

2000

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

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 APPELLANTS

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

FILED
UTAH SUPREME COURT

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CLERK OF THE COURT**

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LIST OF ALL PARTIES

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

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STATEMENT OF JURISDICTION

This court has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(J)(1996).

ISSUE FOR REVIEW

Did the trial court error in granting defendants' motion to dismiss on the grounds that plaintiffs had failed to give adequate notice under the Governmental Immunity Act. This issue was preserved by virtue of the motion, memoranda, and order of dismissal on the issue. (R. 20, 22, 32, 83, and 166).

STANDARD OF REVIEW

A trial court's grant of a dismissal for failure to comply with the notice requirements of the Governmental Immunity Act is a conclusion of law which is reviewed for correctness, giving no deference to the trial court's decision. Rushton v. Salt Lake County, 1999 UT 36, ¶ 17, 977 P.2d 1201; Larson v. Park City Mun. Corp., 955 P.2d 343, 345 (Utah 1998). See also Brittain v. State, 882 P.2d 666, 668 (Utah App. 1994).

DETERMINATIVE STATUTES AND CASES

Utah Code Ann. § 63-30-11 and 63-30-13 are implicated in this matter and therefore are reproduced in their entirety in Addendum A to this brief.

The following cases have previously addressed this issue in Utah and must be

considered in this present appeal. Rushton v. Salt Lake County, 1999 UT 36, ¶ 17, 977 P.2d 1201; Moreno v. Board of Educ. of Jordan School Dist., 926 P.2d 886 (Utah 1996); Stahl v. Utah Transit Authority, 618 P.2d 480 (Utah 1980); Scarborough v. Granite School Dist., 531 P.2d 480 (Utah 1975); Bellonio v. Salt Lake City Corp. 911 P.2d 1294, 1297 (Utah App. 1996); Bischel v. Merritt, 907 P.2d 275 (Utah App. 1995); Brittan v. State, 882 P.2d 666 (Utah App. 1994). Copies of these cases are attached hereto in Addendum B.

STATEMENT OF THE CASE

This action arises out of a motor vehicle accident which occurred on September 27, 1998.¹ (R. 1). The accident occurred in Kane County, but the lawsuit was transferred to Washington County because the defendant Mark McPherson was an employee of Kane County and Kane County was a named party. Plaintiffs' complaint alleged that McPherson operated his motor vehicle into a motor vehicle being driven by Dale Wheeler, the husband of the plaintiff Mary Wheeler. Mrs. Wheeler and Ms. Srbova were occupants of Mr. Wheeler's vehicle. Plaintiffs complained that defendant McPherson failed to maintain proper control of his vehicle, failed to maintain a proper lookout and failed to yield to on-coming traffic and was otherwise negligent.

As a result of the accident, plaintiffs claimed to have incurred special damages

¹For the purposes of a motion to dismiss, this court must take the allegations of plaintiff's complaint as true. Harmon City, Inc. v. Nielsen & Senior, 907 P.2d 1162, 1167 (Utah 1995).

including medical expenses in excess of \$3,000.00, as well as loss of income. Plaintiffs also pled for general damages. Plaintiffs maintained that as a direct approximate result of the defendants' negligence that defendants caused plaintiffs permanent impairment, permanent disability and loss of earning capacity. Plaintiffs alleged that defendant McPherson was at all relevant times an agent and employee of Kane County acting in the scope of that agency and employment.

Prior to the complaint being filed September 27, 1999, Plaintiffs had filed a notice of claim with the Kane County Board of Commissioners by sending a notice on February 11, 1999, to each and every commissioner individually, as well as to the insurance carrier which insured Kane County.² See notices of claim attached in Addendum C (R. 64-69). Thus, the notices of claim were submitted to the governing body of Kane County less than five months after the accident occurred and seven months prior to any required notice of claim being required. The notices were sent to the Kane County offices and received by the county clerk's office. Holly Ramsay, an employee of the Kane County Clerk's office, signed for the certified notices. (R. 71-72). Later, Ms. Ramsay would file the only affidavit in support of defendants' motion stating that no notices were "filed" with the Kane County Clerk. The affidavit does not state that no notices were delivered to the

²Prior to 1998, the proper persons upon whom a notice of claim could be served were the County Commissioners, as the governing body of Kane County. Yates v. Vernal Family Health Ctr., 617 P.2d 352 (Utah 1980). Utah Code Ann. § 63-30-11 was amended and the amendment became effective in May of 1998. Section 63-30-13 still requires notice to be filed "with the governing body," according to the requirements of §63-30-11.

Kane County Clerk's office, as Ms. Ramsay's signature on the return slips would clearly rebut such an assertion.

Subsequent to the notices of claim being submitted, a Kane County commissioner contacted plaintiffs' counsel and discussed the submission of the notices of claim and asked particularly concerning the demands of plaintiffs. Mr. Peatross, plaintiffs' attorney, indicated that the matter should be submitted to Kane County's insurance carrier. See Affidavit of Mr. Peatross R. 58). In a letter dated March 8, 1999, an attorney who had been retained by Kane County, Ms. Hutton, acknowledged receipt of the notices of claim and requested further information regarding plaintiffs' injuries and submitted to plaintiff a consent to release medical information. The letter did note: "Please be advised this does not constitute an acceptance or denial of the 'notice of claim,' nor does it confirm or verify the sufficiency of the claimants' notice of claim as required by the governmental immunity act, Utah Code Ann. § 63-30-1 et seq." See letter of Ms. Hutton attached hereto as Addendum D.

In a subsequent letter of March 20, 1999, Collin R. Winchester, the Kane County Attorney, wrote Mr. Peatross and indicated the claim had been turned over to adjusters who had in turn retained Ms. Hutton. The March 20, 1999 letter indicated: "Please direct all other communication and correspondence to Ms. Hutton." See attached letter attached as Addendum E. All communication with Kane County from that time forward was directed to Ms. Hutton per Kane County Attorney Winchester's request. (R. 60).

Course of Proceedings. Plaintiffs filed their complaint on September 27, 1999, one day before any notice of claim would have been required. Plaintiff's complaint was answered by Kane County. Defendant then served upon Plaintiffs a set of interrogatories, after which six subpoenas for medical records, as well as corresponding notices of records depositions were served upon defendant.

On March 16, 2000, defendants filed a motion to dismiss upon the basis that the trial court lacked jurisdiction as the plaintiff had failed to comply with the requirements of Utah Code Ann. § 63-30-11(3)(b)(ii)(B)(1998). The motion was supported by the affidavit of Holly Ramsay. Defendants filed a memorandum in support of the motion to dismiss (R. 22). In opposition, Plaintiff's filed a memorandum in opposition to the motion (R. 32), as well as a Rule 56 (f) affidavit seeking further discovery (R. 30). Defendants thereafter responded with a reply memorandum (R.87), as well as a memorandum in opposition to rule 56 (f) affidavit. (R.83).

A hearing was held on this matter August 10, 2000, whereupon the court granted the motion. An order thereon was filed August 28, 2000. (R. 166) Notice of appeal was thereafter filed on September 8, 2000 (R. 170).

SUMMARY OF THE ARGUMENT

Plaintiffs fulfilled the purpose of the notice of claim requirements. There is no question but that the notice of claim was received by those exercising the function of adjusting and litigating the claims against Kane County. The notice was timely, proper as

to form, and delivered to the Kane County Clerk's office. Thereafter, within the purview of his duties and with the authority vested in him as Kane County Attorney, Carl Winchester expressly directed that any and all communication or correspondence should be directed to attorney Hutton, who had been retained to defend the county. As the record before the Court shows, Ms. Hutton had in fact received the notice of claim as of that time. As a result, plaintiffs were secure in their belief that the notice of claim resided with the proper authority to investigate and adjust the claim.

Utah appellate courts have stated that in interpreting the notice requirements of the Utah Governmental Immunity Act, the statute will be interpreted consistent with the overall purpose of the act itself. The primary purpose of the notice and claim requirement is to afford the responsible public authorities an opportunity to timely investigate, and if appropriate, settle claims brought against governmental entities. That purpose was clearly fulfilled under the present circumstances as the notice of claim was filed well before the one year deadline for filing the claim. However, the county attorney acknowledged receipt of the same and directed all further correspondence to go to Ms. Hutton. The purposes of the notice of claim requirements had therefore been fulfilled.

This conclusion is supported by a decision of the Utah Court of Appeals in Bischel v. Meritt, 907 P.2d 275 (Utah App. 1995) wherein a plaintiff called the county attorney's office and was told to send her notice of claim to that office. The plaintiff in Bischel followed the instruction of the county attorney's office, but when the lawsuit was

brought, the county moved to dismiss because the notice of claim had not been served upon the county commissioners. The Utah Court of Appeals reversed the trial court's dismissal and found that the notice of claim to the county attorney was valid. The Court of Appeals based this decision, in large part, on the significant fact that the attorney in the county attorney's office had verified her apparent authority to receive the notice on behalf of the county commission. Plaintiffs ask this court to affirm the reasoning of Bischel and apply that reasoning to the present case.

The present circumstances, as well as applicable law, show that the County Attorney is empowered to act on behalf of the county, particularly in the defense of claims made against the county. As such, the fact that the County Attorney indicated that all further correspondence and communication should go through Ms. Hutton, coupled with the fact plaintiffs knew that Ms. Hutton already possessed the notice of claim and had requested further information, leads to a conclusion that the notice of claim was effectual in this case.

Further, the plaintiffs maintain that additional discovery should have been allowed pursuant to Utah Rules of Civil Procedure 56(f). It is universally held that when matters outside the pleadings are considered in a motion under Rule 12 of the Utah Rules of Civil Procedure, the motion is properly treated as one for summary judgment under Rule 56. Plaintiff's motion to dismiss was supported by an affidavit. The defendant's opposition was likewise supported with an affidavit. As a result, the trial court considered matters

outside the pleadings, yet the trial court would allow no discovery pursuant to Rule 56(f). In this regard, the trial court abused its discretion. Plaintiffs Rule 56(f) affidavit spells out clearly the discovery plaintiffs wished to pursue. Since Ms. Ramsay signed for the notices of claim, plaintiffs should be allowed to discover exactly what she did with them. The only remedy for the court at this point is to reverse the dismissal and remand the case back to the district court in order for this discovery to ensue.

Finally, plaintiffs maintain that this court should take this opportunity to align Utah's law with those state jurisdictions which require "substantial compliance" with notice of claim requirements, instead of "strict compliance." Public policy stands in favor of allowing citizens to bring claims against the government where the government has acted in a tortious manner. Plaintiffs acknowledge that limitations must be set on the public's abilities to bring claims, but the finality sought to be created by the notice of claim requirements can be fulfilled by requiring strict compliance with the timing provisions of a notice of claim, but allowing for substantial compliance as to the form of the notice and its delivery.

The trial court erroneously concluded as a matter of law that the notice of claim was defective. Therefore, this court must reverse.

ARGUMENT

I. PLAINTIFFS FULFILLED THE PURPOSE OF THE NOTICE OF CLAIM REQUIREMENTS; DEFENDANTS ARE ESTOPPED FROM RAISING THE NOTICE OF CLAIM ISSUE

Plaintiffs delivery of the notice was legally sufficient. The facts and circumstances of this case indicate that defendant should be estopped from asserting the failure to file the notice of claim with the county clerk. The real claim of the defendants is that the claim was not directed to the County Clerk. The record indicates that the notices were in fact received in the County Clerk's office by an employee of the County Clerk. There is no question but that the notice of claim was received by those with exercising function of adjusting and litigating claims against Kane County. Moreover, under the actual or apparent authority of his position as Kane County attorney, Carl Winchester expressly directed the plaintiff's to direct all further communication and correspondence to an attorney who had been hired by the county's insurer. This all inclusive statement would encompass any notice of claim. Thus, the continuing activities of the defendants in the following many months prior to the expiration of time for the notice of claim to be filed, and the information forwarded, clearly constituted a proper notice of claim. Even if such did not constitute as proper notice, the activities and representation of Mr. Winchester lead to the conclusion that defendants should be estopped from asserting the notice of claim requirements as being fatal to plaintiff's claims.

Utah appellate courts have explained that interpreting the notice of requirements the Utah governmental immunity act they will do so in a manner consistent with the overall purpose of the act itself. Brittian v. State by and through Utah Department of

Employment, 882 P.2d 666, 670 (Utah App. 1994). This court recently explained that a notice of claim provides the entity sued with the factual details of the incident and provides the governmental entity “an opportunity to correct the condition that caused the injury, and perhaps settle the matter without the expense of litigation.” Rushton v. Salt Lake County, 1999 UT 36, ¶ 20, 977 P.2d 1201 (quoting Larson v. Park City Mun. Corp., 955 P.2d 343, 345 (Utah 1998)).

As explained by the Utah Supreme court, “[I]t is necessary to consider the policy of the notice requirement so that in any particular case the facts may be evaluated to determine that the intent of the statute has been accomplished.”

Brittian, 882 P.2d 666, 670.

The Brittian court, citing the Utah Supreme Court, explained the purpose of the notice of claim requirement.

[T]he primary purpose of the notice claim requirement is to afford the responsible public authorities an opportunity to pursue a proper and timely investigation of the merits of a claim and to arrive at a timely settlement if appropriate thereby appointing the expenditure of public revenue for costly and unnecessary litigation.

Brittian, 882P.2d at 671. In finding that the plaintiff in Brittian had fulfilled the notice of claim requirements by filing a notice of claim with the division of risk management,³ which agency had the responsibility to adjust the claim, the court concluded:

Considering the duties delegated to Risk Management, it appears the state entity

³ Brittian was decided under a predecessor statute.

entrusted with investigating and settling or defending the claim received the requisite notice in a timely manner and well within the one year period imposed by the statute. Filing notice with Risk Management in no way inhibited the possibility of settling the claim without resort of litigation. In fact, given the powers and responsibility the legislature has bestowed upon risk management, the opposite is true. Filing notice with Risk Management facilitated settlement discussion by providing notice to the agency responsible for investigating and settling the claim.... Indeed, the record indicates that Risk Management activity pursued settling Brittian's claim.

In the present matter, the exact same factual scenario is presented. The letters by Mr. Winchester and Ms. Hutton point out that Ms. Hutton was delegated the duty of investigating or settling or defending the claim which had been received by virtue of the notice of claim filed with the county commissioners. Filing the notice with the county commissioners has in no way inhibited the possibility of settling the claim without resort to litigation. Instead, Ms. Hutton attempted to verify the claim by the submission of the consent to the release of medical records. All of the activities occurred in the months before the notice was due. Thus, the agents for Kane County actively pursued investigating and settling this claim.

The holding of Brittain obtains here. As the plaintiff in Brittian had timely filed the notice of claim, the Brittain court only required substantial compliance with the statute as to the notice's delivery. Such substantial compliance meets all of the goals of the Governmental Immunity Act. The correct entity had an opportunity to investigate the claim. That entity could thereafter adjust and settle the claim.

The case of Stahl v. Utah Transit Authority, 618 P.2d 480 (Utah 1980) buttresses

the position that the notice of claim in this matter was satisfactory. In Stahl, the plaintiff was rear ended by a UTA bus. The same day as the accident, plaintiff was contacted by the insurance adjuster for the insurance carrier for UTA.

He obtained a statement from her concerning the accident and wrote a two page report based on her answers to his inquiries. Vance also had Plaintiff sign a statement and medical information release allowing her physical physician to disclose information to him.

Stahl, 618 P.2d at 480. Based upon this statement alone and the medical releases, the Utah Supreme court held that a proper notice of claim had been made.

When the plaintiff in Stahl brought the lawsuit against UTA, UTA argued that the plaintiff had not brought her claim within the then applicable 30 day period. However, the Utah Supreme Court in Stahl found that: “There was substantial compliance with the 30 day notice provision and defendant was in no way prejudiced by plaintiff’s failure to comply with the formality of filing a claim.” Id at 42. So holding, the Stahl court found the insurance agent was authorized by law to handle the approval and denial of plaintiff’s claims, thus representing the interests of the government. The court found that the insurance adjuster’s actions in obtaining a signed statement of the plaintiff’s version of the accident were for all practical purposes the acts of the UTA. Under these facts, the Utah Supreme court held: “Clearly there was substantial compliance with the notice of claim provision. No undue hardship resulted from the notice being given to an agent of

the party named in the statute.” Id.⁴

With approval, the Stahl court reviewed the Pennsylvania case of Badger v. Upper Darby Township, 348 Pa. 551, 36 A.2d 507 (1944) where plaintiff’s counsel, within the prescribed period, gave written notice to the insurance carrier for the defendant Township rather than the clerk or secretary of such municipality, as required by statute. In allowing the plaintiff to maintain the action even in light of this failure, the Badger court held:

In determining, in its discretion, whether a failure to file a notice prescribed by the act should be excused, a weighty circumstance could be considered by the court as whether or not the municipality has suffered any undue hardship. Here there is nothing to indicate that it did so suffer. Of controlling importance is the fact that within the prescribed period the insurance company was notified that the claim was being made, was furnished with the essential facts regarding the accident, and, by designating a physician to examine the plaintiff apparently admitted its responsibilities to investigate the claim. If, as would appear, the insurance the company is the real party in interest a decision denying plaintiff the right to prosecute a claim because of failure to give written notice to the township would be one of sure literalism, for had such notice been given, the township would undoubtedly, in due course, have turned it over to the company to which plaintiff’s counsel had sent it in the first instance. It is no unusual for lawyers representing claimants in accident cases to communicate with insurance companies directly rather than with defendants, since the former control negotiations for settlement and prepared the defense in case of litigation.

Id at 508-09.

In the present circumstances the applicability of this reasoning is even more plain.

⁴Plaintiff recognizes that the Stahl court attempted to distinguish the Transit Act from the Governmental Immunity Act at issue here. However, plaintiff maintains that the distinction does not survive scrutiny and that the underlying holding of the Stahl court obtains here.

