Plaintiffs did not comply with the statutory notice requirements, which resulted in the proper dismissal of their claim.

The County Attorney Did Not Have The Authority To Confirm The Person To Possess And Act Upon The Notice of Claim.

Plaintiffs argue further that Kane County Attorney, Colin Winchester's correspondence confirmed Kane County's legal counsel, Linette B. Hutton as who should possess and act upon the notice.

Again, Plaintiffs' erroneously rely on Bischel, and point to a March 20, 1999 letter from Mr. Winchester which stated in relevant part that "Kane County has turned the claim over to its claim adjustors, who have in turn retained Linette B. Hutton. Please direct all further correspondence to Ms. Hutton," See Appellants' Brief, Addendum E.

In light of the language in Ms. Hutton's letter as well as the decision on this exact issue in Bellonio³,, it was not

³In Bellonio, plaintiff's claims against Salt Lake City were dismissed because he filed a notice of claim with the airport's attorney. Prior to filing any notice, Plaintiff was instructed to address all correspondence to the airport's attorney. Based on these facts, the plaintiff argued that his reliance and substantial compliance was sufficient. The Court of Appeals disagreed and stated [w]hile it is clear that [the airport's attorney] did make such a request, he never indicated, either expressly or impliedly, that he was the proper agent to receive the statutory notice of claim, nor did [plaintiff] request from him any information regarding Governmental Immunity Act Compliance. Bellonio, at 1298.

reasonable for Plaintiffs to believe Mr. Winchester's instruction to address all further correspondence to Ms. Hutton made their notice sufficient and effective. As argued above, neither Ms. Hutton or Mr. Winchester represented that notice was sufficient. In fact, Ms. Hutton went one step further than the airport's attorney in Bellonio, and declared in her letter that correspondence with her **did not** validate sufficiency of notice. Further, it must be noted that even though Plaintiffs tout that they believed Mr. Winchester and Ms. Hutton to have had authority to act on behalf of Kane County, Plaintiffs never attempted to direct and deliver a notice of claim to either of them.

All Plaintiffs' reasoning and argument does not obviate the fact that they did not comply with the notice requirements. For these reasons, the trial court's decision must be affirmed.

II. IT WAS PROPER FOR THE TRIAL COURT TO NOT ALLOW PLAINTIFFS' REQUEST FOR ADDITIONAL DISCOVERY SINCE THE CLAIM WAS DISMISSED DUE TO THE COURT'S LACK OF JURISDICTION.

In their brief, Plaintiffs state that "when matters outside the pleadings under Rule 12 of the Utah Rules of Civil Procedure are considered, the motion is properly treated as one for summary judgment under rule 56." See Appellants' Brief at p. 19. In this case, the court granted Defendants' motion to dismiss based on a lack of subject matter jurisdiction, therefore, Rule 56(f) is inapplicable. See R. at 165-167.

The Utah Supreme Court has explicitly held that the statutory notice requirement is " a jurisdictional requirement and a precondition to suit." Lamarr v. Utah State Dept. of Transp., 828 P.2d 535, 540 (Utah Ct. App. 1992) (citing Madsen v. Borthick, 769 P.2d 245, 250 (Utah 1988)). In Lamarr, the court granted defendant's motion for summary judgment and found the agency immune as per the Utah Governmental Immunity Act and plaintiff appealed. The plaintiff argued that the notice issue was not properly before the court because the notice issue was an affirmative defense and not properly pleaded in defendant's answer. Lamarr, at 540. Plaintiff argued further that since the defendant did not ask the court to rule on the notice issue in their summary judgment motion, the court could not rule on it. Id. The court declared that the plaintiff's argument "misconstrues the nature of the statutory notice of claim requirement." Id. The court in Lamarr announced that it was **required** to dismiss the claim against the defendant because it lacked jurisdiction. Id.

In the present case, while Defendants did provide an affidavit in support of their Motion to Dismiss. Plaintiffs have misrepresented the law regarding this motion. Therefore, Rule 56(f) is inapplicable to the present case. Here, Defendants' Motion to Dismiss was not based on grounds that Plaintiff did not state a claim upon which relief can be granted. Defendants moved

the court to dismiss Plaintiffs' claim based on lack of subject matter jurisdiction pursuant to Rule 12(b)(1). R. 20-29. Since the Utah Rules of Civil Procedure do not provide for treatment of Rule (b)(1) motions as motions for summary judgment, Plaintiffs' appeal on this issue is inappropriate.

Likewise, the trial court relied upon sufficient evidence to determine that the Plaintiffs did not satisfy the notice requirement as set forth in § 13. Plaintiffs **do not** dispute that they failed to direct and deliver their notice of claim to the Kane County Clerk. Moreover, Plaintiffs have been in full possession of all correspondence between themselves and Kane County, and any further information was and is irrelevant as to whether they fulfilled the statutory requirements of § 13.

Because the Utah Rules of Civil Procedure do not provide for treatment of Rule 12(b)(1) motions as motions for summary judgment, Plaintiffs attempt to color the dismissal for other reasons than jurisdictional to invoke Rule 56(f) discovery procedures is inappropriate. The trial court was **required** to dismiss Plaintiffs' claims and did so appropriately without allowing further discovery.

III. STRICT COMPLIANCE IS THE LAW IN THE STATE OF UTAH.

In Plaintiffs' last issue on appeal, they contend that this Court should now overturn the long standing law of strict compliance and find substantial compliance adequate. The

gravamen of Plaintiffs' complaint is that when the purpose and intent of the statute are met, regardless of how or who the notice of claim is directed and delivered to, then notice should be effective.

The landmark case of Scarborough, this Court explicitly stated that:

The purpose of statutes requiring the presentation of claims to political subdivisions prior to filing a suit is in furtherance of public policy to prevent unnecessary litigation. The purpose of the notice provisions is to afford the political subdivision an opportunity to investigate the claim while the matter is of recent memory, witnesses are yet available, conditions have not been materially changed and to determine if there is liability, and if there is the extent of it.

Additionally, in a most recent decision dealing with § 13, the Utah Court of Appeals in Great West Casualty recognized that the judicial forum is not the place to adjust the strict compliance rule and refused to do so. The court stated:

[s]uch an adjustment in the philosophy underlying our State's sovereign immunity scheme must, however, come at the hands of the Legislature and not this Court. Great West Casualty, at 27-28.