The governmental entity in the present circumstances has not claimed any undue hardship. In fact, the record is clear that the claim in this matter was made months before the notice of claim was even required. The lawsuit was filed on the one year anniversary of the accident date. Clearly, Ms. Hutton, representing Kane County and its insurer, admitted her responsibility to investigate the claim by the letter of March 8, 1999. Even more importantly, the Kane County attorney by his letter of March 20, 1999 indicated that “All further communication and correspondence” should be referred to Ms. Hutton. In other words, from that point on, the county had designated Ms. Hutton for the receipt of any notice whatsoever. It would be an inequitable conclusion and unjust for this court to hold that plaintiffs could not rely on the county attorney himself or other representatives of the county.

The case of Bischel v. Merit, 907 P.2d 275 (Utah App. 1995) leads to a similar conclusion. In Bischel, a plaintiff was uncertain where a notice of claim should be filed. The plaintiff called the county offices and was told to send the notice to a specific attorney at the county attorney’s office. The plaintiff then called the county attorney to confirm the instruction. The notice was sent by certified mail to the county attorney. However, when the action was brought, the county moved to dismiss the case based on the single fact that the notice was addressed to the county attorney instead of the county commission.

The court of appeals reversed the trial court and found the notice of claim to the

county attorney was valid. The court of appeals based its decision, in large part, on the significant fact that the county attorney verified her apparent authority to receive the notice on behalf of the county commission. Bischel, 902 P.2d at 278. Plaintiffs ask this court to affirm the reasoning of Bischel and apply that reasoning herein. In the present action, with the clear authority of Kane County, Kane County's attorney, Mr. Winchester directed that all further communications and correspondence should be made to Ms. Hutton. Ms. Hutton had already acknowledged the receipt of the notice of claim. Accordingly, plaintiffs knew that the notice of claim was already in possession of that person who should have the notice of claim according to the county attorney Mr. Winchester.

The notice provided by plaintiffs in the present action gave Kane County ample opportunity to investigate and negotiate the claims. The Bischel court concluded in that case: "Bischel thus fulfilled the purpose of the notice requirement by filing the notice of her claim with the designated person in the county attorneys office." Id 278. In the present circumstances, plaintiffs have fulfilled the notice requirements by filing the notice with the county commissioners and by further following the instructions of the Kane County attorney that all further communication and correspondence be referred to Mr. Hutton.

The Bischel court concluded:

Considering the duties and authority delegated to the County Attorney's Office, it is evident that the governmental entity entrusted with

investigating and settling or defending the claim received the requisite notice well within the one year period imposed by the statute. Directing and delivering her notice of claim to the County Attorney's Office in no way inhibited settling Bischel's claim without resort of litigation. In fact, given the powers and responsibilities the County has bestowed upon the County Attorney's Office, the opposite is true. See Id at 672. Filing notice with the County Attorney's Office facilitated settlement discussion. Indeed, the County Attorney's Office actively pursued settlement of Bischel's claim, even paying her property damage.

Id at 278-79. Likewise, in the present circumstances, directing the notice to the county commissioners in no way inhibited the settlement of plaintiffs' claim without resort to litigation. The county attorney turned the entire matter over to its insurance company, which in turn turned it over to its current attorneys months before any notice of claim was required. Those attorneys followed up on receiving supplemental information regarding the claim. In the final analysis, once the Kane County attorney directed that all further communication and correspondence go through Ms. Hutton, no further claims or notice were required.

Applying estoppel in a notice of claim situation is not new to this court. In Rice v. Granite School Dist., 23 Utah 2d 22, 456 P.2d 159 (Utah 1969) this court held that a school district was estopped to assert a statute of limitations where a claimant had been induced to non-action by the representations of an adjuster of the school district's insurer. This court held that a material issue of fact precluding summary judgment existed as to the application of the facts to the issue of estoppel. Accordingly, the matter was remanded to the trial court.

Again, in the present matter, plaintiffs reasonably relied upon the representation of the Kane County Attorney as to the person who needed to possess the notice of claim, Ms. Hutton. As stated, Ms. Hutton had already confirmed her possession of that same notice of claim.

Accordingly, the trial court erroneously concluded that plaintiff had failed to fulfill the purpose of the notice of claim requirements.

The County Attorney had the authority, real or apparent, to confirm the person to possess and act upon the notice of claim. The Kane County attorney had authority to direct plaintiffs to direct all communication to Ms. Hutton. Once again, the case of Bischel v. Merritt, 907 P.2d 275 (Utah App. 1995) is instructive. In Bischel, the plaintiff sent a notice of claim to the County Attorney's Office as instructed by the County Attorney's Office. In deciding the notice of claim was sufficient under those circumstances, the Utah Court of Appeals stated: "Considering the duties and authority delegated to the county attorney's office, it is evident that the governmental entity entrusted with investigating and settling or defending the claim received the requisite notice well within the one year period imposed by the statute." Id. at 278. The Court of Appeals noted that in Bischel the court was not faced with a case where the plaintiff had given no notice, or where the notice of claim was defective in its form or content, or where the notice had not been filed within one year. The Bischel court concluded: "It appears at best disingenuous for the county to argue that Bischel's notice was inadequate

merely because she directed and delivered it at the county commission and the county attorney's office as instructed. The public deserves more consistent, more credible treatment from its servants."

This holding is in concert with this court's recent ruling in Salt Lake County Commission v. Salt Lake County Attorney, 1999 UT 73, ¶¶ 17 and 19, 985 P.2d 899 where this court unequivocally stated that the county attorney represents the entity of the county. The county attorney acts as the attorney for the county. This conclusion finds support in Utah's statutes. Whether a county attorney acts in a prosecution district or in a county which is not in a prosecution district, a county attorney is charged to "defend all actions brought against the county." See Utah Code Ann. § 17-18-1(7)(a)(1995) and §17-18-1.5(5)(a)(1997). Further, Utah Code Ann. §17-18-2 (1993) provides: "The county attorney is the legal adviser of the county. He must attend meetings of the county legislative body when required, and must oppose all claims and accounts against the county when he deems them unjust or illegal." Thus, the Kane County Attorney, Mr. Winchester, clearly had the statutory authority to direct plaintiffs that all communications and correspondence should go to Ms. Hutton.

Even if the county attorney did not have statutory authority, his apparent authority was clear. The position of the county attorney creates an appearance which would direct any person to reasonably believe that the county attorney had authority to act on the county's behalf. Therefore, although actual authority is self-apparent in the present

matter, in any event the county attorney had apparent authority for his direction. See Zions First Nat'l Bank v. Clark Clinic Corp., 762 P.2d 1090, 1095 (Utah 1988); Walker Bank & Trust Co. v. Jones, 672 P.2d 73,75 (Utah 1983). Accordingly, plaintiffs acted reasonably and in reliance upon the county attorney when faced with facts and circumstances where the county attorney had directed all communication and correspondence be sent to Ms. Hutton and Ms. Hutton had already confirmed to plaintiffs that she possessed the actual notice of claim itself. As a result, the trial court should have concluded that the notice of claim was proper. Therefore, the trial court must be reversed.

II. ADDITIONAL DISCOVERY SHOULD HAVE BEEN ALLOWED PURSUANT TO UTAH RULE OF CIVIL PROCEDURE 56(f).

It is universally held 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. Thayne v. Beneficial Utah, Inc., 874 P.2d 120 (Utah 1994); Lind v. Lynch, 665 P.2d 1276 (Utah 1983). In fact, in Shunk v. State, 924 P.2d 879 (Utah 1996) this court reviewed a governmental immunity case where matters were examined outside the pleadings and therefore the motion was decided under Rule 56.

Defendants' motion to dismiss in the present circumstances was supported by an affidavit, as was plaintiffs' opposition. Accordingly, the trial court of necessity considered matters outside the pleadings. As a result, the present motion is one which was considered under rule 56. Pursuant to rule 56(f) plaintiffs filed an affidavit seeking

further discovery which was denied by the trial court. Plaintiffs should be allowed additional discovery to investigate the full extent of Kane County's receipt of the notice of claim. While the affidavit of Holly Ramsey does state that neither Mary Wheeler nor Petra Srbova filed notices of claim with the Kane County Clerk on or before September 27, 1999, the affidavit does not set forth that the County Clerk did not in fact receive the notice by some other means. Discovery on this issue should be allowed. As such, plaintiffs wish to obtain a full and complete claim file held by defendants in this matter, including all correspondence between Kane County and their attorneys. Plaintiffs need to see any documentation or reports generated by Kane County, or its insurer. Most importantly, plaintiffs wish to depose Ms. Ramsay.

Therefore, based upon the rule 56(f) affidavit previously filed, the motion to dismiss should not have been granted, but discovery should have been allowed to proceed. The only remedy for this court at this point is to reverse the dismissal and remand the case back to the district court for this discovery to ensue.

III. ONLY SUBSTANTIAL COMPLIANCE SHOULD BE REQUIRED AS TO THE DELIVERY OF A NOTICE OF CLAIM.

Judge Orme of the Utah Court of Appeals recently noted:

Significantly, the rule requiring "strict compliance" with the notice requirements of the Governmental Immunity Act does not come from the language of the act itself. See Utah Code Annotated Sections 63-30-1 to 38 (1997 and Supp. 2000). Instead, the "strict compliance" standard was first applied to Utah's Governmental Immunity Act by the Utah Supreme Court in Scarborough v. Granite School District, 531 P.2d 480, 482 (Utah 1975). This shift in Moreno from a blanket "strict compliance" standard for

notices of claim to more of a “substantial compliance” standard, at least in certain situations, is fully consistent with the more charitable view taken in many other jurisdictions, which require only substantial compliance with the state’s governmental immunity statute. See, e.g. Brasher v. City of Birmingham, 341 So.2d 137, 138 (Ala.1976); Woodsmall v. Regional Trans. Dist., 800 P.2d 63,69 (Colo. 1990) (en banc); Washington v. City of Columbus, 222 S.E.2d. 583, 589 (Ga. Ct. App. 1975); Vermeer v. Sneller, 190 N.W.2d 389, 394 (Iowa 1971); Carr v. Town of Shubuta, 733 So.2d 261,263 (Miss. 1999).

Great West Cas. v. Utah Dept. of Trans., 2001 UT App 54, ¶ 15 note 6, 415 Utah Adv.

Rep. 26. In Moreno, this court found a notice of claim “legally sufficient” where a guardian of a child “mistakenly assumed” they would be the beneficiaries of a wrongful death action regarding a minor decedent. This court allowed the notice of claim where plaintiff acted upon advice of counsel and “in good faith.” Moreno v. Board of Educ. of Jordan School Dist., 926 P.2d 886, 892 (Utah 1996). A copy of the Moreno decision is attached hereto in Appendix B.

As Judge Orme recognized, the strict compliance requirement is a creation of this court. Utah Code Annotated Section 63-30-11(2) provides:

Any person having a claim for injury against a governmental entity, or against its employee for an act or omission occurring during the performance of the employee’s duties, within the scope of employment, or under color of authority, shall file a written notice **with the entity** before maintaining an action, regardless whether or not the function giving rise to the claims is governmental.

(emphasis added). Thus, the heart and soul of the Governmental Immunity Act’s governmental notice of claim requirements is that a notice of claim be filed with the

entity.⁵ In the present circumstances, there is no question but that the notice of claim was filed with the entity. The present dispute arises in the next subsection which requires:

The notice shall be:

(ii) directed and delivered to: . . .

(B) the county clerk when the claim is against the county [.]

Utah Code Ann. § 63-30-11(3)(b)(ii)(B)(1998).

In the present circumstances, the notice of claim requirement has been fulfilled because the entity received the notices and it had been delivered to that person the county designated as the direct repository for notice of claims for this claim. However, this court should take this opportunity to modify its standard as to notices of claim to a “substantial compliance” standard instead of “strict compliance” so far as form of the notice and its delivery are concerned. As long as the purpose and intent of subsection (2) of § 63-30-11 is met, that is, the entity has received the claim, the notice of claim should be found effective if it otherwise substantially meets the notice requirements and is timely.

In fact, long ago this court essentially applied the substantial compliance standard

⁵Before the trial court below defendants cited the court to Bellonio v. Salt Lake City Corp., 911 P.2d 1294 (Utah App. 1996). A copy of Bellonio is attached in Appendix B. Bellonio upheld the dismissal of a claim where a notice of claim had been presented to the wrong **entity**. This court characterized the holding of Bellonio as: “dismissing action by pedestrian injured in airport parking terrace for failure to serve governing body of city.” Thus, Bellonio’s facts are readily distinguishable from the present case. Here, the correct entity received the notice, acknowledged that receipt, and gave direction concerning the notice.

to a notice of claim issue in Spencer v. Salt Lake City, 17 Utah 2d 362, 412 P.2d 449 (1966). A copy is attached hereto in Appendix B. In Spencer, a plaintiff had fallen on an allegedly defective sidewalk. At that time, Utah Code Ann. § 10-7-77 (1953) required a person to file a claim within 30 days of the injury. Although the claim was filed within 30 days, the trial court dismissed the action because the notice did not state the amount of damages claimed. The Spencer court noted:

There is a wide difference between presenting no claim at all and presenting one of the kind shown here which evidently fulfills the main purpose of the statute: of giving the City the essential facts as soon as reasonably possible after the injury so that it will have ample opportunity to make a proper investigation.

Id. at 450. The Spencer court then held:

Inasmuch as the plaintiff filed the claim within the 30 days allowed by statute, the claim was sufficient to constitute **substantial compliance** with the statute and apprise the City of the essentials thereof, it is our opinion that the dismissal was in error.

Id. (emphasis added). This court should reaffirm this holding and clarify that jurisdictionally a trial court cannot entertain an action against a governmental entity where no notice of claim was filed or where the notice is simply untimely. However, where a notice is timely submitted, the notice of claim should suffice if the claimant substantially complies with the form and delivery requirements of the statute. Such a conclusion would be in concert with the reality of the modern relationship between the government and its citizens.

As Judge Orme noted:

Aside from the niceties of prior case law adopting and reiterating a “strict compliance” standard found nowhere in the governing statute, if a technically deficient notice of claim nonetheless does what such a notice is designed to do and provides the State with enough information to become aware of the incident, conduct an investigation, and make an informed decision about its liability, the State should not be so quick to hide behind the cloak of “sovereign immunity.” That doctrine arose when the monarch was rather antagonistic to his subjects and wished to insulate the treasury from the just claims of the peasantry, who were expected to embrace the fiction that “the King can do no wrong.” We know better now, and in modern America, where the state enjoys a much more benevolent relationship with its citizens and has a more realistic view of its own fallibility, the enlightened sovereign should be willing to accept responsibility for its negligence when the deficiencies in a notice of claim do not actually prejudice its ability to investigate a claim, evaluate its merit, and resolve it in timely fashion. Such 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 v. Utah Department of Transportation, 2001 UT App 54, ¶ 18, 415

Utah Adv. Rep. 26. While Judge Orme’s sentiments concerning the realities of a strict compliance standard are accurate, an adjustment of the philosophy should come from this court. The Utah Court of Appeals was compelled to follow this court’s established rule of strict compliance. However, where the genesis of the strict compliance rule is found in this court’s jurisprudence, and not in the statute at issue, this court should review the application of the strict compliance standard.

Public policy stands in favor of allowing citizens to bring claims against the government where the government has acted in a tortious manner. Plaintiffs acknowledge that limitations must be set on the public’s abilities to bring claims, but the finality sought to be created by the notice of claim requirements can be fulfilled by

requiring strict compliance with the timing provisions of a notice of claim, but allowing for substantial compliance as to the form of the notice and its delivery.

When this court imposed its strict compliance requirement upon the statutory notice of claim rubric, the court's action was not without dissent. Scarborough v. Granite School District, 531 P.2d 480 (Utah 1975)(Justice Maughan dissenting)⁶; Varoz v. Sevey, 29 Utah 2d 158, 506 P.2d 435 (1973)(Justice Ellett dissenting); Gallegos v. Midvale City, 27 Utah 2d 27, 492 P.2d 1335 (1972)(Justice Ellett dissenting).

This court should review its position as to strict compliance and allow for justice. As the legislature directed in Utah Code Ann. § 68-3-2 (1953):

The rule of common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with the view to effect the objects of the statutes and promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail.

Justice Maughan invoked this section when he noted:

In view of the fact that our statutes are to be liberally construed to effect their objectives and to promote justice, I would not extend, by implication, the terms of 63-30-13, particularly where it is invoked by a political

⁶In Scarborough, Justice Maughan stated: "The instant matter sparks recollection of the instructions given by the Khalif Omar, to his first Kadi c. 900 A.D.: 'If thou seest fit to judge differently from yesterday, do not hesitate to follow the truth as thou seest it; for truth is eternal and it is better to return to the true than persist in the false.'" Scarborough, 531 P.2d at 483, note 5. (Please note if using Westlaw electronic services that the Westlaw transcriber left out the paragraph to which this footnote is ascribed).

subdivision to avoid liability.

Scarborough, 531 P.2d at 483.

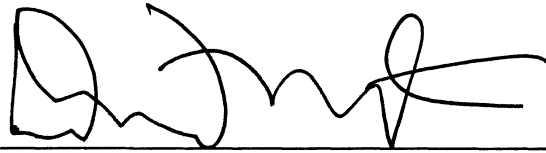
Since this court did in fact impose the strict compliance standard by implication, this court should review this position and align its conclusion to promote justice and equity. Citizens with colorable claims against the state government should be able to proceed if they have substantially complied with the notice of claim provisions in a timely manner. The weight of equity can be balanced by requiring that a notice be filed and that the notice is timely. However, this court should allow for substantial compliance as to the form of the notice and its delivery. Since plaintiffs did in fact substantially comply with the statute by timely filing a notice of claim, the trial court should be reversed and this matter remanded for trial.