Further, even more recently than Great West Casualty, the Utah Court of Appeals announced **again** in Thimmes that strict compliance is the rule. In Thimmes, the plaintiff was not sure who to direct and deliver her notice to, so she called an unknown individual at the Utah Attorney General's Office. Plaintiff

contends that someone, although she could not say who, instructed her to direct and deliver her notice of claim to Risk Management. Id. Thimmes argued that Bischel applied and because she was instructed by a state agent to direct and deliver her notice of claim to Risk Management. However, the court found that the "[a]ppellant ha[d] not presented sufficient evidence to justify her reliance on the advice of an unnamed state employee rather than the plain language of section 63-30-12." Id. The court noted their decision in Bellonio and indicated that "[w]e pointed to the unique factual circumstances of Bischel and said our decision in that case should **not** be viewed as an "abrogat[ion of] the long-standing rule requiring strict compliance with **all** aspects of the Governmental Immunity Act." Id. (citing Bellonio, at 1297) (emphasis added).

For over twenty-five years, from Scarborough in 1975 to Great West Casualty and Thimmes in 2001, the courts have recognized and respected a rule of strict compliance of all aspects of the Utah Governmental Immunity Act, specifically the notice requirements. The Immunity Act has evolved from a substandard substantial compliance rule to a more effective, strict compliance standard, which has become a rule affording and promoting justice and equity as § 63-30-13 explicitly sets forth requirements and the consequences for failure to follow them. As

stated above, in decisions that seem to make the rule more flexible, it has been declared that:

[w]hile . . . it may seem to indicate a flexible rule of constructive notice to governmental entities, this ***is not the general rule in this state***. Bellonio, at 1297 (emphasis added).

Further, the court set forth:

[T]he precedential effect of [these] cases is limited by their unique factual underpinnings and therefore, ***neither should be construed as an indication that we are prepared to abrogate the longstanding rule requiring strict compliance with all aspects of the Governmental Immunity Act***. Id. (emphasis added).

Strict compliance has been declared the law in order to make sure that the proper entities know that they are being sued and so they are able to prepare for litigation. If the courts had to determine in each and every case whether notice requirements had been substantially complied with, our already limited judicial resources would be wasted.

In this case, Plaintiffs have admitted that they have only substantially complied with required notice requirements, so now in a last ditch effort they are reaching to this Court to overturn a well defined mandated rule to reach sufficiency in order to reverse the trial courts decision and remand the issue for trial. For the foregoing reasons and since this Court is not the proper forum in which to adjust the strict compliance rule,

the strict compliance standard must be upheld making anything less deficient.

CONCLUSION

Because Plaintiffs admittedly did not strictly comply with the requirements set forth in § 63-30-13 and direct and deliver their notice of claim with the Kane County Clerk within the one year statutory time period, the trial court had to dismiss Plaintiffs claim for lack of subject matter jurisdiction. For the foregoing reasons, the trial court was correct in dismissing Plaintiffs' claims and its decision must be upheld.

DATED on this 16 day of April, 2001.

STIRBA & HATHAWAY

By:

A handwritten signature in black ink, appearing to read "Peter Stirba", written over a horizontal line.

PETER STIRBA

AIMEE K. MARTINEZ

Attorneys for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17 day of April, 2001, I caused to be served two (2) true and correct copies of the foregoing **BRIEF OF APPELLEE**, by the method indicated below, to the following;

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APPELLEES' ADDENDUM

Tab A

*535 828 P.2d 535

Court of Appeals of Utah.

Nicholas LAMARR, Plaintiff and Appellant,
v.

UTAH STATE DEPARTMENT OF
TRANSPORTATION, and Salt Lake City,
Defendants and Appellees.

No. 910600-CA.

March 26, 1992.

Pedestrian who was struck while walking across overpass brought action against city and Department of Transportation. The Third District Court, Salt Lake County, Homer F. Wilkinson, J., granted defendants' motions for summary judgment and pedestrian appealed. The Court of Appeals, Billings, Associate P.J., held that: (1) Sidewalk Construction Act did not require city to maintain sidewalk along overpass which was a state road on which state had placed pedestrian walkway; (2) city owed no special duty to pedestrian to control transients who allegedly prevented him from using the pedestrian walkway; and (3) pedestrian was required to serve notice of claim on both Department of Transportation and the Attorney General.

Affirmed.

West Headnotes

[1] Courts ☞99(3)

106 ----

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k99 Previous Decisions in Same Case as Law of the Case

106k99(3) Jurisdiction, Dismissal, Nonsuit, and Summary Judgment, Rulings Relating To.

Trial court's earlier denial of defendant's motion for summary judgment did not preclude the court from revisiting the issue and later granting summary judgment.

[2] Negligence ☞202

272 ----

272I In General

272k202 Elements in General.

(Formerly 272k1)

Four elements which plaintiff must establish to state claim of negligence are that defendant owed plaintiff a duty, that defendant breached the duty, that the

breach of the duty was the proximate cause of plaintiff's injury, and that there was injury.

[3] Highways ☞198

200 ----

200IX Regulation and Use for Travel

200IX(C) Injuries from Defects or Obstructions

200k198 Liabilities of Local Authorities and Officers.

Provision of the Sidewalk Construction Act allowing city to use certain funds for construction of curbs, gutters, sidewalks, and pedestrian safety devices did not impose mandatory duty on city to construct sidewalk on overpass, which was a state road and already had a state-maintained pedestrian walkway. U.C.A.1953, 27-14-2.

[4] Highways ☞198

200 ----

200IX Regulation and Use for Travel

200IX(C) Injuries from Defects or Obstructions

200k198 Liabilities of Local Authorities and Officers.

Sidewalk Construction Act does not place mandatory duty on city to supplement state's efforts to insure pedestrian's safety on state roads. U.C.A.1953, 27-14-2.

[5] Municipal Corporations ☞766

268 ----

268XII Torts

268XII(C) Defects or Obstructions in Streets and Other Public Ways

268k765 Nature of Defects

268k766 In General.

Under the public duty doctrine, city owed no duty to pedestrian to control transients who gathered at stairway to pedestrian walkway along overpass, and pedestrian could not recover for injuries which he sustained when he chose to walk on the overpass rather than the pedestrian walkway in order to avoid harassment and possible physical violence by transients.

[6] Municipal Corporations ☞723

268 ----

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k723 Nature and Grounds of Liability.

Public duty doctrine applies even where governmental immunity has been specifically waived by statute.

[7] Municipal Corporations ☞ 723

268 ----

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k723 Nature and Grounds of Liability.

Public duty doctrine is a creature of the common law and legislature could abrogate that common-law doctrine if it chose to do so in specific terms.

[8] Municipal Corporations ☞ 741.20

268 ----

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k741 Notice or Presentation of Claims for Injury

268k741.20 Requirement as Mandatory or Condition Precedent.

(Formerly 268k741.1(3))

[See headnote text below]

[8] Municipal Corporations ☞ 742(4)

268 ----

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k742 Actions

268k742(4) Pleading.

Statutory notice of claim is a jurisdictional requirement and a precondition to suit; it is not an affirmative defense which must be pled. Rules Civ.Proc., Rule 8(c).

[9] Courts ☞ 37(2)

106 ----

106I Nature, Extent, and Exercise of Jurisdiction in General

106k37 Waiver of Objections

106k37(2) Time of Making Objection.

[See headnote text below]

[9] Courts ☞ 39

106 ----

106I Nature, Extent, and Exercise of Jurisdiction in General

106k39 Determination of Questions of Jurisdiction in General.

Lack of jurisdiction can be raised at any time by any party or the court.

[10] Statutes ☞ 223.4

361 ----

361VI Construction and Operation

361VI(A) General Rules of Construction

361k223 Construction with Reference to Other Statutes

361k223.4 General and Special Statutes.

When two statutory provisions appear to conflict, the more specific provision governs over the more general provision.

[11] Highways ☞ 203

200 ----

200IX Regulation and Use for Travel

200IX(C) Injuries from Defects or Obstructions

200k201 Actions for Injuries

200k203 Notice of Claim for Injury.

Statutory requirement that person suing Department of Transportation serve notice of claim on UDOT and the Attorney General prevails over rule of civil procedure allowing service on the agency. Rules Civ.Proc., Rule 4(e)(11); U.C.A.1953, 63-30-12.

[12] Highways ☞ 203

200 ----

200IX Regulation and Use for Travel

200IX(C) Injuries from Defects or Obstructions

200k201 Actions for Injuries

200k203 Notice of Claim for Injury.

Claimant did not effectively comply with statute governing service of notice of claim by serving only the Department of Transportation and not the Attorney General. U.C.A.1953, 63-30-12.

[13] States ☞ 197

360 ----

360VI Actions

360k194 Conditions Precedent to Action Against State

360k197 Presentation of Claim.

One-year period for filing notice of claim against state is tolled for the duration of any legally recognized disability. U.C.A.1953, 63-30-12, 78-12-36.

***536** Gordon K. Jensen (Argued), Goicoechea Law Offices, West Valley City, for appellant.

Roger F. Cutler, City Atty., Bruce R. Baird (Argued), Asst. City Atty., Salt Lake City, R. Paul Van Dam, Utah Atty. Gen., Brent Burnett (Argued), Asst. Atty. Gen., Salt Lake City, for appellee.

Before BILLINGS, Associate P.J., and JACKSON

and RUSSON, JJ.

OPINION

BILLINGS, Associate Presiding Judge:

Plaintiff Nicholas Lamarr (Lamarr) appeals from a summary judgment dismissing his negligence claims against the Utah State Department of Transportation (UDOT) and Salt Lake City (the City) arising out of an accident on the North Temple overpass. We affirm.

FACTS

On April 18, 1987, at approximately 10:30 p.m., Lamarr was struck by a car while walking east across the North Temple overpass. The impact threw Lamarr over the side of the overpass, and Lamarr struck the ground, suffering serious, permanent injuries.

Before the accident, Lamarr had walked west across the overpass using the pedestrian walkway that deposits pedestrians under the overpass. Lamarr was frightened and harassed by transients who had congregated under the overpass. On his return trip, Lamarr walked along the overpass's roadway. Lamarr claims this was necessary to avoid harassment and possible *537 physical violence by the transients congregated around the stairway leading to the walkway. While walking along the roadway, an automobile struck Lamarr throwing him over the side of the overpass.

Lamarr brought suit against UDOT and the City. Lamarr contends UDOT and the City were negligent in failing to properly construct, maintain, and place signs on the overpass. Lamarr also contends the City negligently failed to properly "control" (FN1) the transient population under the overpass. After discovery, the City and UDOT moved for summary judgment on a number of alternative grounds. The trial court granted summary judgment in favor of both UDOT and the City.

Lamarr presents four issues on appeal: (1) did the trial court err in holding the City owed Lamarr no duty for construction, maintenance, or placing signs on the overpass?; (2) did the trial court err in holding the City owed Lamarr no private duty to control the transient population?; (3) did the trial court err in ruling as a matter of law the City and UDOT did not proximately cause Lamarr's injuries?; and (4) did

the trial court err in concluding any duty of the City to control the transient population is an immune discretionary function, under Utah Code Ann. § 63-30-10(1)(a) (1989)? UDOT presents two additional issues on appeal: (1) did Lamarr's failure to file a notice of his claim with both UDOT and the attorney general deprive the trial court of jurisdiction over Lamarr's claims against UDOT?, and (2) did UDOT owe Lamarr a duty of care?

Summary judgment is proper when the record indicates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Kitchen v. Cal Gas Co.*, 821 P.2d 458, 460 (Utah App.1991). We review the trial court's grant of summary judgment under a "correctness" standard. *Id.* Thus, we accord no deference to the trial court's legal conclusions underlying its grant of summary judgment. *Id.*

We first consider whether summary judgment in favor of the City was proper, and then turn to the grant of summary judgment in favor of UDOT.

I. SUMMARY JUDGMENT FOR THE CITY

[1] Lamarr raises multiple claims of error. Because of our resolution of the duty issue, however, we need not reach the other issues briefed on appeal. (FN2)

A. Duty Generally

[2] In Utah, a plaintiff must establish four elements to state a claim of negligence: the defendant owed the plaintiff a duty, defendant breached the duty (negligence), the breach of the duty was the proximate cause of plaintiff's injury, and there was in fact injury. *Reeves v. Gentile*, 813 P.2d 111, 116 (Utah 1991). Establishing the defendant owed the plaintiff a duty of care is "[a]n essential element of a negligence claim." *Owens v. Garfield*, 784 P.2d 1187, 1189 (Utah 1989). In fact, the Utah Supreme Court recently noted that without a showing of duty, a plaintiff cannot *538 recover. *Rollins v. Petersen*, 813 P.2d 1156, 1159 (Utah 1991). "Duty is 'a question of whether the defendant is under any obligation for the benefit of a particular plaintiff....' " *Ferree v. State*, 784 P.2d 149, 151 (Utah 1989) (quoting W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 30, at 356-57 (W. Keeton 5th ed. 1984)). Whether the defendant owed the plaintiff a duty of care is "entirely a question of law to be determined by the court." *Id.*

B. Duty to Maintain Safe Overpass

[3] Lamarr first claims the City owed him a duty to maintain a sidewalk on the overpass or to place on the overpass signs that would have prevented him from walking on the roadway. Lamarr contends this duty inheres from the Utah Sidewalk Construction Act, which provides:

The legislature recognizes that adequate sidewalks and pedestrian safety devices are essential to the general welfare of the citizens of the state. It is the opinion of the legislature that existing sidewalks within the state, especially in the most populated areas, are not adequate to service the walking public with a result of creating unnecessary hazards to pedestrian and vehicular traffic.