CONCLUSION

Because Kane County, the entity concerned, received the notice of claim, and more particularly, because the person whom the county attorney designated as the proper

recipient for the notice of claim did in fact possess the notice of claim, the trial court's decision to dismiss the matter must be reversed. Further, for the other reasons outlined in plaintiffs' brief, the trial court's conclusion must be reversed and the matter remanded for trial.

DATED AND SIGNED this 16th day of March, 2001.


A handwritten signature in black ink, appearing to be 'R. Phil Ivie', written over a horizontal line.

R. PHIL IVIE
DAVID N. MORTENSEN
JEFFERY C. PEATROSS
Attorneys for the Plaintiffs/Appellants

Mailing Certificate

I hereby certify that I mailed two (2) true and correct copies of the foregoing Brief of Appellant with postage prepaid thereon this 16th day of March, 2001 to the following:

Peter Stirba
STIRBA & HATHAWAY
215 South State Street, Suite 1150
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read 'DMort', is written above a horizontal line.

DAVID N. MORTENSEN

ADDENDUM A

Utah Code § 63-30-11

**WEST'S UTAH CODE
TITLE 63. STATE AFFAIRS IN
GENERAL
CHAPTER 30.
GOVERNMENTAL
IMMUNITY ACT**

*Current through End of 2000 General
Sess*

**§ 63-30-11. Claim for injury--Notice--
Contents--Service--Legal disability.**

**< Text of section effective until
July 1, 2001 >**

(1) A claim arises when the statute of limitations that would apply if the claim were against a private person begins to run

(2) Any person having a claim for injury against a governmental entity, or against its employee for an act or omission occurring during the performance of the employee's duties, within the scope of employment, or under color of authority shall file a written notice of claim with the entity before maintaining an action, regardless of whether or not the function giving rise to the claim is characterized as governmental

(3)(a) The notice of claim shall set forth

(i) a brief statement of the facts,

(ii) the nature of the claim asserted, and

(iii) the damages incurred by the claimant so far as they are known

(b) The notice of claim shall be

(i) signed by the person making the claim or that person's agent, attorney, parent, or legal guardian, and

(ii) directed and delivered to

(A) the city or town recorder, when the claim is against an incorporated city or town,

(B) the county clerk, when the claim is against a county,

(C) the superintendent or business administrator of the board, when the claim is against a school district or board of education,

(D) the president or secretary of the board, when the claim is against a special district,

(E) the attorney general, when the claim is against the State of Utah, or

(F) a member of the governing board, the executive director, or executive secretary, when the claim is against any other public board, commission, or body

(4)(a) If the claimant is under the age of majority, or mentally incompetent and without a legal guardian at the time the claim arises, the claimant may apply to the court to extend the time for service of notice of claim

(b)(i) After hearing and notice to the governmental entity, the court may extend the time for service of notice of claim

(ii) The court may not grant an extension that exceeds the applicable statute of limitations

***21751** (c) In determining whether or not to grant an extension, the court shall consider whether the delay in serving the notice of claim will substantially prejudice the governmental entity in maintaining its defense on the merits

*Amended by Laws 1991 c 76 Laws 1998 c 164, § 1, eff
May 4, 1998*

**< For text of section effective
July 1, 2001, see § 63-30-11, post >**

Search this disc for cases citing this section

Utah Code § 63-30-13

**WEST'S UTAH CODE
TITLE 63. STATE AFFAIRS
IN GENERAL
CHAPTER 30.
GOVERNMENTAL
IMMUNITY ACT**

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)

Current through End of 2000 General Sess.

§ 63-30-13. Claim against political subdivision or its employee--Time for filing notice.

A claim against a political subdivision, or against its employee for an act or omission

occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, 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, or before the expiration of any extension of time granted under Section 63-30-11, regardless of whether or not the function giving rise to the claim is characterized as governmental.

Amended by Laws 1987, c. 75; Laws 1998, c. 164, § 3, eff. May 4, 1998.

WEST'S UTAH CODE

**TITLE 63. STATE AFFAIRS IN
GENERAL**

**CHAPTER 30. GOVERNMENTAL
IMMUNITY ACT**

Search this disc for cases citing this section.

ADDENDUM B

1201 977 P.2d 1201

367 Utah Adv. Rep. 26, 1999 UT 36

Supreme Court of Utah.

Owen RUSHTON, Plaintiff and Appellant,

v.

**SALT LAKE COUNTY, a political subdivision of
the State of
Utah, Defendant and Appellee.**

No. 980039.

April 16, 1999.

Property owner filed action against county seeking return of excess land mistakenly conveyed to county in condemnation proceedings. The Third District, Salt Lake County, Glenn K. Iwasaki, J., dismissed property owner's claim, and property owner appealed. The Supreme Court, Russon, J., held that: (1) property owner did not meet written notice of claim requirements of immunity statute, and (2) property owner's action was barred by statute of limitations.

Affirmed.

Howe, C.J., concurred in the result and filed an opinion.

Stewart, J., dissented.

West Headnotes

[1] Statutes ☞ 176

361 ----

361VI Construction and Operation

361VI(A) General Rules of Construction

361k176 Judicial Authority and Duty.

The proper interpretation of a statute is a question of law.

[2] 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.

Failure to file a written notice of claim against a governmental entity for an injury deprives the court of subject matter jurisdiction. U.C.A.1953, 63-30-11(2).

[3] Municipal Corporations ☞ 741.40(1)

268 ----

268XII Torts

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

268k741 Notice or Presentation of Claims
for Injury

268k741.40 Excuses for and Relief from
Delay or Failure

268k741.40(1) In General.

Actual notice does not cure a party's failure to meet the notice of claim requirements of the Governmental Immunity Act. U.C.A.1953, 63-30-11(3)(a).

[4] Municipal Corporations ☞ 741.15

268 ----

268XII Torts

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

268k741 Notice or Presentation of Claims
for Injury

268k741.15 Necessity and Purpose.

A notice of claim pursuant to the Governmental Immunity Act provides the governmental entity an opportunity to correct the condition that caused the injury, evaluate the claim, and perhaps settle the matter without the expense of litigation. U.C.A.1953, 63-30-11(3)(a).

[5] Counties ☞ 212

104 ----

104XII Actions

104k211 Conditions Precedent

104k212 Notice or Demand.

Letters hand-delivered by property owner's wife to county board of commissioners did not meet written notice of claim requirements of Governmental Immunity Act in action seeking return of excess land mistakenly conveyed to county in condemnation proceedings, where letters simply requested county's assistance in settling dispute so that property owner could develop property and did not alert board to impeding legal action or mention property owner's intention to seek a judicial remedy. U.C.A.1953, 63-30-11(3)(a).

[6] Limitation of Actions ☞ 66(14)

241 ----

241II Computation of Period of Limitation

241II(B) Performance of Condition, Demand,
and Notice

241k66 Demand

241k66(14) Property Wrongfully Received
or Held.

Even if property owner filed a valid notice of claim against county seeking return of excess land mistakenly conveyed to county in condemnation proceedings, action based on the claim was required to be filed within one year after claim was denied or deemed denied. U.C.A.1953, 63-30-14, 63-30-15.

Carvel R. Shaffer, Bountiful, for plaintiff.

Douglas R. Short, Paul G. Maughan, Salt Lake City, for defendant.

RUSSON, Justice:

¶ 1 Plaintiff Owen Rushton appeals the district court's order of dismissal in favor of defendant Salt Lake County. The district court dismissed Rushton's claim against Salt Lake County on the ground that Rushton failed to comply with the notice requirements of the Utah Governmental Immunity Act. We affirm.

BACKGROUND

¶ 2 In November of 1967, Salt Lake County (the "County") filed an eminent domain action to condemn several parcels of property in order to widen 5400 South at its intersection with 4300 West. As part of that action, County officials sought to condemn .53 acres of property owned by Owen Rushton.

¶ 3 In December of 1967, the court issued an order of immediate occupancy for the property in question, which gave the County the right to occupy and use the property in *1202 the manner intended by the original condemnation resolution.

¶ 4 In August of 1969, LaMar Duncan, a deputy county attorney, visited the Rushtons' home and requested that they execute a quitclaim deed. Rushton, his first wife Carol, and his mother Annie conveyed the requested property to the County by quitclaim deed on August 29, 1969. (FN1) The quitclaim deed conveyed 1.02 acres of the Rushtons' property to the County, .49 acres more than that which had been condemned.

¶ 5 In September of 1969, the County, through its Board of Commissioners (the "Board"), approved payment to the Rushtons for the purchase of their land and issued a "claim form" requesting payment for 1.02 acres of land at \$3,500 per acre, for a total of \$3,573. However, the claim form did not have a warrant

number and was not signed by the County Commissioners. Rushton asserts that he never received payment for any property conveyed by the quitclaim deed.

¶ 6 The County used the Rushtons' land as proposed--to widen the road at the intersection of 5400 South and 4300 West. The County did not, however, use all of the land the Rushtons conveyed in the quitclaim deed. For the next twenty-four years, the Rushtons cared for the excess portion of property conveyed to the County, which they believed to be theirs. (FN2) During that time, neither the County nor the Rushtons attempted to make use of the excess land.

¶ 7 In June of 1994, the Rushtons applied for a conditional use permit to build a group dwelling on the excess land. The County denied the Rushtons' application on the ground that the Rushtons had conveyed that land to the County by quitclaim deed in 1969.

¶ 8 On September 14, 1994, Rushton's second wife Myrna attended a Salt Lake County Commission meeting. (FN3) She presented a letter addressed to the Board expressing her concerns over the excess land the Rushtons had conveyed to the County. The letter stated the Rushtons' desire to develop the excess land and their inability to do so because of the boundary dispute. It also requested that the boundary be "corrected on the county record .. to match the original court order." (FN4) which condemned only .53 acres. Myrna contended there should be no charge for correcting the deed and no further delay in obtaining the necessary building permits to complete the proposed development.

¶ 9 In addition, the letter detailed the history of the condemnation action and the quitclaim executed by the Rushtons. The letter stated that neither Owen, Carol, nor Annie realized the deed they signed conveyed more property than originally condemned by the County. Rather, they believed they had conveyed only .53 acres. In her letter, Myrna wrote that there had never been a marker or a fence to indicate the point where the Rushtons' land ended and the County's began. Instead, the Rushtons had used the curb and gutter constructed by the County as the boundary between what they believed to be their property and the land the County used to widen the road. Myrna's letter reiterated the Rushtons' claim that over the years they had maintained land which, unbeknownst to them, was owned by the County. Finally, the Rushtons asserted that the County never paid them for the value of their land.

¶ 10 In response, the Board stated that the quitclaim deed signed by the Rushtons and filed with the County indicated that the County owned the land in question. The Board suggested the Rushtons might be able to purchase the excess land from the County to proceed with their development and referred Myrna to the Salt Lake County Real Estate Department.

*1203 ¶ 11 On September 15, 1994, Myrna presented a second letter addressed to then-County Commissioner Jim Bradley. In this letter, Myrna objected to the Board's suggestion that the Rushtons simply buy back the excess land from the County. She reiterated Rushton's claim that, had he known of the inclusion of the excess land in the quitclaim deed, he would not have signed the deed. The letter also restated the Rushtons' claim that they were never paid for the value of the land condemned by the County. In closing, Myrna wrote, "With this further information in your hands, I ask that you reconsider and agree to a corrected QCD [quitclaim deed] on this property."

¶ 12 Neither of the letters expressed an intent to file suit against the County or to resort to legal action if the matter was not resolved. Furthermore, while the names of Myrna and Owen were typed at the end of the letters, neither letter was signed.

¶ 13 On March 13, 1996, approximately eighteen months after Myrna addressed the Board, Rushton filed an action in Third District Court, seeking a writ of mandamus ordering the County to convey the excess acreage to him. Rushton claimed he signed the quitclaim deed only because he believed the property had been condemned by an order of the court. He contended that, but for that belief, he would not have executed the deed that incorporated not only the original parcel of land the County condemned but also the excess acreage. Moreover, Rushton claimed he was never paid for either the original parcel of land or the excess acreage.

¶ 14 The County moved to dismiss the action, claiming that Rushton failed to file a notice of claim with the County, as required by the Utah Governmental Immunity Act (the "Immunity Act"), and that Rushton's action was barred by the statute of limitations. On December 22, 1997, the trial court granted the County's motion and dismissed Rushton's complaint on the ground that he failed to comply with the notice provisions of the Immunity Act.

¶ 15 On appeal, Rushton argues that the letters presented to the Board met the statutory requirements

of notice prior to filing suit and that, therefore, the district court erred in granting the County's motion to dismiss. In response, the County argues that the notice requirements of the Immunity Act require strict compliance and that Rushton's letters did not meet the mandatory requirements of the Act. The County argues that even if we were to deem the Rushtons' letters to be sufficient notice of their claim against the County, Rushton's action would be barred because he did not file his action within the time frame specified by the Immunity Act. Furthermore, the County argues that Rushton's action for payment for the land he conveyed to the County is time-barred.

¶ 16 The issue before this court is whether the district court erred in granting the County's motion to dismiss on the ground that Rushton failed to comply with the notice provisions of the Immunity Act.

STANDARD OF REVIEW

[1] ¶ 17 The proper interpretation of a statute is a question of law. *See Johnson v. Redevelopment Agency*, 913 P.2d 723, 727 (Utah 1995). Therefore, when reviewing an order of dismissal involving the interpretation of a statute, we accord no deference to the legal conclusions of the district court but review them for correctness. *See id.*

ANALYSIS

[2] ¶ 18 To bring suit against a governmental entity for an injury, a party must file a written notice of claim with that entity. *See Utah Code Ann. § 63-30-11(2)* (Supp.1998). Failure to file such notice deprives the court of subject matter jurisdiction. *See Madsen v. Borthick*, 769 P.2d 245, 250 (Utah 1988).

[3] ¶ 19 A notice of claim must include "(i) a brief statement of the facts; (ii) the nature of the claim asserted; and (iii) the damages incurred by the claimant so far as they are known." *Utah Code Ann. § 63-30-11(3)(a)*. We have consistently required strict compliance with the requirements of the Immunity Act. Actual notice does not cure a party's failure to meet these requirements. *See, e.g., Larson v. Park City Mun. Corp.*, 955 P.2d 343, 345 (Utah 1998); *Shunk v. State*, 924 P.2d 879, 881 (Utah 1996); *1204. *Yearsley v. Jensen*, 798 P.2d 1127, 1129 (Utah 1990); *Yates v. Vernal Family Health Ctr.*, 617 P.2d 352, 354 (Utah 1980); *Scarborough v. Granite Sch. Dist.*, 531 P.2d 480, 482 (Utah 1975).

[4] ¶ 20 A notice of claim provides the entity being

sued with the factual details of the incident that led to the plaintiff's claim. Moreover, it "provide[s] the governmental entity an opportunity to correct the condition that caused the injury, evaluate the claim, and perhaps settle the matter without the expense of litigation." *Larson*, 955 P.2d at 345-46.

[5] ¶ 21 Rushton asserts he filed sufficient notice of his claim against the County in the form of the letters Myrna hand-delivered to the Board on September 14 and 15 of 1994. We disagree. A review of the letters reveals that neither letter sufficiently set forth the nature of the claim asserted for statutory purposes. While the letters set forth the facts surrounding the boundary dispute, neither letter was presented to the Board as a notice of claim. Furthermore, they were not worded so as to alert the Board or the County to any impending legal action. In fact, there was no mention of the Rushtons' intention to seek any judicial remedy. Rather, the letters simply requested the County's assistance in settling the boundary dispute so the Rushtons could proceed with the development of their property. Such a request is not sufficient to state the nature of the claim asserted or to put the County on notice that a claim is being asserted against it. Therefore, the district court did not err in dismissing Rushton's complaint against the County for failure to comply with the notice requirements of the Immunity Act. (FN5)

[6] ¶ 22 Furthermore, Rushton's action fails because he did not file it within the time period prescribed in Utah Code Ann. §§ 63-30-14 & -15. After a valid notice of claim is filed, the governmental entity or its insurance carrier has ninety days in which to approve or deny the claim. *See* Utah Code Ann. § 63-30-14. If at the end of the ninety days the claim has not been approved or denied, it is deemed to be denied. *See id.* Once the claim is denied, a party has one year in which to initiate an action. *See id.* § 63-30-15. In the present case, Rushton argues he filed a valid notice of claim in September of 1994. However, Rushton did not file his action until March 13, 1996, one and a half years later. Therefore, even assuming there was a valid notice of claim, Rushton did not file his action within one year after the claim was either denied or deemed to be denied. Therefore, his action must fail.

CONCLUSION

¶ 23 We affirm the district court's dismissal of Rushton's complaint against the County.

¶ 24 Associate Chief Justice DURHAM and Justice ZIMMERMAN concur in Justice RUSSON's opinion.

HOWE, Chief Justice, concurring in the result:

¶ 25 I concur in the result. I write to point out that in his complaint, Rushton sought both money damages and an order that the County reconvey to him the property described in the quitclaim deed in excess of the .53 acres that he claims he intended to convey and that the County intended to buy. To the extent that his suit constituted an equitable claim against the County, it would not be subject to the Immunity Act. *Bennett v. Bow Valley Dev. Corp.*, 797 P.2d 419, 422 (Utah 1990). However, Rushton did not argue that he had an equitable claim either in the district court or in his brief on appeal. He apparently first made that assertion in his oral argument before this court. That came too late since the County had no opportunity to respond.

¶ 26 Justice STEWART dissents.

(FN1.) Rushton's quitclaim deed was recorded with the Salt Lake County Recorder on May 20, 1970.

(FN2.) The County made several requests to the Rushtons to keep the excess property free of weeds and debris. On one occasion, when the Rushtons failed to maintain the property to the County's satisfaction, the County performed the work itself and then billed the Rushtons for its efforts.

(FN3.) On June 9, 1993, Rushton appointed his wife Myrna as his attorney-in-fact for purposes of litigation. It was in this capacity that she addressed the Board.

(FN4.) In referring to the "original court order," Myrna probably meant to refer to the condemnation resolution of 1967.

*1204_ (FN5.) We also note that neither letter was signed. Rather, the names of Myrna and Owen were typed at the end of the letter. *See* Utah Code Ann. § 63-30-11(3)(b) (Supp.1998) ("The notice of claim shall be: (i) signed by the person making the claim or that person's agent, attorney, parent, or legal guardian[.]").

926 P.2d 886

114 Ed. Law Rep. 326, 303 Utah Adv. Rep. 20

Supreme Court of Utah.

**Julie and Emilio MORENO, Plaintiffs and
Appellees,**

v.

**BOARD OF EDUCATION OF THE JORDAN
SCHOOL DISTRICT, Jordan
School District, and John Does I-X, Defendants
and
Appellees.**

**Laura Bartlett, individually and as representative
of the
heirs of Bill Bartlett, deceased, Intervenor and
Appellant.**
No. 950185.
Nov. 8, 1996.

After school district denied child's legal guardians' notice of claim, which sought recovery for child's drowning, guardians sued school district's Board of Education for wrongful death. Child's mother moved to intervene as party plaintiff. The Third District Court, Salt Lake County, Homer F. Wilkinson, J., denied Board's motion for summary judgment as against guardians, and denied mother's motion to intervene. Mother appealed. The Supreme Court, Russon, J., held that guardians could not maintain wrongful death action on their own behalf, but only in behalf of child's heirs. In separate opinion by Howe, J., the court held that guardians' notice of claim was legally sufficient to support mother's maintenance of wrongful death action.

Reversed and remanded.

Zimmerman, C.J., concurred in opinion by Russon, J.

Howe, J., filed separate opinion in which Stewart, Associate C.J., and Durham, J., concurred.

West Headnotes

[1] Appeal and Error ⇨842(2)

30 ----

30XVI Review

30XVI(A) Scope, Standards, and Extent, in
General

30k838 Questions Considered .

30k842 Review Dependent on Whether

Questions Are of Law or
of Fact

30k842(2) Findings of Fact and
Conclusions of Law.

[See headnote text below]

[1] Appeal and Error ⇨1008.1(5)

30 ----

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and
Findings

30XVI(I)3 Findings of Court

30k1008 Conclusiveness in General

30k1008.1 In General

30k1008.1(5) Clearly Erroneous
Findings.

Supreme Court reviews trial court's legal
conclusions nondeferentially for correctness and its
factual determinations for clear error.

[2] Statutes ⇨188

361 ----

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k188 In General.

Statute is generally construed according to its plain
language.

[3] Statutes ⇨189

361 ----

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k189 Literal and Grammatical
Interpretation.

[See headnote text below]

[3] Statutes ⇨212.6

361 ----

361VI Construction and Operation

361VI(A) General Rules of Construction

361k212 Presumptions to Aid Construction

361k212.6 Words Used.

Court assumes that each term in statute was used
advisedly; thus, statutory words are read literally,
unless such reading is unreasonably confused or
inoperable.

[4] Statutes ⇨184

361 ----

361VI Construction and Operation

361VI(A) General Rules of Construction
 361k180 Intention of Legislature
 361k184 Policy and Purpose of Act.

[See headnote text below]

[4] Statutes ⚡ 217.4

361 ----

361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k213 Extrinsic Aids to Construction
 361k217.4 Legislative History in General.

Only when court finds ambiguity in statute's plain language must court seek guidance from legislative history and relevant policy determinations.

[5] Statutes ⚡ 183

361 ----

361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k180 Intention of Legislature
 361k183 Spirit or Letter of Law.

[See headnote text below]

[5] Statutes ⚡ 206

361 ----

361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k204 Statute as a Whole, and Intrinsic Aids to Construction
 361k206 Giving Effect to Entire Statute.

[See headnote text below]

[5] Statutes ⚡ 208

361 ----

361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k204 Statute as a Whole, and Intrinsic Aids to Construction
 361k208 Context and Related Clauses.

One cardinal principle of statutory construction is that courts will look to reason, spirit, and sense of legislation, as indicated by entire context and subject matter of statute dealing with subject.

[6] Death ⚡ 32

117 ----

117III Actions for Causing Death
 117III(A) Right of Action and Defenses
 117k32 Persons for Whose Benefit Suit May Be Maintained.

[See headnote text below]

[6] Guardian and Ward ⚡ 118

196 ----

196V Actions

196k118 Rights of Action by Guardian or Ward or Both.

Statute that permits parents or guardian to maintain action for wrongful death of child does not permit guardian to maintain action in his own behalf, but only in behalf of child's heirs. U.C.A.1953, 78-11-6.

[7] Death ⚡ 31(1)

117 ----

117III Actions for Causing Death
 117III(A) Right of Action and Defenses
 117k31 Persons Entitled to Sue
 117k31(1) In General.

[See headnote text below]

[7] Death ⚡ 32

117 ----

117III Actions for Causing Death
 117III(A) Right of Action and Defenses
 117k32 Persons for Whose Benefit Suit May Be Maintained.

[See headnote text below]

[7] Guardian and Ward ⚡ 22

196 ----

196II Appointment, Qualification, and Tenure of Guardian
 196k22 Death of Ward.

[See headnote text below]

[7] Guardian and Ward ⚡ 118

196 ----

196V Actions

196k118 Rights of Action by Guardian or Ward or Both.

While rights and responsibilities of guardian flowing out of legal custody of ward terminate upon death of ward, guardian's ability to maintain action for wrongful death of minor flows from guardian's residual duty of accounting and does not terminate upon minor's death; this obligation is not for personal benefit of guardian, but is among guardian's residual duties upon death of his ward, and therefore any wrongful death action must be brought in behalf of ward's heirs. U.C.A.1953, 75-5-210, 78-11-6.

[8] Appeal and Error ☞854(1)

30 ----

30XVI Review

30XVI(A) Scope, Standards, and Extent, in
General30k851 Theory and Grounds of Decision of
Lower Court

30k854 Reasons for Decision

30k854(1) In General.

Supreme Court may affirm trial court's decision on
any ground.

[9] Schools ☞112

345 ----

345II Public Schools

345II(I) Claims Against District

345k112 Presentation and Allowance of
Claims.

Child's legal guardians' notice of claim to school arising from child's death was sufficient to notify school of child's mother's claim, thus enabling her to maintain wrongful death action against school, even though guardians' notice of claim sought to recover in their own behalf, and did not even mention mother; notice of claim fulfilled purpose of Governmental Immunity Act's notice of claim provision, as notice was timely filed, set out facts and nature of claim, and stated damages incurred by claimant "so far as they are known." U.C.A.1953, 63-30-11(3)(a).

P/C per Justice Howe's separate opinion

***887** Julian D. Jensen, Salt Lake City, for plaintiffs.

Jan Graham, Atty. Gen., Donald H. Hansen, Brent A. Burnett, Asst. Attys. Gen., Salt Lake City, for school district parties.

Richard I. Ashton, David A. Wilde, Murray, for intervenor.

RUSSON, Justice:

Laura Bartlett appeals from the trial court's denial of her motion to intervene in the action for wrongful death of her minor son Bill Bartlett, brought by her son's legal custodians and guardians, Julie and Emilio Moreno, against the Board of Education of the Jordan School District and the Jordan School District (collectively, the School District). The trial court denied Bartlett's motion to intervene on the ground that the Morenos, not Bartlett, were the real party in interest. The trial court further concluded that any

residual parental rights Bartlett had after losing custody of her son terminated at her son's death. We reverse.

FACTS

Julie and Emilio Moreno provided foster care for Bill Bartlett commencing approximately March 1983, when he was five years old. In November 1991, by order of the Third District Juvenile Court, the Morenos were awarded permanent custody and guardianship of Bill. However, the Morenos never adopted Bill, nor were Bill's mother's parental rights terminated. Bill resided with the Morenos for approximately nine years until his death in June 1992 after drowning in the swimming pool at West Jordan Middle School.

In December 1992, the Morenos filed a notice of claim with the School District pursuant to the Utah Governmental Immunity Act, Utah Code Ann. §§ 63-30-1 to -38, alleging that the negligence of the School District and its employees proximately caused Bill's death. Further, the Morenos claimed that as Bill's legal and exclusive guardians, they were entitled to bring an action and recover damages in their own behalf for Bill's wrongful death pursuant to section 78-11-6 of the Utah Code. That section provides:

[A] parent or guardian may maintain an action for the death or injury of a minor child when the injury or death is caused by the wrongful act or neglect of another.

The Morenos sought special medical damages in the amount of \$87,543.39, funeral and personal losses of \$10,000, and compensation for loss of love, affection, comfort, and society in the amount of \$750,000. The notice of claim did not name--or even mention--Bill's natural mother, Laura Bartlett.

In September 1993, the School District denied the Morenos' claim on the basis that a guardian is not permitted to recover for the wrongful death of a ward and, further, that a guardian's appointment terminates upon the death of the ward. The Morenos subsequently filed a civil complaint in district court against the School District, alleging that its negligent acts and policies had proximately caused Bill's wrongful death. The Morenos further alleged that as Bill's permanent legal guardians and custodians, they were bringing this action in their own behalf pursuant to section 78-11-6. Again, Bill's natural mother was not named or joined in the complaint.

In January 1994, the School District moved for

summary judgment. It alleged that the Morenos had no legal standing to bring their wrongful death action because they were not Bill's heirs, but merely his guardians.

In January 1995, during the pendency of the School District's motion for summary judgment, Bartlett moved to intervene in the action pursuant to rule 24(a) of the Utah *888 Rules of Civil Procedure, claiming that she, as Bill's natural mother, was the real party in interest and that the Morenos were not. The School District opposed the motion, arguing that Bartlett's claim was time-barred for failure to file a timely notice of claim as required by the Utah Governmental Immunity Act. The Morenos also opposed Bartlett's motion, asserting that under section 78-11-6, either a parent *or* a guardian can bring a claim in their own behalf for the wrongful death of a minor, but not both. In addition, the Morenos argued that they were, in fact, Bill's true "parents" and care-givers and, furthermore, that Bartlett had abandoned Bill many years before. Thus, they argued, Bartlett's motion to intervene should be denied.

In March 1995, the trial court denied the School District's motion for summary judgment against the Morenos, holding that the Morenos had the authority to bring this wrongful death action in their own behalf. The trial court also denied Bartlett's motion to intervene as a party plaintiff, reasoning that the Morenos, not Bartlett, were the real party in interest in the wrongful death action by virtue of their permanent custody and guardianship of Bill and that even if Bartlett had retained parental rights after the Morenos were awarded permanent custody and guardianship, those rights terminated at Bill's death. Bartlett now appeals from the trial court's denial of her motion to intervene. The School District did not appeal from the denial of its motion for summary judgment but is an appellee in Bartlett's appeal.

On appeal, Bartlett argues that only an heir, not a guardian, can recover for the wrongful death of a minor child and, thus, the trial court erred in denying her motion to intervene in the action. Bartlett further argues that the Morenos had acted as her representative in filing their claim against the School District and, therefore, under rules 17 and 24(a) of the Utah Rules of Civil Procedure, her intervention is timely and proper. Finally, she asserts that a neglectful parent is not barred from recovery for the wrongful death of her child, although issues of neglect may bear upon the damages she is entitled to recover.

The Morenos respond that as Bill's guardians, they have a right to recover in their own behalf under section 78-11-6 for the wrongful death of their minor ward. In addition, they argue that an abandoning natural parent should be precluded from recovering under a wrongful death statute for the death of her abandoned child.

The School District responds that the Morenos cannot personally recover damages in their own behalf for Bill's wrongful death because (1) only heirs can recover for the wrongful death of a child, and guardians are not heirs, and (2) Bartlett's parental rights had never been terminated and she was still Bill's rightful heir and thus entitled to bring an action as Bill's heir. However, the School District argues that Bartlett's claim was barred for failure to timely file a notice of her claim as required by the Utah Governmental Immunity Act and, therefore, the trial court lacked jurisdiction over her claim.

ANALYSIS

[1] The issue before us is whether the trial court erred in denying Bartlett's motion to intervene in the Morenos' action pursuant to rule 24(a) of the Utah Rules of Civil Procedure.

By the terms of [rule 24(a)], an applicant must be allowed to intervene if four requirements are met: 1) the application is timely; 2) the applicant has an interest in the subject matter of the dispute; 3) that interest is or may be inadequately represented; and 4) the applicant is or may be bound by a judgment in the action.

Lima v. Chambers, 657 P.2d 279, 282 (Utah 1982). Such a determination may involve questions of both law and fact. We review a trial court's legal conclusions nondeferentially for correctness and its factual determinations for clear error. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

[2][3][4][5] Section 78-11-6 of the Utah Code establishes who may be a plaintiff in an action to recover for the wrongful death or injury of a child. This section provides in relevant part:

[A] parent or guardian may maintain an action for the death or injury of a minor *889 child when the injury or death is caused by the wrongful act or neglect of another.

In interpreting section 78-11-6, this court is guided

by the principle that a statute is generally construed according to its plain language. *State v. A House and 1. 37 Acres of Real Property located at 392 South 600 East*, 886 P.2d 534, 537 (Utah 1994). We assume that "each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable." *Savage Indus., Inc. v. Utah State Tax Comm'n*, 811 P.2d 664, 670 (Utah 1991). In addition, "[w]ords and phrases are to be construed according to the context and the approved usage of the language." Utah Code Ann. § 68-3-11. "Only when we find ambiguity in the statute's plain language must we seek guidance from the legislative history and relevant policy determinations." *World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253, 259 (Utah 1994). Finally, "[o]ne of the cardinal principles of statutory construction is that the courts will look to the reason, spirit, and sense of the legislation, as indicated by the entire context and subject matter of the statute dealing with the subject." *Mountain States Tel. & Tel. Co. v. Payne*, 782 P.2d 464, 466 (Utah 1989) (quoting *Masich v. U.S. Smelting*, 113 Utah 101, 108, 191 P.2d 612, 616 (1948)).

[6] Section 78-11-6 states that a parent or guardian may maintain an action for the wrongful death of a child. The section is silent, however, on whether a guardian may maintain an action in his own behalf or only in behalf of the child's heirs. Thus, we look to adjacent provisions for guidance in interpreting this section. See *Berrett v. Purser & Edwards*, 876 P.2d 367, 369 (Utah 1994) (examining preceding section to interpret scope of particular term).

Section 78-11-7 of the Utah Code provides for recovery for the death or injury of an adult. This section is more explicit as to who can bring a claim. This section provides in relevant part:

[W]hen the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death.... If such adult person has a guardian at the time of his death, *only one action can be maintained for the injury to or death of such person, and such action may be brought by either the personal representatives of such adult deceased person, for the benefit of his heirs, or by such guardian for the benefit of his heirs as provided in the next preceding section [section 78-11-6].* In every action under this and the next preceding section [section 78-11-6] such damages

may be given as under all the circumstances of the case may be just.

Utah Code Ann. § 78-11-7 (1992) (emphasis added).

Under section 78-11-7, it is clear that the wrongful death action of an adult can be maintained only by the deceased's heirs or by the representative or guardian of such person *in behalf of* the heirs. Further, section 78-11-7 states that the action may be brought by the guardian in behalf of the heirs "as provided in the next preceding section [section 78-11-6]." Thus, the provisions regarding who may sue and in whose behalf they may recover under section 78-11-7 apply to suits under section 78-11-6 by explicit reference to that section in section 78-11-7. See also *Jones v. Carvell*, 641 P.2d 105, 107 (Utah 1982) (applying language from section 78-11-7 to determine scope of damages recoverable for wrongful death of child).

This interpretation comports with the statutes concerning the rights and obligations of parents in contrast to the rights and obligations of guardians with respect to their ward. "The court may appoint a guardian for an unemancipated minor if all *parental rights of custody* have been terminated or suspended by circumstances or prior court order." Utah Code Ann. § 75-5-204 (emphasis added). However, even after the parental right of custody has been terminated and physical custody of the child is placed in a guardian, the parent retains certain rights with respect to the child:

"Residual parental rights and duties" means those rights and duties remaining with the parent after legal custody or guardianship, or both, have been vested in *890 another person or agency, including, but not limited to, the responsibility for support, the right to consent to adoption, the right to determine the child's religious affiliation, and the right to reasonable visitation unless restricted by the court. If no guardian has been appointed, "residual parental rights and duties" also include the right to consent to marriage, to enlistment, and to consent to major medical, surgical, or psychiatric treatment.

Utah Code Ann. § 78-3a-2(18) (1992). Other residual parental rights include the right to inherit from a child and vice versa, Utah Code Ann. § 75-2-103, and the right to maintain an action for the wrongful death of a child, Utah Code Ann. § 78-11-6. See also *In re J.P.*, 648 P.2d 1364, 1366 n. 1 (Utah 1982) (enumerating residual parental rights). Thus, the

parent retains the responsibility to support the child as well as certain rights including the right to visitation, allowing the parent the possibility of maintaining a meaningful relationship with the child despite lack of physical custody. Furthermore, there is a distinct procedure for the termination of all parental rights. See Utah Code Ann §§ 78-3a-401 to -414 (Supp.1996).

On the other hand, the rights and responsibilities of a guardian are premised on the right to physical custody of the child:

"Legal custody" means a relationship embodying the following rights and duties:

- (a) the right to physical custody of a child;
- (b) the right and duty to protect, train, and discipline him;
- (c) the duty to provide him with food, clothing, shelter, education, and ordinary medical care;
- (d) the right to determine where and with whom he shall live; and
- (e) the right, in an emergency, to authorize surgery or other extraordinary care.

Utah Code Ann. § 78-3a-2(14) (1992); *see also* Utah Code Ann. § 75-5-209 (powers and duties of guardian of minor).

Furthermore, "[a] guardian's authority and responsibility terminates ... upon the minor's death, adoption, marriage, or attainment of majority, but termination does not affect his liability for prior acts [or] his obligation to account for funds and assets of his ward." Utah Code Ann. § 75-5-210. Thus, while the guardian retains such general duties as accounting for the ward, no personal rights or responsibilities of the guardian continue after the ward's death.