Utah Code Ann. § 27-14-2 (1989). Section 27-14-2 further states: "It is the intent of this act to provide a means whereby a portion of the funds received by the counties and participating cities as B and C road funds *may* be used for the construction of curbs, gutters, sidewalks and pedestrian safety devices pursuant to the guidelines set forth in this act." *Id.* (emphasis added). Lamarr argues this statute imposes a mandatory duty on the City to construct a sidewalk on the overpass, even though Lamarr admits the overpass is a state road and already has a state-maintained pedestrian walkway. We disagree.

In construing statutes, we are bound to "assume that each term of a statute was used advisedly; and that each should be given an interpretation and application in accord with their [sic] usually accepted meaning, unless the context otherwise requires." *Grant v. Utah State Land Bd.*, 26 Utah 2d 100, 485 P.2d 1035, 1036 (1971). In *Grant*, the court construed a forfeiture statute providing that the State Land Board " 'may reinstate' " a previously forfeited land sales contract. *Id.*, 485 P.2d at 1036 (quoting Utah Code Ann. § 65-1-47 (1953)). The plaintiff contended section 65-1-47 "vest[ed] in him the absolute right to reinstate a forfeited certificate." *Id.* The court disagreed, holding the word "may" is not mandatory but only permissive. *Id.*

[4] Based on the plain meaning of the statute, we hold the Utah Sidewalk Construction Act does not place a mandatory duty on the City to supplement the State's efforts to ensure pedestrian safety on state roads. Thus, the City had no duty to maintain or construct a sidewalk on the overpass or to place signs on the overpass that would have prevented Lamarr

from walking across the roadway. Accordingly, the trial court did not err in granting the City summary judgment on this duty issue. (FN3)

C. Public Duty Doctrine

[5] Lamarr also claims the City owed him a duty to "control" the transient population beneath the overpass. The trial court held the City did not owe Lamarr such a duty. We agree with the trial court, and hold that under the public duty doctrine, the City owed no duty to Lamarr to "control" transients.

Under the public duty doctrine,

[f]or a governmental agency and its agents to be liable for negligently caused injury suffered by a member of the public, *539 the plaintiff must show a breach of a duty owed him as an individual, not merely the breach of an obligation owed to the general public at large by the governmental official.

Ferree, 784 P.2d at 151 (citing *Obray v. Malmberg*, 26 Utah 2d 17, 484 P.2d 160, 162 (1971)). The public duty doctrine has been defined as "a duty to all is a duty to none." *Rollins*, 813 P.2d at 1165 (Durham, J., concurring in part and dissenting in part). Thus, if the City owed no duty to Lamarr apart from its duty to the general public, Lamarr cannot recover. *See Ferree*, 784 P.2d at 152.

The Utah Supreme Court recently explained the parameters of Utah's public duty doctrine. *See id.* In *Ferree*, the court applied the public duty doctrine holding state corrections officials were not liable when a prison inmate on weekend release murdered Dean Ferree. *Id.* at 151-52. The court concluded the officials had only a general duty to the public, not a private duty to Ferree, and therefore owed Ferree no duty of care. *Id.* Moreover, in *Rollins*, 813 P.2d 1156, the court affirmed the trial court's grant of summary judgment because under the public duty doctrine, the State did not owe a duty to protect the decedent from a state hospital patient. *Id.* at 1161-62. The court specifically noted the decedent "was simply a member of the public, no more distinguishable to the hospital than to any other person." *Id.* at 1162.

[6][7] Lamarr contends "[t]he public duty doctrine has no application where governmental immunity has specifically been waived by statute." The Utah Supreme Court has clearly rejected Lamarr's theory. (FN4) The specific question of the effect of waiver of immunity on the public duty doctrine was

addressed in *Ferree*. In rejecting a claim similar to Lamarr's, the court stated:

Sovereign immunity, however, is an affirmative defense and conceptually arises subsequent to the question of whether there is tort liability in the first instance. There is sound reason and desirable simplicity in analyzing and applying negligence concepts before deciding issues of sovereign immunity....

"... Conceptually, the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity."

Ferree, 784 P.2d at 152-53 (quoting *Davidson v. City of Westminster*, 32 Cal.3d 197, 201-02, 649 P.2d 894, 896, 185 Cal.Rptr. 252, 254 (1982)).

The Utah Supreme Court recently affirmed its decision and reasoning in *Ferree*. In *Rollins*, 813 P.2d 1156, the estate of a decedent killed in an accident with a stolen automobile driven by a state hospital patient brought a wrongful death action against, among others, the State. *Id.* at 1158. The trial court granted the State's motion for summary judgment concluding the State had no duty to the decedent other than its duty to the general public. *Id.* On appeal, the court again addressed the question of whether the legislature's abrogation of immunity abolished the public duty doctrine. Once again answering this question in the negative, the court explained:

[T]he legislature's abrogation of absolute sovereign immunity does not lead to the conclusion that the public duty doctrine has also been abrogated. Legislative recognition of a right to recover from one who has previously been immune from liability for tortious acts cannot logically be read as an elimination of the requirement that before one can recover damages from another, a tort must be proven. There must still be *540 proof of a duty owed to the one claiming injury and a breach of that duty.

Therefore, in the present case, as in any tort case, the proper mode of analysis is to first consider whether there is a legal theory upon which suit can be brought ... before considering the separate and independent question of whether the [governmental agency] is immune.

Id. at 1162 n. 3 (emphasis added); see also *Kirk v. State*, 784 P.2d 1255, 1256 (Utah App.1989) (to reach immunity issue, court must assume duty and negligence).

Based on the preceding authority, Lamarr must establish the City owed him a "special duty." See *Ferree*, 784 P.2d at 151. We conclude Lamarr has failed to establish the City owed him any duty of care beyond that owed the general public. There is no evidence in the record the City had any reason to distinguish Lamarr from the general public. Like the decedent in *Rollins*, Lamarr "had not set himself apart" from the general public such that any special duty arose between himself and the City. In fact, there is no evidence the City had any knowledge whatsoever of either of Lamarr's trips across the overpass. (FN5)

In summary, we hold the City owed Lamarr no duty of care. Accordingly, the trial court properly granted summary judgment in favor of the City.