[7] Consistent with section 75-5-210, we hold that while the rights and responsibilities of a guardian flowing out of legal custody of the ward terminate upon the death of the ward, the guardian's ability to maintain an action for the wrongful death of a minor flows from the guardian's residual duty of accounting and does not terminate upon the minor's death. This obligation is not for the personal benefit of the guardian, but is among a guardian's residual duties upon the death of his ward, and therefore any wrongful death action must be brought in behalf of the ward's heirs. Accordingly,

we find that the Morenos' argument that they can maintain an action for Bill's wrongful death in their own behalf is not supported by the statutes at issue.

[8] The School District argues that even though Bartlett is the real party in interest, her claim is barred for failure to file a notice of claim within one year of the injury, pursuant to the Utah Governmental Immunity Act. Therefore, it argues, we should affirm the trial court's denial of her motion to intervene on this ground. Although the School District raised this argument below, the trial court denied Bartlett's motion on the basis that the Morenos, not Bartlett, were the real parties in interest in this action. However, we may affirm the trial court's decision on any ground. *White v. Deseelhorst*, 879 P.2d 1371, 1376 (Utah 1994).

Bartlett argues that the notice of claim filed by the Morenos was filed in a representative capacity for and in behalf of Bill's heirs and, thus, the School District was notified of her claim pursuant to the requirements of the Utah Governmental Immunity Act. Bartlett additionally argues that pursuant to rule 17 of the Utah Rules of Civil Procedure, she may be substituted for the Morenos as a party in the wrongful death action, thereby also substituting herself as the claimant under *891 the Act. The School District argues, on the other hand, that strict compliance with the Act requires that Bartlett independently file a notice of her claim and that Bartlett cannot evade compliance with this requirement by intervening in the Morenos' action.

Section 63-30-13 of the Utah Governmental Immunity Act provides:

A claim against a political subdivision, 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 governing body of the political subdivision within one year after the claim arises.*

(Emphasis added.)

In this case, the School District is a political subdivision. See Utah Code Ann. § 63-30-2(7) (defining "[p]olitical subdivision" to include "school district"). Bill's injury occurred on May 22, 1992, and he died on June 2, 1992. Thus, prior to bringing the action for Bill's wrongful death, the Morenos, if they were the appropriate party, were required under the Act to file a notice of claim with the School District within one year of his death, i.e., by June 2, 1993. See

Nelson v. Logan City, 103 Utah 356, 368-69, 135 P.2d 259, 265 (1943) (holding that statute begins to run on date of death for wrongful death claim). The Morenos complied with the notice requirement by filing a notice of claim with the School District on December 3, 1992. However, Bartlett did not independently file a notice of claim with the School District and did not move to intervene in the Morenos' action until January 1995, well beyond the time permitted by the statutory notice requirement. Thus, the resolution of this issue turns on whether the Morenos' notice of claim satisfies Bartlett's notice requirement under the Act.

The Governmental Immunity Act has been strictly construed by Utah courts. In *Scarborough v. Granite School District*, 531 P.2d 480, 482 (Utah 1975), this court stated in reference to the notice requirement under the Act, "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."

Bartlett argues that because the Morenos filed notice of their claim, the School District was properly notified as to her claim. However, the Morenos' notice of claim clearly states that the Morenos sought to maintain a claim in their own behalf, not in a representative capacity for Bartlett or Bill's heirs. In fact, the Morenos' notice of claim specifically states:

[T]he Morenos, as the sole and exclusive guardians and foster parents for the minor child, are fully entitled to bring an action for wrongful death pursuant to the provisions of Utah Code Annotated § 78-11-6. The Morenos are further convinced that the Utah law will entitle *them* to recover damages for all monetary amounts incurred by them related to the accident and for the loss of the love, affection, and society of the minor child.

While it is difficult to measure such losses, we have attempted to itemize below the losses which we believe *the Morenos, as the legal and exclusive guardians, and in loco parentis, are entitled to recover.*

(Citation omitted; emphasis added.) Further, the notice of claim, which included a copy of the order awarding permanent custody and guardianship of Bill to the Morenos, does not even mention Bartlett.

Moreover, the School District clearly denied the Morenos' claim on the basis that they brought the claim in their own behalf, not on Bartlett's behalf. The letter

of denial stated that "(1) a guardian is not an heir of the minor and is not entitled to inherit a share of the minor's estate when the minor dies, and (2) the appointment of a guardian terminates upon the minor's death."

Therefore, this author would conclude that the notice of claim filed by the Morenos for damages in their own behalf clearly was not sufficient to notify the School District of Bartlett's claim. However, a majority of the court agrees with Justice Howe's separate opinion that the notice provided by the Morenos was legally sufficient to notify the School District of Bartlett's claim.

*892. CONCLUSION

We reverse the trial court's denial of Bartlett's motion to intervene and hold that Bartlett, not the Morenos, is the real party in interest. We further hold that the notice provided by the Morenos was legally sufficient to notify the School District of Bartlett's claim. Accordingly, we remand for further proceedings consistent with this opinion.

ZIMMERMAN, C.J., concurs.

HOWE, Justice, separate opinion:

[9] I concur in that part of the lead opinion which holds that when a guardian brings a wrongful death action for the death of his ward, it is brought on behalf of the ward's heirs and not for the personal benefit of the guardian. However, I dissent as to that part which holds that the instant action brought by the Morenos must be dismissed because the notice of claim given to the School District was defective.

Utah Code Ann. § 63-30-11(3)(a) provides that a notice of claim shall contain (1) a brief statement of the facts, (2) the nature of the claim asserted, and (3) the damages incurred by the claimant so far as they are known. The purpose of a notice of claim is to give timely notice of the above requirements so that the state or one of its political subdivisions may conduct an investigation. In this case, that purpose was fulfilled. The notice of claim given by the Morenos stated the facts surrounding Bill's drowning and made claim for his wrongful death. Amounts of damage were stated for his hospitalization, medical care, funeral, and loss of companionship. Because the Morenos were laboring under a mistake of law, they claimed damages *for their* loss of companionship rather than for the heir's loss.

We hold that the notice of claim is sufficient to support the wrongful death action filed by the Morenos even though we have now decided that Bill's heirs, not the Morenos, are the beneficiaries. Since section 78-11-6 authorizes a guardian to maintain an action for the wrongful death of his ward, it follows that the guardian has the authority to file the prerequisite notice of claim. The notice here was timely filed, set out the facts and the nature of the claim, and stated the damages incurred by the claimant "so far as they are known." The Morenos, acting upon the advice of legal counsel and in good faith, erroneously claimed damages for their loss of companionship because of their misapprehension of the law. This should not be fatal since irrespective of who the beneficiaries of a wrongful death action are, the damages claimed for medical, hospitalization, and funeral costs do not

change. Only the damages for loss of companionship might differ. In fact, because of Bartlett's detachment from Bill, her damages might well be less than those of the Morenos. Therefore, no prejudice can be shown to the School District because the claim was filed by the Morenos in their own behalf rather than in a representative capacity for Bartlett or Bill's heirs.

We hold that the notice of claim given to the School District was legally sufficient to support the maintenance of this wrongful death action, although the Morenos mistakenly assumed that they, not Bartlett, would be the beneficiaries of the action.

STEWART, Associate C.J., and DURHAM, J., concur.

*480 618 P.2d 480

Supreme Court of Utah.

Jolene STAHL, Plaintiff and Appellant,
v.
UTAH TRANSIT AUTHORITY, a public agency,
Defendant and Respondent.
 No. 16419.
 Sept. 12, 1980.

Motorist brought action against public transit authority to recover damages sustained in automobile accident involving a bus owned by the authority and driven by one of its employees. The Third District Court, Salt Lake County, Christine M. Durham, J., entered judgment of default due to plaintiff's failure to comply with statutory notice provision, and plaintiff appealed. The Supreme Court, Stewart, J., held that motorist substantially complied with the statute by furnishing signed accident report and medical release to defendant's insurance adjuster, who acted as defendant's agent.

Reversed and remanded.

West Headnotes

[1] Statutes ⚡223.1

361 ----

361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k223 Construction with Reference to
 Other Statutes

361k223.1 In General.

Statutory provision must be construed so as to make it harmonious with other statutes relevant to the subject matter.

[2] Statutes ⚡227

361 ----

361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k227 Construction as Mandatory or
 Directory.

Generally, a direction in a statute to do an act is considered "mandatory" when consequences are attached to the failure to act; conversely, when a statute requires an action to be taken without prescribing a penalty for failure to so act, the requirement is not often deemed mandatory.

[3] Statutes ⚡184

361 ----

361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k180 Intention of Legislature
 361k184 Policy and Purpose of Act.

A statute is to be construed in light of its intended purpose.

[4] Automobiles ⚡230

48A ----

48AV Injuries from Operation, or Use of
 Highway

48AV(B) Actions

48Ak230 Notice of Claim for Injury.

Motorist, who was involved in automobile accident allegedly caused by bus owned by public transit authority, substantially complied with statutory notice provision by supplying signed accident form and medical release to authority's insurance adjuster, who was authorized by law to handle approval or denial of victim's claim and thus acted as agent of the authority. U.C.A.1953, 11-20-56.

Wendall E. Bennett, Salt Lake City, for plaintiff and appellant.

Rex J. Hanson, David H. Epperson, Salt Lake City, for defendant and respondent.

STEWART, Justice:

On September 9, 1976, in Salt Lake City a bus owned by the Utah Transit Authority ("UTA") and driven by a UTA employee collided with the rear end of an automobile which in turn collided head-on with an automobile driven by the plaintiff. The plaintiff was taken to the Valley West Hospital for examination. Upon returning to work that same day plaintiff was contacted by Thomas Vance, an insurance adjuster for Brown Brothers Insurance, which represents UTA's insurer, Transit Casualty. He obtained a statement from her concerning the accident and wrote a two-page report based on her answers to his inquiries. Vance also had plaintiff sign a statement and a medical information release allowing her personal physician to disclose information to him.

On December 28, 1976, after 31/2 months had elapsed with no action by the insurance company or UTA, plaintiff retained counsel. The following day counsel sent a written notice of claim to the Utah Transit Authority and to the Utah Attorney General. Suit was filed in district court July 14, 1977.

On motion the case was dismissed without

prejudice. Plaintiff then filed an amended complaint, along with depositions of herself and the insurance adjuster, Vance. UTA moved for summary judgment for failure to comply with s 11-20-56 U.C.A., as amended, a part of the Utah Public Transit District Act. That section provides:

Claims against district-Requirements.-Every claim against the district for *481 death, injury or damage alleged to have been caused by the negligent act or omission of the district shall be presented to the board of directors in writing within thirty days after the death, injury, or damage, signed and verified by the claimant or his duly authorized agent, stating the time and place where the injury or damage occurred and a general statement of the cause and circumstances of the death, injury or damages. No action under this section shall be commenced until sixty days after presentation, or unless the board of directors shall sooner deny claim. (Emphasis added.)

On the basis of that statute a judgment of dismissal was entered, and this appeal ensued. For the purpose of this appeal we state the facts developed in discovery in a light most favorable to the plaintiff.

Plaintiff contends that the provision above cited was not intended to be a statute of limitations and that s 63-30-12 of the Governmental Immunity Act provides the relevant statute of limitation in this case. Plaintiff also contends that UTA is estopped from relying on s 11-20-56 as a result of the actions of the insurance adjuster.

(1) Grant v. Utah State Land Board, 26 Utah 2d 100, 485 P.2d 1035 (1971), held that it is for the judiciary to assume that each term of a statute was advisedly adopted by the Legislature. It is also our duty to construe a statutory provision so as to make it harmonious with other statutes relevant to the subject matter. The language in the Utah Public Transit District Act stands in direct contrast to the general notice of claim provision found in the Governmental Immunity Act enacted in 1965, four years prior to the Public Transit Act. The Governmental Immunity Act makes clear that a failure to comply with the notice provision results in a bar to prosecution of the action. Section 63-30-12, Utah Code Annotated (1953), as amended, provides that:

Claim against state or agency-Notice to attorney general and agency-Time for filing.-A claim against the state or any agency thereof as defined herein

shall be forever barred unless notice thereof is filed with the attorney general of the state of Utah and the agency concerned within one year after the cause of action arises. (Emphasis added.)

Section 63-30-13 includes the same mandatory language in prescribing the penalty for noncompliance with the notice requirement regarding claims against political subdivisions.

(2) We are guided in construing the language of the instant statute by the principle that generally a direction in a statute to do an act is considered "mandatory" when consequences are attached to the failure to act. Conversely, when a statute requires an action to be taken without prescribing a penalty for failure to so act, the requirement is not often deemed mandatory. Whitley v. Superior Ct., 18 Cal.2d 75, 113 P.2d 449 (1941). See Barton v. Atkinson, 228 Ga. 733, 187 S.E.2d 835 (1972); Paul v. City of Manhattan, 212 Kan. 381, 511 P.2d 244 (1973); State ex rel. Ferro v. Oellermann, Mo., 458 S.W.2d 583 (1970); Dunker v. Brown County Bd. of Ed., 80 S.D. 193, 121 N.W.2d 10 (1963); Chisholm v. Bewley Mills, 155 Tex. 400, 287 S.W.2d 943 (1956); State ex rel. Werlein v. Elamore, 33 Wis.2d 288, 147 N.W.2d 252 (1967).

Further assistance in this case is provided by viewing the pertinent language in light of our Legislature's choice of language construction in similar provisions. The difference thus uncovered signifies a purposeful selection and indicates the intended meaning. See Bird & Jex Co. v. Funk, 96 Utah 450, 85 P.2d 831 (1939); Canada Dry Bottling Co. v. Board of Review, 118 Utah 619, 223 P.2d 586 (1950); Ballou v. Kemp, 92 F.2d 556 (D.C. Cir. 1937); Commonwealth v. Reick Investment Corp., 419 Pa. 52, 213 A.2d 277 (1965).

The express bar against maintaining an action for noncompliance with the notice provision in the Governmental Immunity Act, when compared with the Utah Public Transit District Act, which contains no such language, indicates an intent on the part of the Legislature not to impose a bar for *482 noncompliance with the notice provision of the latter act. It is not for the Court to read into the statute an intention to establish a statute of limitations which is not expressly stated in the statute.

The cases cited by defendant which hold a statutory notice requirement mandatory and a bar to filing an action without strict compliance with the time limitation involve statutory language which

unequivocally designates a legislative intent to have the failure to comply stand as a bar to further action. These cases therefore are not controlling in the instant case. See *Crowder v. Salt Lake County*, Utah, 552 P.2d 646 (1976); *Gallegos v. Midvale City*, 27 Utah 2d 27, 492 P.2d 1335 (1972); *Peterson v. Salt Lake City*, 118 Utah 231, 221 P.2d 591 (1950).

Moreover, there was substantial compliance with the 30-day notice provision and defendant was in no way prejudiced by plaintiff's failure to comply with the formality of filing a claim.

(3) A statute is, of course, to be construed in light of its intended purpose. *Child v. City of Spanish Fork*, Utah, 538 P.2d 184 (1975). It is necessary to consider the policy of the notice requirement so that in any particular case the facts can be evaluated to determine if the intent of the statute has been accomplished by substantial compliance with the statutory directive. *Smith v. State*, Ala., 364 So.2d 1 (1978). This Court has previously stated that the primary purpose of a notice of claim requirement is to afford the responsible public authorities an opportunity to pursue a proper and timely investigation of the merits of a claim and to arrive at a timely settlement, if appropriate, thereby avoiding the expenditure of public revenue for costly and unnecessary litigation. *Sears v. Southworth*, Utah, 563 P.2d 192 (1977); *Gallegos v. Midvale City*, 27 Utah 2d 27, 492 P.2d 1335 (1972).

We view plaintiff's contention that the notice given to the insurance adjuster in this case constituted compliance with the statute in light of these policy considerations. First, we note that s 63-30-14 of the Governmental Immunity Act equates the authority of the insurance carrier with that of the governmental entity concerning the notice to claimant of the approval or denial of a claim for injury. Thus the insurance agent is authorized by law to handle the approval or denial of plaintiff's claim, representing the interests of the government. *Rice v. Granite School District*, 23 Utah 2d 22, 456 P.2d 159 (1969). Further, Vance testified in this case that all claims against UTA are handled directly by his office and specifically by himself. The record also reveals that UTA informed Vance of the accident shortly after its occurrence. He immediately contacted plaintiff on the same day as the accident, obtained a signed statement of her version of the incident, and received a medical release form from her. In light of these facts, Vance's actions in obtaining a signed statement of plaintiff's version of the accident were for all practical purposes the acts of UTA.

(4) Clearly there was substantial compliance with the notice provision. No undue hardship resulted from the notice being given to an agent of the party named in the statute. Considering the duties delegated to the insurance agent, it appears that the person entrusted with the investigation and settlement procedures received the requisite information in a timely fashion and within the time constraints imposed by the statute. Furthermore, conceding there is some validity to the necessity of having a notice in writing to guard against the unreliability of memory, the information given was committed to writing in a two-page report and signed by plaintiff, thus recording plaintiff's account of the accident.

A case closely in point with the case at bar is *Badger v. Upper Darby Township*, 348 Pa. 551, 36 A.2d 507 (1944). Plaintiff's counsel, within the prescribed period, gave written notice to the insurance carrier for the defendant township rather than the clerk or secretary of such municipality, as required by statute. The court, in allowing plaintiff to maintain an action for damages, declared:

*483. In determining, in its discretion, whether a failure to file the notice prescribed by the act should be excused, a weighty circumstance to be considered by the court is whether or not the municipality has suffered any undue hardship. Here there is nothing to indicate that it did so suffer. Of controlling importance is the fact that within the prescribed period the insurance company was notified that claim was being made, was furnished with the essential facts in regard to the accident, and, by designating a physician to examine plaintiff, apparently admitted its responsibility to investigate the claim. If, as would appear, the insurance company is the real party in interest, a decision denying plaintiff the right to prosecute her claim because of failure to give written notice to the township would be one of sheer literalism, for, had such notice been given, the township would undoubtedly, in due course, have turned it over to the company to which plaintiff's counsel had sent it in the first instance. It is not unusual for lawyers representing claimants in accident cases to communicate with insurance companies directly rather than with defendants, since the former control the negotiations for settlement and prepare the defense in case of litigation. (Emphasis added.) (36 A.2d at 508-09.)