II. SUMMARY JUDGMENT FOR UDOT

UDOT moved for summary judgment on grounds Lamarr failed to file notice of his claim within one year with both UDOT and the Utah Attorney General as required by the waiver provisions of the Utah Governmental Immunity Act, Utah Code Ann. § 63-30-12 (1989). Although the issue was fully briefed, the trial court did not reach the notice issue. Rather, the trial court ruled in favor of UDOT on its proximate cause claim. On appeal, UDOT asserts these alternative grounds upon which we can affirm the trial court's summary judgment: absence of proper notice, proximate cause, or duty of care owed to Lamarr. Because of our resolution of the threshold notice issue, we do not reach the proximate cause and duty issues.

A. Notice of Claim is Jurisdictional

[8] Lamarr first claims the notice issue is not properly before this court. Lamarr asserts the notice issue is an affirmative defense that was not pleaded in the answer, and thus Rule 8(c) of the Utah Rules of Civil Procedure precludes UDOT from raising it in its summary judgment motion and on appeal. Lamarr notes UDOT never mentions the term "notice of claim" in its answer. He further argues UDOT did not request the court to rule on this issue on summary judgment and therefore we cannot consider it on

now case

appeal. Lamarr's argument, however, misconstrues the nature of the statutory notice of claim requirement. Lamarr erroneously asserts the notice of claim provision is a statute of limitation. Rather, the supreme court has held the statutory notice requirement is a jurisdictional requirement and a precondition to suit. See *Madsen v. Borthick*, 769 P.2d 245, 250 (Utah 1988).

[9] Lack of jurisdiction can be raised at any time by any party or the court. *Olson v. Salt Lake City Sch. Dist.*, 724 P.2d 960, 964 (Utah 1986). Therefore, Lamarr's contention that the notice issue is not properly before this court fails. In fact, Rule 12(h)(2) of the Utah Rules of Civil Procedure *requires* this court to dismiss the claim against UDOT if the trial court lacked jurisdiction.

B. Notice of Claim Under Section 63-30-12

[10][11] First, Lamarr claims Rule 4(e)(11) of the Utah Rules of Civil Procedure allows him to effect notice by serving only UDOT, and not the attorney general. *541 Section 63-30-12, however, is more specific than Rule 4 in that the former requires notice on UDOT *and* the attorney general. When two statutory provisions appear to conflict, the more specific provision governs over the more general provision. *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 216 (Utah 1984). Thus, section 63-30-12 is the applicable rule at issue, not Rule 4. To invoke the trial court's jurisdiction over UDOT, Lamarr was required to comply with section 63-30-12, the more specific jurisdictional rule.

ame! Next, Lamarr argues he has "effectively" complied with section 63-30-12 by serving notice only on UDOT. Lamarr points out the attorney general's office had actual notice of Lamarr's claims within the one-year period. Thus, Lamarr argues the intent of the statute was satisfied.

[12] In construing section 60-30-12, the supreme court has stated: "Section 63-30-12 provides that an action against the State is barred if the required notice is not filed. It therefore makes ~~failure to give~~ notice grounds for dismissal. A plain reading of those sections indicates that no suit against the State may be maintained if notice is not given." *Madsen*, 769 P.2d at 249 (citation omitted) (emphasis added). The importance of *Madsen* for Lamarr's case is the supreme court's application of "[a] plain reading" of section 60-30-12. *Id.* The plain language of section 60-30-12 requires notice both to the attorney general

and UDOT, and Lamarr admits he never filed notice with the attorney general. (FN6)

[13] Moreover, the supreme court has indicated that actual notice cannot cure a failure to comply with the notice provisions of the Governmental Immunity Act. In *Varoz v. Sevey*, 29 Utah 2d 158, 506 P.2d 435 (1973), the court held a plaintiff's minority did not excuse failure to comply with a statute requiring timely notice of a claim against a county. *Id.*, 506 P.2d at 436. (FN7) Significantly for the present case, the supreme court held that the county's actual notice of the claim did not satisfy the statute:

[f]rom the language of the statute it is quite clear that the legislature intended to make the filing of a timely notice of claim prerequisite to maintaining an action.

....

Actual knowledge of the circumstances which resulted in the death of the plaintiff's mother by officials of the county does not dispense with the necessity of filing a timely claim.

*542. *Id.* (FN8)

Requiring written notice to both UDOT and the attorney general is consistent with cases interpreting notice statutes similar to section 60-30-12. For example, *Scarborough v. Granite School District*, 531 P.2d 480 (Utah 1975), involved a companion statute to section 63-30-12, section 63-30-13. Section 63-30-13 is identical to section 63-30-12 except that the former applies to political subdivisions, whereas the latter applies to state agencies. In *Scarborough*, the trial court dismissed a complaint against Granite School District because the plaintiff had not filed notice with the school district and the attorney general. *Id.* at 481. The supreme court, affirming the dismissal, explained:

The School District is a political subdivision of the state. Therefore it would normally be immune from suit; and the right to sue is an exception created by statute. We have consistently held that where a cause of action is based upon a statute, full compliance with its requirements is a condition precedent to the right to maintain a suit.

Id. at 482 (footnotes omitted).

Applying a plain reading, we hold section 63-30-12

required Lamarr to serve written notice of his claim on both UDOT and the attorney general within one year of his injuries. Lamarr failed to serve the attorney general within the specified time, thus depriving the trial court of jurisdiction over Lamarr's claims against UDOT. Accordingly, we affirm the trial court's dismissal of Lamarr's claims against UDOT.

III. CONCLUSION

We hold the trial court did not err in concluding as a matter of law that the City owed Lamarr no duty of care. Further, we hold Lamarr's failure to comply with the notice provision of the Governmental Immunity Act deprived the trial court of jurisdiction over Lamarr's claims against UDOT.

Accordingly, for the reasons set forth, the judgment of the trial court is affirmed.

JACKSON and RUSSON, JJ., concur.

(FN1.) Although we find Lamarr's use of the term "control" in reference to the City's transient population troublesome, to directly address Lamarr's claims we repeat that term here.

(FN2.) Lamarr also argues the trial court improperly reconsidered the question of the City's duty to Lamarr. Lamarr correctly notes the trial court denied the City's first motion for summary judgment asserting the City owed Lamarr no duty of care. The trial court granted summary judgment only after the City made a second motion for summary judgment. Lamarr claims the trial court's earlier denial of the City's first motion for summary judgment precluded the trial court from revisiting the duty issue.