The instant case is clearly distinguishable from *Moran v. Salt Lake City*, 53 Utah 407, 173 P. 702

(1918). In that case a notice was presented to a party other than the recipient prescribed by statute. The Court consequently found the notice to be inadequate. The Court in Moran specifically found that the board to whom notice had been given lacked authority to consider or settle damage claims against the city for any acts of negligence. In the instant case, as pointed above, the insurance carrier through its agent has specific authority to consider and settle damage claims.

The cases cited by defendant in support of the contention that notice to the insurance agent does not comply with the notice requirement are distinguishable from the instant case. In those cases, the applicable statutes contained words of absolute prohibition as a consequence of noncompliance, thus suggesting a stricter standard of adherence. *Sears v. Southworth*, Utah, 563 P.2d 192 (1977); *Scarborough v. Granite School District*, Utah, 531 P.2d 480 (1975); *Varoz v. Sevey*, 29 Utah 2d 158, 506 P.2d 435 (1973); *Roosendaal Construction and Mining Corp. v. Holman*, 28 Utah 2d 396, 503 P.2d 446 (1972). Furthermore, it should be noted in the instant case that plaintiff met the strict requirements placed on the cause of action by (1) the statute of limitation found in s 63-30-12 of the Governmental Immunity Act and (2) the prohibition against any action being brought until sixty days after presentation of notice found in s 11-20-56 of the Utah

Public Transit District Act.

Other courts have also construed similar statutory notice requirements to hold that substantial compliance meets the statutory requirements even in the face of mandatory language. *Ray v. City of Council Bluffs*, 193 Iowa 620, 187 N.W. 447 (1922); *Brickell v. Kansas City*, 364 Mo. 679, 265 S.W.2d 342 (1954); *Peterson v. Kansas City*, 324 Mo. 454, 23 S.W.2d 1045 (1930); *Shaw v. City of New York*, 83 A.D. 212, 82 N.Y.S. 44 (1903).

In sum, the purpose of the notice requirement was satisfied.

Plaintiff's second contention is that UTA is estopped from relying on the notice of claim requirement in light of the insurance adjustor's conduct. Whether the facts in this case support an estoppel or waiver theory need not be decided in light of the foregoing.

Accordingly, we reverse and remand for a trial on the merits.

CROCKETT, C. J., and WILKINS, MAUGHAN and HALL, JJ., concur.

*480 531 P.2d 480

Supreme Court of Utah.

**Francine G. SCARBOROUGH, for herself and as
guardian for
Jeffrey Dean Scarborough, Plaintiff and Appellant,**
v.

**GRANITE SCHOOL DISTRICT, a political
subdivision of the
State of Utah, Defendant and Respondent.**
No. 13558.
Feb. 3, 1975.

Mother sought to recover for injuries sustained by 12-year-old son when he fell while playing with dead wires dangling from utility poles on elementary school playground. The Third District Court, Salt Lake County, Ernest F. Baldwin, Jr., J., dismissed the action, and mother appealed. The Supreme Court, Crockett, J., held that conversation between mother and school principal, in which principal allegedly stated wires were left in such condition by utility company, coupled with a report of principal's investigation filed with school district office, did not constitute a 'filing' of a claim that would meet requirements of statute governing time for filing claim against political subdivision and that alleged statement by principal that wires were left in such condition by utility company did not estop school district from asserting such statute as bar to cause of action, where principal did not make any representation that school district was responsible and where he told mother that he could not give any information or do anything about the situation and that the problem would have to be taken up with the school district office.

Affirmed.

Maughan, J., dissented and filed opinion.

West Headnotes

[1] Action ⚡ 10
13 ----

13I Grounds and Conditions Precedent
13k10 Conditions Precedent in General.

Where cause of action is based upon statute, full compliance with its requirements is condition precedent to the right to maintain a suit.

[2] Schools ⚡ 112
345 ----

345II Public Schools

345II(I) Claims Against District
345k112 Presentation and Allowance of
Claims.

(Formerly 345k12)

In order to meet requirements of statute, providing that "claim against a political subdivision shall be forever barred unless notice thereof is filed within ninety days after the cause of action arises," and to fulfill its intended purpose, the "filing" of a claim must include: that it be in writing; that it contain brief statement of facts and the nature of claim asserted; that it be subscribed by party required to give it and who intends to rely on it; that it be directed to and delivered to someone authorized to or responsible for receiving it; and that this be done within prescribed time. U.C.A.1953, 63-30-13.

[3] Schools ⚡ 112
345 ----

345II Public Schools
345II(I) Claims Against District
345k112 Presentation and Allowance of
Claims.

(Formerly 345k12)

Where elementary school student was injured on playground while playing with dead wires dangling from utility poles, subsequent conversation between student's mother and principal in which principal allegedly stated that wires were left in such condition by utility company, coupled with a report of principal's investigation filed with school district office, did not constitute a "filing" within purview of statute requiring that a "claim against a political subdivision shall be forever barred unless notice thereof is filed within ninety days after the cause of action arises." U.C.A.1953, 63-30-2, 63-30-3, 63-30-13.

[4] Estoppel ⚡ 62.5
156 ----

156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k62 Estoppel Against Public,
Government, or Public
Officers

156k62.5 Acts of Officers or Boards.

After elementary school student was injured on playground while playing with dead wires dangling from utility poles, alleged statement by school principal to student's mother that wires had been left in that condition by utility company did not estop school district from asserting statute governing time for filing claim against political subdivision as bar to cause of action after mother learned school employees were

responsible for the condition, where principal made no representation that school district was responsible and where he told mother that he could not give her any information or do anything about the situation and that the problem would have to be taken up with school district office. U.C.A.1953, 63-30-2, 63-30-3, 63-30-13.

***481** James F. Housley, Salt Lake City, for plaintiff and appellant.

Leonard H. Russon, of Hanson, Wadsworth & Russon, Salt Lake City, for defendant and respondent.

CROCKETT, Justice:

Plaintiff Francine G. Scarborough, for herself and as guardian for her 12-year-old son Jeffrey, sues to recover for injuries he suffered in a fall on the playground at the Holladay Elementary School of the defendant, Granite School District. Upon the basis of the pleadings, depositions and affidavits, the trial court ruled that because the plaintiff had failed to file a claim as required by Section 63--30--13, U.C.A.1953, quoted below, her action was barred; and therefore there was no issue of material fact which if resolved in her favor would entitle her to prevail, and entered judgment of dismissal against her. ([FN1]) She appeals.

On the morning of February 29, 1972, Jeffrey, and other boys were playing on the ball ground of the School. About a month before, one of the utility poles had been knocked down by maintenance employees while trimming trees; and some dead wires had been left dangling from the remaining poles. It was in playing and swinging with these wires that Jeffrey fell several feet to the ground and suffered the injuries complained of. The principal, William Lee Anderson, was informed, examined and talked to the boy, and permitted him to go to class. About an hour later, Jeffrey developed nausea and began vomiting. His mother was called and she took him home.

Later that day she called Mr. Anderson and talked to him about the apparently serious nature of Jeffrey's injuries, asked for details concerning the accident and responsibility therefor. She avers that he told her that the tree trimming had been done and the wires left in that condition by the utility company, Utah Power & Light Company. ([FN2]) Mr. Anderson filed a report of his investigation with the office of defendant, Granite School District. Two days after the accident, plaintiff employed an attorney (not present counsel) to

handle this matter. It is alleged that in reliance on Mr. Anderson's statements, the attorney made demand upon the Utah Power & Light Company, and further, that it was not until six months later plaintiff learned that it was not Utah Power & Light Company, but employees of the School District who had done the work and left the wires in that condition.

The statute of concern here upon which the court based its dismissal is Section 63--30--13, U.C.A.1953:

A claim against a political subdivision shall be forever barred unless notice thereof is filed within ninety (90) days after the cause of action arises . . .

Plaintiff makes no contention that there was any literal compliance with that statute in the usual form or sense. Her argument is that because of the conversations with the principal, his representations as to who was responsible; and his report to the School District, it should be deemed: (1) that she had made a sufficient 'filing' of a claim to satisfy the requirements of the statute; and (2) that the School District should be estopped to assert the protection of the statute.

***482** Oral Statements as a 'Filing'

[1][2][3] The School District is a political subdivision of the state. ([FN3]) Therefore it would normally be immune from suit; and the right to sue is an exception created by statute. ([FN4]) 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. ([FN5]) In order to so meet the requirements of the statute quoted above and fulfill its intended purpose, the 'filing' of a claim should include these essentials: that it be in writing; ([FN6]) that it contain a brief statement of the facts and the nature of the claim asserted; that it be subscribed by the party required to give it and who intends to rely on it; that it be directed to and delivered to someone authorized to or responsible for receiving it; and that this be done within the prescribed time. ([FN7]) It should require no exposition to demonstrate that the oral conversation with the school principal, and the fact that he turned in a report to the School District, do not satisfy the foregoing requirements.

The Claimed Estoppel

[4] On her issue relating to estoppel, the plaintiff argues that the conversation with the school principal brings her case within the ruling of this court in Rice v.

Granite School District. ([FN8]) There are significant differences between this case and that one. There the plaintiff had filed a timely written notice with the School District. The plaintiff's contention was that the insurance adjuster, who was handling the matter for the School District, gave the plaintiff assurances that the case would be settled after the extent of injuries and damages had been determined, and that this lulled her into a sense of security until after the time for filing the suit had expired. Then the School District attempted to assert that as a defense. We remanded for a trial as to the facts.

Here there is no averment that the principal, Mr. Anderson, made any representation, either that the School District was responsible, or that it would be responsible, to the plaintiff. The best that can be said from the plaintiff's point of view is that he told her either: that the Utah Power & Light Company was responsible, or that he was not sure who was responsible for the condition of the wires. But it is without dispute that he told her that he could not give her any information or do anything about it, and that that would have to be done with Dr. Lloyd of the School District office. Accordingly, he did nothing to delude, dissuade or delay plaintiff or her attorney in the filing of her claim.

From what has been said herein it is our conclusion that the trial court could properly rule as a matter of law that because of the plaintiff's failure to file a claim within the time allowed by the statute; and because there is no basis upon which estoppel against the defendant's reliance on the statute could be made out, that she cannot show entitlement to maintain this action.

Affirmed. No costs awarded.

HENRIOD, C.J., and ELLETT and TUCKETT, JJ., concur.

MAUGHAN, Justice (dissenting):

I respectfully dissent.

The facts as stated by Mr. Justice Crockett are accepted.

*483 Our statute, 63--30--13, U.C.A.1953, as amended, says two things:

A claim against a political subdivision shall be forever barred unless notice thereof is filed within

ninety days after the cause of action arises; provided, however, that any claim filed against a city or incorporated town under section 63--30--8 shall be governed by the provisions of section 10--7--77, Utah Code Annotated, 1953.

First, it says that a claim against a political subdivision will be barred, unless notice of the claim is filed within ninety days after the cause of action arises. Second, it says that any claim filed against a city or incorporated town under this section, shall not be governed by the provisions of 63--30--13, but shall be governed by the provisions of 10--7--77. The first part of the statute says nothing about a written notice, nor to whom notice shall be delivered. The second part of the statute requires examination of 10--7--77, which specifies that the claim referred to there must be in writing. It further is very explicit about what the notice of the claim must contain, and to whom it must be presented. These two statutes are distinctly different. They are similar only in the fact that both require some notice.

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 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 materially changed and to determine if there is liability, and if there is, the extent of it. These salutary provisions do serve to prevent needless litigation. ([FN1]) The procedure set out in the main opinion is merely more mechanistic, but would not impart any more notice than defendant had.

The main opinion has engrafted on 63--30--13 all manner of requirements for the notice, which are not set forth in the statute, nor necessary. The subject statute says nothing about written notice, but the main opinion cites the case of Tooele Meat & Storage Co. v. Morse, 43 Utah 515, 136 P. 965, wherein, Mr. Justice Frick says:

We think the law is well settled that where a statute requires notice to be given but is silent with respect to the manner of notification, written notice is understood. . . . A substantial compliance with the statute in that regard is, we think, all that is necessary.

In support of that proposition, Mr. Justice Frick cites 29 Cyc. 1117:

The general rule in respect to notices is that mere informalities do not vitiate them so long as they do not mislead, and give the necessary information to the proper parties.

In view of the fact that our statutes are to be liberally construed to effect their objectives and to promote justice, ([FN2]) I would not extend, by implication, the terms of 63--30--13, particularly where it is invoked by a political subdivision to avoid liability. ([FN3])]

***484.** Given the salutary public policy in 63--30--13, allowing one redress against a political subdivision, the lack of express requirements, and the substantial compliance doctrine set forth in the Tooele case, I would hold the following:

That defendant did have notice, that it had written notice (in the form of the school principal's written report, filed with defendant), that it was not misled, and that it had all of the opportunities the statute means to provide it, viz., an opportunity to investigate, to secure its witnesses, to determine liability and the extent of it, all before a material change in conditions. If anyone were misled, plaintiff was.

That if the foregoing were not determinative of this matter (and I think it is), the conflict in the statements of plaintiff and the school principal necessarily needs to be determined at trial, and if determined in plaintiff's favor, such would be sufficient to allow the action, because the detrimental effect of the misleading statement would thereby be cured.

That the holding of the district court be reversed and the matter remanded for trial.

(FN1.) See Rule 56, U.R.C.P.

(FN2.) Mr. Anderson denied this, but in view of the rejection of her cause by dismissal, for the purpose of determining the correctness of the ruling, we accept her averment as the fact.

(FN3.) Sec. 63--30--2, U.C.A.1953, defines a political subdivision as: '... any county, city, town, school district ...'

(FN4.) See Sec. 63--30--3, U.C.A.1953.

(FN5.) Varoz v. Sevey, 29 Utah 2d 158, 506 P.2d 435 (1973); Gallegos v. Midvale City, 27 Utah 2d 27, 492 P.2d 1335 (1972); Hurley v. Bingham, 63 Utah 589, 228 P. 213 (1924).

(FN6.) That an oral notice does not suffice as a 'filing,' but it must be in writing, see Tooele Meat & Storage Co. v. Morse, 43 Utah 515, 136 P. 965; and see 66 C.J.S. Notice s 16, p. 656; and 58 Am.Jur.2d, Notice, p. 505.

(FN7.) 56 Am.Jur.2d, Municipal Corporations, Counties and Other Political Subdivisions, Sec. 683.

(FN8.) 23 Utah 2d 22, 456 P.2d 159.

(FN1.) 56 Am.Jur.2d, Municipal Corporations, etc., Sec. 686.

(FN2.) Sec. 68--3--2, U.C.A.1953.

(FN3.) 56 Am.Jur.2d, Municipal Corporations, etc., Sec. 687.

FN4. See the dissents in Gallegos v. Midvale City, 27 Utah 2d 27, 492 P.2d 1335 (1972); Varoz v. Sevey, 29 Utah 2d 158, 506 P.2d 435 (1973).

FN5. The instant matter sparks recollection of the instructions given by the Khalif Omar, to his first Kadi c. 900 A.D.: 'If thou seest fit to judge differently from yesterday, do not hesitate to follow the truth as thou seest it; for truth is eternal and it is better to return to the true than to persist in the false!'

*1294 911 P.2d 1294

Court of Appeals of Utah.

Ron BELLONIO, Plaintiff and Appellee,

v.

**SALT LAKE CITY CORPORATION and Salt
Lake Airport Authority,
Defendants and Appellant.**

No. 950260-CA.

Feb. 15, 1996.

Pedestrian who tripped and fell in parking terrace at city airport brought personal injury action against city. City moved for dismissal for failure to comply with notice requirements of Utah Governmental Immunity Act. The Third District Court, Homer F. Wilkinson, J., refused to dismiss. City sought interlocutory appeal. The Court of Appeals, Greenwood, J., held that pedestrian failed to serve governing body of city, precluding action.

Reversed and remanded.

Orme, P.J., concurred in result.

West Headnotes

[1] Appeal and Error ☞842(1)

30 ----

30XVI Review

30XVI(A) Scope, Standards, and Extent, in
General

30k838 Questions Considered

30k842 Review Dependent on Whether
Questions Are of Law or
of Fact

30k842(1) In General.

Statutory interpretation is question of law which Court of Appeals reviews for correctness, granting no deference to trial court's determinations.

[2] Statutes ☞188

361 ----

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k188 In General.

[See headnote text below]

[2] Statutes ☞190

361 ----

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 Existence of Ambiguity.

When interpreting statute, Court of Appeals begins by examining its plain language, and will resort to other methods of statutory interpretation only if it finds language of statute to be ambiguous.

[3] Municipal Corporations ☞741.30

268 ----

268XII Torts

268XII(A) Exercise of Governmental and
Corporate Powers in
General268k741 Notice or Presentation of Claims
for Injury268k741.30 Service or Presentation: Time
Therefor.

Under plain meaning of Utah Governmental Immunity Act, claim against political subdivision is barred unless notice is filed with "governing body" within one year of claim arising. U.C.A.1953, 63-30-13.

[4] Municipal Corporations ☞741.30

268 ----

268XII Torts

268XII(A) Exercise of Governmental and
Corporate Powers in
General268k741 Notice or Presentation of Claims
for Injury268k741.30 Service or Presentation: Time
Therefor.

"Governing body" of city, within meaning of Utah Governmental Immunity Act, is mayor and city council. U.C.A.1953, 10-1-104(2).

[5] Municipal Corporations ☞857

268 ----

268XII Torts

268XII(E) Condition or Use of Public
Buildings and Other
Property

268k857 Actions for Injuries.

Tort claim of pedestrian who tripped and fell in parking terrace of city airport was barred, where pedestrian failed to file notice of claim with either mayor or city council, even though airport's counsel told him to direct all correspondence to him personally, since pedestrian demonstrated understanding that service upon airport's counsel would not be sufficient under Utah Governmental Immunity Act, and airport's counsel was not agent of city. U.C.A.1953, 63-30-13.

[6] Municipal Corporations ☞741.20

268 ----

268XII Torts

268XII(A) Exercise of Governmental and
Corporate Powers in
General268k741 Notice or Presentation of Claims
for Injury268k741.20 Requirement as Mandatory or
Condition Precedent.

Since notice of claim was statutory prerequisite to tort suit under Utah Governmental Immunity Act, trial court was without jurisdiction to hear case of injured pedestrian who failed to serve notice on proper parties. U.C.A.1953, 63-30-13.

*1295 Roger H. Bullock (argued), Strong & Hanni, Salt Lake City, for Appellant.

Gordon K. Jensen (argued), Lehman, Jensen & Donahue, L.C., Salt Lake City, for Appellee.

Before ORME, P.J., DAVIS, Associate P.J., and GREENWOOD, J.

OPINION

GREENWOOD, Judge:

Appellant Salt Lake City Corporation (the City), on interlocutory appeal, seeks reversal of the trial court's refusal to dismiss appellee Ron Bellonio's action, despite his failure to strictly comply with the relevant notice of claim requirements of the Utah Governmental Immunity Act. *See* Utah Code Ann. §§ 63-30-11, -13 (1993). We reverse.

BACKGROUND

Bellonio's cause of action arose on June 14, 1992, when he tripped and fell in the parking terrace at the Salt Lake International Airport (the Airport). Utilizing a "fill-in-the-blank" letter, dated July 9, 1992, Bellonio's first attorney informed the Airport's insurance carrier that he was representing Bellonio with respect to an accident which had occurred at the Airport. This letter was forwarded to Robert M. Kern, counsel for the Airport, who responded, on July 22, 1992, instructing Bellonio to address future communications to his office.

On December 7, 1992, Bellonio's second attorney sent a letter to the Airport's safety officer, requesting any reports regarding the accident. This letter was forwarded to Kern, who again requested, on December

22, 1992, that all communications go through his office.

Bellonio's attorney then sent a second letter to Kern, dated December 28, 1992, again requesting information and suggesting that settlement negotiations take place. In this letter Bellonio's counsel indicated his awareness of the potential bar of governmental immunity--even citing the relevant code sections--and of the procedures necessary to comply therewith.

On January 4, 1993, Kern responded that he did not possess much of the requested information and that the rest was likely privileged. On March 24, 1993, Bellonio's attorney sent a letter describing his theory of the Airport's liability. He also provided a synopsis of Bellonio's medical expenses to date and threatened to file a "Notice of Intent to Commence Legal Action" if no settlement took place. Kern acknowledged receipt of this letter on April 6, 1993, and indicated he was awaiting reports by Bellonio's experts indicating any possible liability on the part of the Airport.

On June 11, 1993, Bellonio's attorney prepared a document titled "NOTICE OF INTENT TO COMMENCE LEGAL ACTION AGAINST THE STATE OF UTAH OR ONE OF ITS POLITICAL SUBDIVISIONS." This document was served by mail upon the Utah Attorney General, the Salt Lake City Attorney, the Airport Director, *1296 and Kern, but not upon the City's Mayor or the Salt Lake City Council.

Finally, Bellonio's third set of attorneys filed a complaint against the City and the Airport on June 14, 1994. The trial court dismissed the claims against the Airport, having determined it was a division of Salt Lake City Corporation, rather than a governmental entity in its own right. This dismissal has not been appealed. The City also sought dismissal due to Bellonio's failure to comply with the notice of claim procedures of the Utah Governmental Immunity Act. The trial court denied this motion and the City brought this interlocutory appeal.

ISSUE ON APPEAL

The sole issue before this court is whether Bellonio properly complied with those notice of claim provisions of the Utah Governmental Immunity Act which apply when an individual sues a political subdivision. *See* Utah Code Ann. §§ 63-30-11, -13 (1993). Bellonio argues that constructive notice to the governmental entity, coupled with substantial

compliance with respect to the form of the notice, is sufficient. The City disagrees, contending that only actual notice and strict compliance with all aspects of the notice of claim requirements will satisfy the Governmental Immunity Act.

STANDARD OF REVIEW

[1] Statutory interpretation is a question of law which we review for correctness, granting no deference to the trial court's determinations. *Brittain v. State*, 882 P.2d 666, 668 (Utah App.1994).

ANALYSIS

This court has addressed the requirements for filing a proper notice of claim in two recent cases. See generally *Bischel v. Merritt*, 907 P.2d 275 (Utah App.1995) and *Brittain*, 882 P.2d at 666. From both the language of the Governmental Immunity Act and extant case law, some initial guiding principles are clear. First, the Governmental Immunity Act requires that "[a]ny person having a claim for injury against a governmental entity ... shall file a written notice of claim with the entity *before* maintaining an action." Utah Code Ann. § 63-30-11(2) (1993) (emphasis added). Second, this notice of claim must be filed with the correct persons or entities. See *id.* §§ 63-30-12, -13 (1993); see also *Yates v. Vernal Family Health Ctr.*, 617 P.2d 352, 354 (Utah 1980); *Lamarr v. Utah State Department of Transp.*, 828 P.2d 535, 540-41 (Utah App.1992).

In the case of a political subdivision such as the City, "[a] claim ... is *barred* unless notice of claim is filed *with the governing body* of the political subdivision within one year after the claim arises." Utah Code Ann. § 63-30-13 (1993) (emphasis added); *Yates*, 617 P.2d at 354. Bellonio argues the notices he filed with the attorney general, the Salt Lake City Attorney, the Airport Director and Kern satisfied the statutory requirements. (FN1) We disagree.

[2][3] When interpreting a statute, we begin by examining its plain language. *State v. Vigil*, 842 P.2d 843, 845 (Utah 1992); *Brittain*, 882 P.2d at 670. "We will resort to other methods of statutory interpretation only if we find the language of the statutes to be ambiguous." *Vigil*, 842 P.2d at 845. In this particular case, we need look no further than the statute's language. The plain meaning of section 13 is that a claim against a political subdivision is "barred" unless notice is filed with the "governing body" within one year of the claim arising. Utah Code Ann. § 63-30-13

(1993). The only remaining question concerns the term "governing body."

[4][5] Under existing statutory and case law there is no ambiguity to the term "governing body." The "governing body" of Salt Lake City is the mayor and the city council. See Utah Code Ann. § 10-1-104(2) (1992) (FN2); accord *Yates*, 617 P.2d at 354 (finding that *1297 "governing body" was the county commission and that failure to file notice with the commission was fatal to plaintiff's claim). Because Bellonio never filed his notice of claim with either the mayor or the city council, his claim is barred. Utah Code Ann. § 63-30-13 (1993).

Bellonio argues that "governing body" contains a latent ambiguity and that, even if we find that it does not, it should be interpreted in an equitable fashion since service upon the Salt Lake City Attorney substantially fulfills the purposes behind the notice of claim requirement. We disagree. As noted in previous opinions of this court and the supreme court:

" 'The primary purpose of a notice of claim requirement is to afford the responsible public authorities an opportunity to pursue a proper and timely investigation of the merits of a claim and to arrive at a timely settlement, if appropriate, thereby avoiding the expenditure of public revenue for costly and unnecessary litigation.' "

Bischel, 907 P.2d at 278 (quoting *Brittain*, 882 P.2d at 671 (quoting *Stahl v. Utah Transit Auth.*, 618 P.2d 480, 482 (Utah 1980))). While this statement, and others like it, may seem to indicate a flexible rule of constructive notice to governmental entities, this is not the general rule in this state.

Utah courts have typically required strict compliance with the notice of claim requirements except in certain very limited circumstances. See, e.g., *Scarborough v. Granite School Dist.*, 531 P.2d 480, 482 (Utah 1975) (construing former statute and noting 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."); see also *Brittain*, 882 P.2d at 669.

Nevertheless, in two recent opinions from this court, plaintiffs have been allowed to proceed despite certain inadequacies in their notice of claim filings. See *Bischel*, 907 P.2d at 279; *Brittain*, 882 P.2d at 672-73. However, the precedential effect of those cases is limited by their unique factual underpinnings

and, therefore, neither should be construed as an indication that we are prepared to abrogate the long-standing rule requiring strict compliance with all aspects of the Governmental Immunity Act.

In *Brittain*, we determined that service of a notice of claim upon the attorney general and upon the State Division of Risk Management satisfied Utah Code Ann. § 63-30-12 (1993), which requires service upon the attorney general and upon the "agency concerned." 882 P.2d at 672. *Brittain*, however, is distinguishable from the present appeal in that it involved section 12 rather than section 13 of the Governmental Immunity Act. Compare Utah Code Ann. § 63-30-12 (1993) with Utah Code Ann. § 63-30-13 (1993). Therefore, while this court found it reasonable to construe Risk Management as the "agency concerned" in section 12, it does not follow, a fortiori, that the Salt Lake City Attorney is the "governing body" of Salt Lake City in section 13. In fact, in contradistinction to section 12, section 13 contains no indication that the City's legal counsel is entitled to any notice of claim. See Utah Code Ann. § 63-30-13 (1993).

Section 13, unlike section 12, contemplates that a notice of claim is to be directed only to a political subdivision's governing body, not to its legal counsel. This interpretation is consistent with the Utah Supreme Court's earlier pronouncements that a primary purpose of the notice of claim is to "afford the responsible public authorities an opportunity to pursue a proper and timely investigation of the merits of a claim." *Stahl*, 618 P.2d at 482 (construing section 12) (emphasis added).

Given our determination that section 13 requires service upon the mayor and the city council, this court's recent opinion in *Bischel* requires some elucidation. In *Bischel*, this court allowed a claim against Salt Lake County to proceed despite the fact that the notice of claim was, in fact, served upon the Salt Lake County Attorney, rather than upon the Salt Lake County Commission as dictated by section 13. *Bischel*, 907 P.2d at 278. While *Bischel* may, at first blush, appear to be controlling in this case, that opinion was based upon a unique set of facts which is absent in this appeal.

In *Bischel*, the plaintiff was unsure of how to serve the county commission with a notice of claim; therefore, she did an entirely sensible thing and called the commission to ask for instructions. *Id.* She was instructed, by *1298, an agent of the commission, to serve her notice of claim upon the Salt Lake County

Attorney. *Id.* On those facts, this court found that the plaintiff had complied with the statute, as misinterpreted for her by the county commission. *Id.* at 279. 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. *Id.* at 278-79. The inequity of allowing the commission to base its defense upon its agent's misinformation prompted this court to utilize an estoppel-type argument to prevent the commission from forging the shield of governmental immunity into a sword. *Id.* at 279; see also *id.* at 280 (Bench, J., dissenting) (stating that majority's theory is implicitly one of estoppel).

Bellonio attempts to place himself within a similar factual scenario, arguing that the Airport's counsel told him to direct all correspondence to him personally. While it is clear that Kern did make such a request, he never indicated, either expressly or impliedly, that he was the proper agent to receive the statutorily mandated notice of claim, nor did Bellonio request from him any information regarding Governmental Immunity Act compliance. See *Scarborough*, 531 P.2d at 482 (finding no basis, under former law, for estoppel when principal of school admitted no liability and did nothing to hinder plaintiff's filing of notice of claim).

Furthermore, Bellonio's December 28, 1992 letter to Kern demonstrated Bellonio's apparent familiarity with the procedural requirements of the Governmental Immunity Act. Also, the fact that Bellonio served notices upon the attorney general and the airport director, in addition to the Salt Lake City Attorney and Kern, indicates an understanding that service upon Kern alone would not be sufficient. (FN3)

Finally, unlike the facts in *Bischel*, Kern was never the agent, apparently or in fact, of the mayor or the city council. While the Salt Lake Airport Authority is not a political subdivision, but rather a division of Salt Lake City Corporation, it is certainly not the governing body of Salt Lake City nor the agent of the mayor or the city council. Therefore, unlike the plaintiff in *Bischel*, Bellonio never even attempted to direct his notice of claim to the proper party, i.e., the mayor or the city council.

[6] Accordingly, we conclude that Bellonio did not properly file his notice of claim and, therefore, his claim is barred by Utah Code Ann. § 63-30-13 (1993). Since a notice of claim is a statutory prerequisite to suit, the trial court was without jurisdiction to hear

Bellonio's case and erred by allowing him to proceed. *Lamarr*, 828 P.2d at 540.

CONCLUSION

Because Bellonio did not file the required notice of claim with the Salt Lake City Mayor or the Salt Lake City Council within one year, as required by Utah Code Ann. § 63-30-13 (1993), his claim is barred. Therefore, the trial court was without jurisdiction to allow his claim to proceed. Accordingly, we reverse the decision of the trial court and remand for an entry of judgment dismissing Bellonio's action with prejudice.

DAVIS, Associate P.J., concurs.

ORME, P.J., concurs in result.

(FN1.) The City argues the notices of claim were also deficient in other regards and did not meet the formal requirements of section 63-30-11(3). However, due to our disposition of this case on the issue of improper service, we do not reach this issue.

(FN2.) Section 10-1-104(2) states: " 'Governing body' means collectively the legislative body and the executive of any municipality." Utah Code Ann. § 10-1-104(2) (1992).

(FN3.) We note that this shotgun approach to service--peppering the valley with notices of claim and hoping one will hit close to the mark--is an unsatisfactory way of assuring compliance with the statute. While such a strategy may often result in giving notice in fact, as the present case illustrates, it does not guarantee compliance with the Governmental Immunity Act.

*275 907 P.2d 275

30k982(1) In General.

Court of Appeals of Utah.

[See headnote text below]

Caren BISCHHEL, Plaintiff and Appellant,
v.
Heather J. MERRITT and Salt Lake County, et
al., Defendants
and Appellees.
 No. 940559-CA.
 Nov. 30, 1995.

Motorist sued county, alleging that she suffered personal injuries in automobile accident caused by county employee. The Third District Court, Salt Lake County, J. Dennis Frederick, J., granted county's motion to dismiss due to plaintiff's failure to file notice of claim in accordance with Utah Governmental Immunity Act. Plaintiff appealed. The Court of Appeals, Jackson, J., held that notice of claim was sufficient, even though it was addressed to county attorney, rather than to county commission.

Reversed and remanded.

Bench, J., issued dissenting opinion.

West Headnotes

[1] Judgment ☞384

228 ----

228IX Opening or Vacating

228k384 Form and Requisites of Application in
 General.

Where plaintiff labeled her motion to set aside trial court's order of dismissal as motion for new trial, but where plaintiff filed that motion more than ten days after entry of judgment because she did not receive timely notice of judgment, trial court properly considered motion as one for relief from judgment. Rules Civ.Proc., Rules 59, 60.

[2] Motions ☞15

267 ----

267k12 Form and Requisites

267k15 Entitling.

It is substantive motion, not caption, that is controlling.

[3] Appeal and Error ☞982(1)

30 ----

30XVI Review

30XVI(H) Discretion of Lower Court

30k982 Vacating Judgment or Order

[3] Judgment ☞355

228 ----

228IX Opening or Vacating

228k353 Errors and Irregularities

228k355 Errors of Law.

Trial courts have discretion to determine whether mistake of law existed, and whether setting aside of judgment would thus be warranted, and Court of Appeals will reverse only if there has been abuse of that discretion. Rules Civ.Proc., Rule 60(b).

[4] Counties ☞213

104 ----

104XII Actions

104k211 Conditions Precedent

104k213 Presentation of Claim.

Plaintiff's notice of claim to recover for personal injury she sustained in automobile accident caused by county employee satisfied requirements of Utah Governmental Immunity Act, even though notice of claim was addressed to county attorney, rather than to county commission; statute was generally silent about how notice should be filed with governing body, both county commission and county attorney informed plaintiff that notice should be filed with county attorney, notice was timely, and filing notice with county attorney facilitated settlement discussions. U.C.A.1953, 60-30-13.

[5] Municipal Corporations ☞741.10

268 ----

268XII Torts

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

268k741 Notice or Presentation of Claims
 for Injury

268k741.10 In General.

Utah courts have established rule of strict compliance with notice provisions of Utah Governmental Immunity Act. U.C.A.1953, 60-30-13.

*276 Samuel King and Harold J. Dent, Jr., Salt Lake City, for Appellant.

Douglas R. Short, Salt Lake County Attorney, and Michael E. Postma, Deputy County Attorney, Salt Lake City, for Appellees.

Before ORME, P.J., and BENCH and JACKSON,

JJ.

OPINION

JACKSON, Judge:

Caren Bischel appeals the trial court's denial of her motion to set aside an order dismissing her personal injury action. Salt Lake County prevailed below on its motion to dismiss Bischel's action for failure to file a notice of claim in accordance with the Utah Governmental Immunity Act. We reverse and remand.

FACTS

On February 1, 1993, Heather J. Merritt, a Salt Lake County employee, caused an automobile accident in which Bischel was allegedly injured. On April 22, 1993, Bischel prepared a notice of claim pursuant to Utah Code Ann. § 63-30-11 (1993) and called the Salt Lake County Commission to determine how and with whom the notice of claim should be filed. Bischel was told to send the notice to Trish McDonald at the Salt Lake County Attorney's Office. Bischel then called McDonald, who confirmed the instructions and provided the proper address for the notice. Bischel sent the notice by certified mail and received a return receipt signed by McDonald.