Lamarr ignores the well-established rule that "[a]ny judge is free to change his or her mind on the outcome of a case until a decision is formally rendered." " *Salt Lake City Corp. v. James Constructors, Inc.*, 761 P.2d 42, 45 (Utah App.1988) (quoting *Bennion v. Hansen*, 699 P.2d 757, 760 (Utah 1985)). "[A] trial court is not inexorably bound by its own precedents...." *Id.* The trial court is free to reconsider its earlier decision, especially when, as here, a party supports a second motion for summary judgment with additional evidence. This rule has particular application in cases that, like this one, involve multiple parties and multiple claims. *Id.* at 44 n. 5.

Therefore, we conclude the trial court did not err in considering the City's second motion for summary judgment.

(FN3.) We emphasize our resolution of the duty issue is fact specific. There is no dispute the overpass is a state highway. Thus, any duty of the City to maintain that highway must be a statutory duty, and our analysis focuses on that issue. Our resolution of this issue in no way addresses the existence or scope of the City's duty to safely maintain its streets.

Because we hold the City had no duty to construct or place signs on the overpass, we need not reach the issue of whether that duty is a public or private duty under the public duty doctrine.

(FN4.) The public duty doctrine is a creature of the common law. Lamarr basically argues the legislature abrogated the common law doctrine in enacting the Governmental Immunity Act. Although the supreme court in *Ferree* and *Rollins* expressly rejects this argument, we note the legislature could abrogate that common law doctrine if it chose to do so in specific terms. *Cf. Norton v. Macfarlane*, 818 P.2d 8, 12 (Utah 1991) (legislature has last word with respect to tort law).

*542_ (FN5.) This conclusion is also supported by the supreme court's decision in *Little v. Utah State Division of Family Services*, 667 P.2d 49 (Utah 1983). In that case, the court held that once a State agency took custody of an autistic child and placed the child in a foster home, the agency assumed a duty of due care to the child. *Id.* at 51. It was only after the agency had knowledge of the child's condition and assumed custody of the child, however, that the special relationship arose between the agency and child. *Id.*

(FN6.) Recently, in *Kabwasa v. University of Utah*, 785 F.Supp. 1445 (D.Utah 1990) (Memorandum Decision and Order), Judge Green of the United States Court for the District of Utah interpreted section 63-30-12 to require notice to both the attorney general and the agency. A party brought several claims, including state law claims, against the University of Utah. That party, however, failed to comply with section 63-30-12 and gave notice only to the attorney general and not to the University of Utah. The University of Utah claimed the party's failure to comply with section 63-30-12 by giving both the University and attorney general

notice deprived the court of jurisdiction. Judge Green ruled:

The court agrees with the defendants that the plain meaning of section 63-30-12 requires that two notices of claim should have been filed by plaintiff: one to the Attorney General and one to the University of Utah. Although this statutory requirement may result in redundant notice being given, such redundancy apparently is mandated by the statute inasmuch as the Utah Attorney General is the agent and legal counsel for all state agencies, including the University of Utah. In this pendant state law claim, the court is unwilling to ignore the unambiguous language of the Utah statute requiring two separate notices, especially where the Utah Supreme Court has repeatedly held that strict compliance with the notice of claim provision is essential to maintain a suit pursuant to the Governmental Immunity Act.

Id. at 1446-47.

(FN7.) We note *Varoz* was impliedly overruled by the enactment of Utah Code Ann. § 78-12-36 (1992)

(enacted in 1975 and amended in 1987). That section provides "the time of [a] disability is not a part of the time limited for the commencement of the action." *Id.* In *Scott v. School Board of Granite School District*, 568 P.2d 746 (Utah 1977), the court held this section applies to the notice provisions of the Governmental Immunity Act. *Id.* at 748. Thus, the one-year period for filing notice under section 63-30-12 is tolled for the duration of any legally recognized disability. Section 78-12-36, as interpreted by *Scott*, however, provides Lamarr no support as he has not relied on that section and does not claim a disability prevented him from filing notice with the attorney general.

(FN8.) See also *Edwards v. Iron County ex rel. Valley View Medical Ctr.*, 531 P.2d 476, 477 (Utah 1975) (even if county employees had actual knowledge of plaintiff's injuries, plaintiff cannot dispense with notice requirement); *Lando v. City of Chicago*, 128 Ill.App.3d 597, 83 Ill.Dec. 752, 755, 470 N.E.2d 1172, 1175 (1984) (where required notice was defective, actual notice supplied by third-party (paramedics) did not satisfy statute).

future. Following those equivocal answers, follow-up questions revealed that resolving the mother's problems would take a "significant amount of time," and that the father felt the children "deserve a lot more than I can give them right now." Then, Appellants both unequivocally agreed that relinquishment and adoption into a loving and stable environment was in the children's best interests. Given this testimony, the family's extensive history with the Division of Child and Family Services, and the nature of Appellants' personal problems, we conclude that the juvenile court did not abuse its discretion in determining that termination of parental rights was in the children's best interests.

¶8 Appellants finally assert that they were denied effective assistance of counsel. In their briefs on appeal, Appellants' only argument on this issue is a terse assertion, without citation to the record or any legal authority, that counsels' "superficial and cursory examination of [Appellants]" constituted ineffective assistance of counsel because it prevented them from both expressing their true feelings and demonstrating "on record" that [they] had an adequate understanding of the proceeding and its consequences. Rule 24(9) of the Utah Rules of Appellate Procedure requires that all arguments contain "citations to the authorities, statutes, and parts of the record relied on." *Id.* Because Appellants have failed to cite to the record and any legal authority in support of their ineffective assistance claim, we could properly refuse to consider it. *See State v. Thomas*, 1999 UT 2, ¶11, 974 P.2d 269.

¶9 In any event, the argument fails on its merits. Appellants first raised their ineffective assistance claim in their post-judgment motion under Rule 60(b)(6) of the Utah Rules of Civil Procedure.³ To establish a claim for ineffective assistance of counsel, an appellant must show that "counsel's performance was objectively deficient and that counsel's deficient performance prejudiced the case." *In re E.H.*, 880 P.2d 11, 13 (Utah Ct. App. 1994). Appellants' only contention in their briefs on appeal is that counsels' examinations of Appellants during the relinquishment proceeding were inadequate. Even assuming that counsels' examinations were objectively deficient, Appellants were not prejudiced. The record establishes that the requirements of section 78-3a-414 were met. In addition, Appellants were given an opportunity to ask questions at the hearing, and they were asked to explain in their own words why termination of parental rights and adoption was in the children's best interests. Thus, the juvenile court did not abuse its discretion in denying Appellants' Rule 60(b) motion. *See Franklin Covey Client Sales, Inc. v. Melvin*, 2000 UT App 110, ¶9, 2 P.3d 451 (establishing abuse of discretion as the proper standard of review for denial of Rule 60(b) motions).

¶10 We affirm the juvenile court's orders terminating Appellants' parental rights and denying their post-judgment motions.

Russell W. Bench, Judge

¶11 WE CONCUR:

Norman H. Jackson, Associate Presiding Judge
Judith M. Billings, Judge

1. At oral argument, Appellants cited *In re D.L.S.*, 332 N.W.2d 293 (Wis. 1983). The court in *In re D.L.S.*, however, merely applied the Wisconsin statutory requirements for voluntary relinquishment of parental rights, which include an explicit right to a jury trial if requested by the relinquishing parent. *See id.* at 296 n.5. *In re D.L.S.* does not stand for the proposition that due process requires a court to comply with Rule 11 in voluntary relinquishment cases.

2. Although a conclusion on the best interest of the children is included in the juvenile court's findings of fact, such a determination is "more properly labeled a conclusion of law." *In re S.L.*, 1999 UT App 390 at ¶30 n.6.

3. Rule 60(b)(6) is "sufficiently broad" to permit a court to set aside a judgment for ineffective assistance of counsel. *Stewart v. Sullivan*, 29 Utah 2d 156, 158, 506 P.2d 74, 76 (1973).

Cite as
417 Utah Adv. Rep. 4

IN THE
UTAH COURT OF APPEALS

Amanda THIMMES,
Plaintiff and Appellant,
v.
UTAH STATE UNIVERSITY, Haven B.
Hendricks, and John Does I-X,
Defendants and Appellees.

No. 991099-CA
FILED: 03/15/01
2001 UT App 93

First District, Logan Department
The Honorable Gordon J. Low

ATTORNEYS:
Randall K. Edwards, Salt Lake City, for
Appellant
Mark L. Shurtleff and Brent A. Burnett, Salt Lake
City, for Appellees

Before Judges Bench, Davis, and Thorne.

*This opinion is subject to revision before
publication in the Pacific Reporter.*

BENCH, Judge:

¶1 Appellant argues that the trial court erred when it granted Appellees' Motion to Dismiss after concluding that it lacked jurisdiction to hear the case because of Appellant's failure to properly serve a notice of claim on the Utah Attorney General. We affirm.

BACKGROUND

¶2 On March 17, 1997, Appellant was struck by a vehicle operated by Appellee Haven B. Hendricks, an employee of Appellee Utah State University. Appellant prepared a complaint against Appellees for damages resulting from the accident. Pursuant to the Utah Governmental Immunity Act, Appellant prepared two notices of claim to be served in accordance with Utah Code Ann. §63-30-12 (1997).¹ An employee of Appellant's attorney sent one notice of claim to Utah State University and called the

Office of the Utah Attorney General (Attorney General) to inquire as to whom the other notice should be sent. After being transferred, the employee spoke to an unidentified person who allegedly told her to send the notice to the Division of Risk Management. The employee mailed a notice of claim to the Division of Risk Management on February 6, 1998.

¶3 In January 1999, Appellant filed her complaint against Appellees in the First District Court. The Attorney General subsequently filed a Motion to Dismiss, alleging that the office had not been properly served with a notice of claim pursuant to section 63-30-12. The trial court held a hearing and granted the motion to dismiss. Appellant filed a motion to reconsider, which the trial court denied. This appeal followed.

ISSUE AND STANDARD OF REVIEW

¶4 The issue before us is whether the trial court properly dismissed Appellant's complaint after finding that she had not complied with the notice of claim requirements in section 63-30-12. "The grant of a motion for judgment on the pleadings is reviewed under the same standard as the grant of a motion to dismiss, i.e., we affirm the grant of such a motion only if, as a matter of law, the plaintiff could not recover under the facts alleged." *Straley v. Halliday*, 2000 UT App 38, ¶8, 997 P.2d 338 (quoting *Golding v. Ashley Cent. Irrigation Co.*, 793 P.2d 897, 898 (Utah 1990)). The grant of a motion to dismiss is thus a matter of law, which "we review for correctness." *Id.*

ANALYSIS

¶5 Appellant relies on *Bischel v. Merritt*, 907 P.2d 275 (Utah Ct. App. 1995) to support her contention that she complied with the requirements for filing a notice of claim. However, we conclude that the circumstances in *Bischel* are easily distinguished from this case. In *Bischel*, we recognized the established rule of strict compliance with the notice provisions of the Utah Governmental Immunity Act. *See id.* at 279. We also acknowledged ambiguities in Utah Code Ann. §63-30-11, -13 (1993) because they did not "prescribe a specific manner or method for filing notice with the governing body of the political subdivision." *Bischel*, 907 P.2d at 278. Specifically, we concluded that "direction and delivery of the notice must be inferred from the phrase, 'notice of claim is filed with the governing body of the political subdivision within one year after the claim arises.'" *Id.* (quoting Utah Code Ann. § 63-30-13 (1993)). Because the statute did not specify to whom *Bischel* was to direct her notice of claim, we concluded that she could rely on representations of an employee of the county attorney's office that she could direct her notice to that office. *See id.* In *Bellonio v. Salt Lake City Corp.*, 911 P.2d 1294 (Utah Ct. App. 1996) we explained the effect of *Bischel* on the general rule requiring strict compliance with the Governmental Immunity Act. We pointed to the unique factual circumstances of *Bischel* and said our decision in that case should not be viewed as an "abrogat[ion of] the long-standing rule requiring strict compliance with all aspects of the Governmental Immunity Act." *Bellonio*, 911 P.2d at 1297.

¶6 In this case, Appellant's claim is against the State, not the county. This case is therefore governed by

in part: "A claim against the state . . . is barred unless notice of claim is filed with the *attorney general and the agency concerned* within one year after the claim arises." *Id.* (emphasis added). Section 63-30-12 does not contain the same ambiguities as to whom the notice of claim should be directed as sections 63-30-11 and -13. An individual making a claim against the State need not infer which governmental entity should be served with notice--the statute gives explicit directions. Any confusion over who should receive the notice was created by Appellant when she elected to rely on advice from an unnamed state employee, rather than the plain language of the statute.

¶7 Appellant would also have us conclude that the Division of Risk Management is an office of the Attorney General because an assistant attorney general maintains an office there. However, in *Straley*, we recognized that while notice to the Division of Risk Management may be "sufficient to comply with . . . [the] requirement that the notice of claim also be filed with the agency concerned, . . . it cannot suffice for the Immunity Act's requirement that notice be filed with the Attorney General." *Straley*, 2000 UT App 38 at ¶16 n.9 (internal citation omitted) (emphasis added).

¶8 Finally, Appellant contends that this case falls within the exception to the general rule that "precludes the assertion of estoppel against the government." *Utah State Univ. v. Sutro & Co.*, 646 P.2d 715, 720 (Utah 1982). The exception to this general rule, however, applies only in cases where "the facts may be found with such certainty, and the injustice to be suffered is of sufficient gravity, to invoke the exception." *Id.* The exception requires "a high standard of proof" and has only applied in cases involving "very specific written representations by authorized government entities." *Anderson v. Public Serv. Comm'n*, 839 P.2d 822, 827 (Utah 1992). No written representation was involved in this case, and Appellant cannot even name the state employee on whose advice she relied. Appellant does not allege, and we can find no indication of, willful misconduct on the government's part nor an intent to hinder Appellant's pursuit of her claim. Thus, we conclude that Appellant falls far short of meeting the high standard of proof required for us to apply estoppel in this case.

CONCLUSION

¶9 Appellant has not presented sufficient evidence to justify her reliance on the advice of an unnamed state employee rather than the plain language of section 63-30-12. Appellant did not strictly comply with the notice requirements of section 63-30-12 because she failed to serve notice of her claim on the Attorney General within the specified time period. Therefore, the trial court lacked jurisdiction to consider Appellant's claim and we affirm the dismissal of her complaint.

Russell W. Bench, Judge

¶10 WE CONCUR:

James Z. Davis, Judge

William A. Thorne, Jr., Judge

1. At the time Appellant's claim arose, section 63-30-12 required that notice be served on "the attorney general and the agency concerned." Utah Code Ann. §63-30-12 (1997). Subsequently, section 63-30-12 has been revised to require that a notice of claim be served only on the Attorney General. *See* Utah Code Ann. §63-30-12 (Supp. 2000).

Cite as
417 Utah Adv. Rep. 6

IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE of Utah,
Plaintiff and Appellee,

v.

ONE 1980 CADILLAC and Three Thousand, Six
Hundred, Seventy Six Dollars U.S. Currency,
Defendant,
Rick Dee Keebler,
Appellant.

No. 990382
FILED: 03/16/01
2001 UT 26

Sixth District, Sevier County
The Honorable David L. Mower

ATTORNEYS:

R. Don Brown, Richfield, for plaintiff
Rick Dee Keebler, Leavenworth, Kansas, pro se

*This opinion is subject to revision before final
publication in the Pacific Reporter.*

DURHAM, Justice:

¶1 Appellant Rick Dee Keebler ("Keebler") appeals pro se from the trial court's judgment, pursuant to the Utah Controlled Substances Act, Utah Code Ann. §58-37-13(1998), ordering forfeiture of his 1980 Cadillac and \$3676 in United States currency to the State of Utah. We affirm.

BACKGROUND

¶2 On September 20, 1994, while driving a 1980 Cadillac in Sevier County, Utah, Keebler was stopped by the Utah Highway Patrol for a traffic offense. A search of the vehicle revealed that Keebler was transporting large quantities of controlled substances, including methamphetamine, cocaine, heroin, and marijuana. The officer arrested Keebler and seized the 1980 Cadillac and \$3676 cash found in Keebler's possession. Keebler was subsequently charged and convicted under federal drug charges. Throughout this litigation, he has been incarcerated and continues to serve as an inmate in federal prison.

¶3 On September 30, 1994, the State of Utah filed a complaint and notice of seizure and forfeiture in the Sixth Judicial District Court in Sevier County. In the complaint, the state alleged that the 1980 Cadillac and the \$3676 were being used or intended for use to facilitate the transportation, receipt, possession, and/or concealment of illegal narcotics in violation of the Utah Controlled Substances Act. Therefore, the state urged forfeiture of Keebler's property. Keebler answered the complaint and denied the state's

allegations.

¶4 No further action was taken in this matter until May 27, 1998, when the state moved for summary judgment. After Keebler opposed the motion, the trial court denied summary judgment because the use of the seized currency was in dispute. Subsequently while still incarcerated, Keebler moved for final disposition of the matter.

¶5 A scheduling conference was held on December 8, 1998, at which Keebler appeared via telephone. At that time, the court scheduled a bench trial for March 23, 1999. About one month before the scheduled trial date, Keebler petitioned the trial court for an order requiring the State of Utah to bear the cost of transporting him to appear and testify at the trial. However, the trial court did not act on the motion and the bench trial was held as scheduled. Keebler, still incarcerated, was not present or represented at the trial.

¶6 After trial, the court made findings of fact that at the time of Keebler's arrest, he possessed and was transporting large quantities of narcotics for illegal distribution, including 8 pounds of methamphetamine, 1 kilogram of cocaine, 5 ounces of heroin, and 11.5 pounds of marijuana. The trial court found that Keebler actually admitted his intent to break the narcotics down into small quantities and sell them illegally for an anticipated return of \$175,000. In addition, the trial court found that Keebler admitted he had previously purchased and distributed for profit other illegal narcotics, including 2 pounds of methamphetamine, 1 kilogram of cocaine, 2 ounces of heroin, and 6 pounds of marijuana. Based on these findings of fact, the court concluded that the 1980 Cadillac was being used to transport narcotics and that the currency constituted proceeds of narcotics distribution in violation of the Utah Controlled Substances Act. The trial court ordered that the 1980 Cadillac and the \$3676 be forfeited to the state.

¶7 On appeal, Keebler raises three claims of error. He argues that (1) the trial court's judgment constitutes double jeopardy because Keebler's conviction on federal drug charges is based on the same conduct relevant to the forfeiture proceeding; (2) the trial court's judgment violates Keebler's right to due process of law because the state did not bear the cost of transporting him to Utah to appear at the trial and did not appoint counsel to represent him; and (3) the trial court did not have subject matter jurisdiction in the forfeiture proceeding because Keebler was convicted under federal jurisdiction and was not charged under the Utah Controlled Substances Act.

STANDARD OF REVIEW

¶8 The trial court's judgment contained no express conclusions of law with regard to Keebler's claims of error. However, the inference inherent in the judgment is that the trial court found no merit to Keebler's constitutional and jurisdictional arguments. Keebler's constitutional arguments regarding double jeopardy and due process present questions of law. *State v. One Hundred Seventy-Five Thousand, Eight Hundred Dollars, United States Currency, and One Scale*, 942 P.2d 343, 346 (Utah 1997) (citing *Ryan v. Gold Cross Servs., Inc.*, 903 P.2d 423, 424 (Utah 1995)). Subject matter jurisdiction is also a question of law. *Barnard v. Utah State Bar*, 857 P.2d 917, 915 (Utah 1993) (citing *Scharf v. BMG Corp.*, 700 P.2d