McDonald and other county employees subsequently negotiated the claim with Bischel. In May 1993, the county issued a \$680 check for property damage to Bischel's vehicle. By January 1994, however, Bischel's personal injury claim had not been settled, and she filed the present action. Salt Lake County then moved to dismiss Bischel's lawsuit for lack of subject matter jurisdiction, asserting the claim was not preserved as required by the Utah Governmental Immunity Act. See Utah Code Ann. § 63-30-13 (1993). The County based its motion to dismiss on the single fact that Bischel's notice of claim was addressed to McDonald rather than to the County Commission.

[1] The trial court granted the County's motion. The County, however, failed to give Bischel timely notice of the entry of judgment. See Utah R.Jud.Admin. 4-504(4) (1995). Once she received the trial court's *277 order of dismissal, Bischel filed a motion to set aside that order. (FN1) Bischel now challenges the trial court's denial of her rule 60(b) motion.

NOTICE OF CLAIM REQUIREMENT

[2][3] Bischel argues the trial court abused its discretion when it failed to recognize a mistake and set aside its order. The County responds the trial court made no mistake of law and therefore did not abuse its discretion in refusing to set aside its original order of dismissal. Rule 60(b)(1) provides a trial court may relieve a party of a judgment in case of mistake. (FN2) A judicial error or "mistake of law by the trial court may support a Rule 60(b) motion." *Udy v. Udy*, 893 P.2d 1097, 1099 (Utah App.1995). Trial courts have discretion to determine whether a mistake of law existed, and we will reverse only if there has been an abuse of that discretion. *Id.* Under the facts of the present case, we conclude a mistake of law existed; therefore, the trial court abused its discretion when it denied Bischel's rule 60(b) motion.

[4] The Utah Governmental Immunity Act provides that

[a]ny person having a claim for injury against a governmental entity, or against an employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority shall file written notice of claim with the entity before maintaining an action, regardless of whether or not the function giving rise to the claim is characterized as governmental.

....

... The notice of claim shall be ... directed and delivered to the responsible governmental entity according to the requirements of Section 63-30-12 or 63-30-13.

Utah Code Ann. § 63-30-11 (1993) (emphasis added). The requirements of section 63-30-13 simply provide that

[a] claim against a political subdivision, 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 governing body of the political subdivision within one year after the claim arises.

Id. § 63-30-13 (emphasis added). Under these sections, plaintiffs must give timely notice to the governing body of a county to maintain an action against that county.

It is undisputed that Bischel sent a certified notice of claim to the Salt Lake County Attorney's Office and that the County Attorney's Office accepted that notice. The trial court concluded Bischel's formal complaint was barred because Bischel failed to file a proper notice of claim in compliance with the Utah Governmental Immunity Act. To determine the accuracy of the trial court's legal conclusion, we must determine what filing a notice of claim with the governing body practically requires of citizens with claims against political subdivisions of the state. *See Brittain v. State ex rel. Utah Dep't of Employment* *278 *Sec.*, 882 P.2d 666, 669-70 (Utah App.1994). (FN3)

The statute does not prescribe a specific manner or method for filing notice with the governing body of the political subdivision. Whereas requirements for the form and content of the notice of claim are specifically articulated in the statute, *see* Utah Code Ann. § 63-30-11(3) (1993), requirements for 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.* § 63-30-13. In other words, although the time requirement is clearly expressed, the statute is generally silent about *how* notice should be filed with the governing body. Furthermore, the County has not articulated any policy or specific procedure for citizens to file notice of civil claims.

Because the statute does not prescribe specific procedures for direction and delivery of the notice of claim, we will interpret section 63-30-13 "in a manner consistent with the overall purpose of the Utah Governmental Immunity Act." (FN4) *Brittain*, 882 P.2d at 670. "It is necessary to consider the policy of the notice requirement so that in any particular case the facts can be evaluated to determine if the intent of the statute has been accomplished...." *Stahl v. Utah Transit Auth.*, 618 P.2d 480, 482 (Utah 1980).

"[T]he primary purpose of a notice of claim requirement is to afford the responsible public authorities an opportunity to pursue a proper and timely investigation of the merits of a claim and to arrive at a timely settlement, if appropriate, thereby avoiding the expenditure of public revenue for costly and unnecessary litigation."

Brittain, 882 P.2d at 671 (quoting *Stahl*, 618 P.2d at 482). Filing notice "tends to minimize the difficulties that may arise due to changes in administrations" and "protects against the passage of

time obscuring memory and distorting a plaintiff's recollection of the events which are at the heart of the claim." *Id.* at 671.

In the present case, Bischel, not finding explicit instructions in the statute but wanting to ensure her notice was directed and delivered correctly, called the County Commission and was instructed to send the notice to Trish McDonald in the County Attorney's office. Bischel took the further step of confirming the County Commission's instruction with McDonald. McDonald agreed she was the proper person to receive the notice and even provided the address where the notice should be filed. Thus, McDonald verified her apparent authority to receive the notice on behalf of the County Commission.

McDonald's instruction to Bischel was certainly reasonable given that the County Attorney's staff investigates and negotiates civil claims against the County. Bischel had no reason to question such a sensible instruction. Bischel's notice enabled the County to investigate the claim and to move toward settlement. Bischel's notice also memorialized the events at the heart of her claim. Bischel thus fulfilled the purpose of the notice requirement by filing notice of her claim with the designated person in the County Attorney's Office.

Considering the duties and authority delegated to the County Attorney's Office, it is evident that the governmental entity entrusted with investigating and settling or defending the claim received the requisite notice well within the one-year period imposed by the statute. Directing and delivering her notice of claim to the County Attorney's Office in no way inhibited settling Bischel's claim without resort to litigation. In fact, given the powers and responsibilities the County has bestowed upon the County Attorney's *279 Office, the opposite is true. *See id.* at 672. Filing notice with the County Attorney's Office facilitated settlement discussions. Indeed, the County Attorney's Office actively pursued settlement of Bischel's claim, even paying her property damage.

[5] Utah courts have established a rule of strict compliance with the notice provisions of the Utah Governmental Immunity Act. *See, e.g., Yates v. Vernal Family Health Ctr.*, 617 P.2d 352, 354 (Utah 1980); *Lamarr v. Utah State Dep't of Transp.*, 828 P.2d 535, 541 (Utah App.1992). Our holding today is consistent with that rule. The present case is not one in which a plaintiff gave no notice, *see, e.g., Madsen v. Borthick*, 658 P.2d 627, 628 (Utah 1983), or in which

a plaintiff filed only one of the two required notices. *see, e.g., Lamarr*, 828 P.2d at 540-41. This case is also not one in which the notice of claim was defective in form or content, *see, e.g., Cox v. Utah Mortgage & Loan Corp.*, 716 P.2d 783, 786 (Utah 1986), or in which notice of claim was not filed within the one-year period. *see, e.g., Richards v. Leavitt*, 716 P.2d 276, 277 (Utah 1985) (per curiam). As required by the statute, Bischel gave the County notice of claim; Bischel's notice complied with the statute's form and content requirements; and Bischel's notice was timely filed. Bischel therefore strictly complied with the statute and with the County Commission's instructions.

In sum, because Bischel directed and delivered her notice precisely as instructed by the statute and the County Commission, her notice was adequate. Further, because her notice and the ensuing lawsuit were timely filed, the trial court's refusal to set aside its dismissal must be reversed. Bischel must be given the opportunity to pursue her claim. (FN5) It appears at best disingenuous for the County to argue that Bischel's notice was inadequate merely because she directed and delivered it as the County Commission and County Attorney's Office instructed. The public deserves more consistent, more credible treatment from its servants.

CONCLUSION

We hold that Bischel's notice of claim met the requirements of the Utah Governmental Immunity Act. We therefore conclude the trial court abused its discretion when it failed to find a mistake of law under rule 60(b)(1) and denied Bischel's motion to set aside its earlier judgment. Accordingly, we reverse the trial court's order and remand the matter for further proceedings consistent with this opinion.

ORME, P.J., concurs.

BENCH, Judge (dissenting):

Had Bischel filed a timely appeal from the judgment of dismissal, we would have to reach the issue of whether she filed a timely notice of claim with "the governing body" as required by Utah Code Ann. § 63-30-13 (1993). However, Bischel did not appeal the judgment of dismissal. She appeals only the denial of her post-judgment motion. *See* main opinion at notes 1 and 2.

"The trial court is afforded broad discretion in ruling on a motion for relief from judgment under Utah R.Civ.P. 60(b), and its determination will not be

disturbed absent an abuse of discretion." *Birch v. Birch*, 771 P.2d 1114, 1117 (Utah App.1989). Insofar as Bischel's post-judgment motion can be construed to be a 60(b) motion, the trial court acted within its discretion in denying the motion. To hold otherwise is to effectively allow a 60(b) motion to stay the time for appealing the underlying judgment. Utah courts have consistently held that a 60(b) motion does not stay the time for appealing a judgment. *Lord v. Lord*, 709 P.2d 338, n. 1 (Utah 1985) (per curiam) (stating that "[r]ule 60(b) motions do not toll the time for appeal"); *Peay v. Peay*, 607 P.2d 841, 842 (Utah 1980) (explaining that rule 60(b) motion does not extend time for filing notice of appeal); *Holbrook v. Hodson*, 24 Utah 2d 120, 122 n. 2, 466 P.2d 843, 845 n. 2 (1970) (same); *Anderson v. Anderson*, 3 Utah 2d 277, 280, 282 P.2d 845, 847 (1955) (same); *see also* Utah R.App.P. 4(b).

*280 In her post-judgment motion, Bischel reargued and restated the same arguments she had made in opposing the motion to dismiss. No new information was provided, nor were any new arguments made. The trial court held that Bischel "failed to articulate sufficient reasons justifying relief," and denied the post-judgment motion. That ruling is within the broad discretion of the trial court.

Even if we could get beyond the procedural defect discussed above, the main opinion fails to follow controlling precedent in discussing the merits of the case. The main opinion erroneously relies upon *Brittain v. State*, 882 P.2d 666 (Utah App.1994) to divine the meaning of the "governing body" provision of section 63-30-13. *Brittain*, however, involved a different statute.

In *Brittain*, the plaintiff had been injured at a Job Service building in Provo, Utah. This court was interpreting section 63-30-12, which requires notice to be filed with the Attorney General's office and the "agency concerned" in any action against the state. The plaintiff properly served notice upon the Attorney General's office but instead of also serving notice upon Job Service or the Division of Facilities Construction and Management, the plaintiff sent notice to the Division of Risk Management. At trial, the State succeeded on its motion to dismiss for failure to file notice with the "agency concerned," and the plaintiff appealed. To interpret "agency concerned," this court relied on the dictionary definition of "concerned" as including those who are "interested." The court concluded that "interested" included the Division of Risk Management since it ultimately handled such claims. *Id.* at 671.

However, this type of interpretation is inappropriate in construing the "governing body" provision of section 63-30-13. In construing that section, the Utah Supreme Court has previously indicated that the governing body of a county is the county commission. *Yates v. Vernal Family Health Ctr.*, 617 P.2d 352, 354 (Utah 1980). In *Yates*, the supreme court expressly held that a complaint against a county was properly dismissed because plaintiff did not give timely notice to the county commission. *Id.*

Bischel did not serve any notice on the Salt Lake County Commission. Bischel also failed to establish, by competent evidence, that she had followed the county commission's instructions as to how to file a notice of claim. She presented no sworn statement from a member of the county commission or any employee of the commission. She did not even secure a sworn statement from Trish McDonald. (FN1) Merely claiming that some unidentified person told her where and how to file her claim is not enough to withstand the strict filing requirements of the Governmental Immunity Act. *See Lamarr v. Utah State Dep't of Transp.*, 828 P.2d 535, 540-41 (Utah App.1992). Bischel has failed to meet her burden of showing that the county commission, in some way, waived those strict notice requirements.

Implicit in the main opinion's decision is that because of what an unidentified commission employee allegedly told Bischel's attorney, the county commission should now be estopped from holding Bischel to the strict requirements of the Governmental Immunity Act. It is, however, very difficult to estop the government. *See Utah State Univ. v. Sutro & Co.*, 646 P.2d 715, 720 (Utah 1982). Only "well-substantiated representations" by a governmental entity will suffice. *Anderson v. Public Serv. Comm'n*, 839 P.2d 822, 828 (Utah 1992). To estop a governmental entity, its representations must generally take the form of a written statement by an authorized person. *Id.* at 827; *Celebrity Club, Inc. v. Utah Liquor Control Comm'n*, 602 P.2d 689, 694-95 (Utah 1979); *Eldredge v. Utah State Retirement Bd.*, 795 P.2d 671, 675-76 (Utah App.1990).

There is clearly no written statement in this case. Bischel has not even identified the commission employee who allegedly told her to file her notice with the county attorney. Under those circumstances, the county commission cannot be estopped from holding Bischel *281. to the strict notice provisions of the Governmental Immunity Act.

For the foregoing reasons, I would affirm.

(FN1.) We note that Bischel labeled her motion to set aside the trial court's order of dismissal as being made pursuant to rules 59 and 60 of the Utah Rules of Civil Procedure. However, Bischel filed the motion more than ten days after entry of judgment because she did not receive timely notice of the judgment from the County. The trial court thus properly considered the motion under rule 60 of the Utah Rules of Civil Procedure, rather than under rule 59. *See Utah R.Civ.P.* 59; *Fackrell v. Fackrell*, 740 P.2d 1318, 1319 (Utah 1987) (Rule 59 motions must be made within ten days after entry of judgment).

(FN2.) Although Bischel labeled her motion as a rule 60(b)(7) motion, it is the substance of the motion, not the caption that is controlling. *State v. Parker*, 872 P.2d 1041, 1044 (Utah App.), *cert. denied*, 883 P.2d 1359 (Utah 1994); *Kunzler v. O'Dell*, 855 P.2d 270, 273 (Utah App.1993). Thus, the trial court should have treated the motion as a rule 60(b)(1) motion rather than a rule 60(b)(7) motion because the substance of the motion challenged the trial court's definition of "strict compliance" required by the Utah Governmental Immunity Act. Furthermore, the trial court should have treated the motion as falling under rule 60(b)(1) because that subsection benefited Bischel. *See Parker*, 872 P.2d at 1044 n. 3 (noting court should choose rule 60 subsection that most benefits party seeking relief). Additionally, Bischel filed her motion within the three-month time frame required by rule 60(b)(1).

(FN3.) In dissent, Judge Bench asserts our reliance on *Brittain* is erroneous because *Brittain* interpreted a different statute. Indeed, *Brittain* focused on section 63-30-12 rather than on section 63-30-13. However, the two sections are identical in their requirements for directing and delivering notice of claim. The basic difference between the two sections is that section 63-30-12 addresses claims against the state while section 63-30-13 addresses claims against political subdivisions of the state.

(FN4.) For brief discussions of how the doctrine of governmental immunity evolved, see *Condemarin v. University Hosp.*, 775 P.2d 348, 349-51 (Utah 1989), and *Brittain*, 882 P.2d at 668-69.

(FN5.) We have also reviewed Bischel's claim for costs and attorney fees incurred on appeal. We deny the claim, finding it without merit. *See State v. Carter*, 776 P.2d 886, 888-89 (Utah 1989)

(observing court may decline to address arguments without merit on appeal).

(FN1.) Bischel's attorney merely alleged that an unidentified receptionist told him to file a notice with McDonald in the county attorney's office. In

an affidavit, the Chief Deputy of the Government Services Division of the county attorney's office stated that Trish McDonald was not authorized to accept notices of claim on behalf of the county commission.

*666 882 P.2d 666

Court of Appeals of Utah.

Harold BRITTAIN, Plaintiff and Appellant,
v.
STATE of Utah, by and through UTAH
DEPARTMENT OF EMPLOYMENT
SECURITY aka Job Service; and the State of
Utah, by and
through Utah Division of Facilities, Construction
and
Management, Defendants and Appellees.
 No. 930416-CA.
 Sept. 15, 1994.

Claimant brought tort suit against state. The District Court, Utah County, Lynn W. Davis, J., dismissed complaint and appeal was taken. The Court of Appeals, Orme, Associate P.J., held that claimant had satisfied requirement that notice be given to "the concerned agency," by filing notice and proper form with Department of Risk Management, even though claimant had not filed notice with Job Service or Division of Facilities Construction and Management, agencies claimed to be at fault.

Reversed and remanded.

West Headnotes

[1] Appeal and Error ⇨863
 30 ----

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k863 In General.

Court of Appeals will uphold trial court's grant of motion to dismiss only when it clearly appears plaintiff or plaintiffs would not be entitled to relief under facts alleged or under any state of facts they could prove to support their claim.

[2] Appeal and Error ⇨919
 30 ----

30XVI Review

30XVI(G) Presumptions

30k915 Pleading

30k919 Striking Out or Dismissal.

On appeal from motion from grant of motion to dismiss, appellate court accepts facts alleged and

complaint as true, and considers those facts and all reasonable inferences drawn therefrom in light most favorable to plaintiff.

[3] Appeal and Error ⇨842(1)
 30 ----

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k842 Review Dependent on Whether Questions Are of Law or of Fact

30k842(1) In General.

Trial court's interpretation of statute is legal conclusion reviewed for correctness, according no particular deference to trial court.

[4] States ⇨197
 360 ----

360VI Actions

360k194 Conditions Precedent to Action Against State

360k197 Presentation of Claim.

Strict compliance with notice requirement has typically been necessary to maintain tort action against state under Governmental Immunity Act. U.C.A.1953, 63-30-1 to 63-30-38.

[5] States ⇨197
 360 ----

360VI Actions

360k194 Conditions Precedent to Action Against State

360k197 Presentation of Claim.

State Division of Risk Management could be "the agency concerned" for purposes of Governmental Immunity Act requirement that notice of claim be filed upon "the agency concerned," even though Immunity Act went into effect in 1966 and Department was not created until 1981; powers and responsibilities conferred on Department were sufficient to qualify it as a concerned agency. U.C.A.1953, 63-30-11, 63-30-12, 63A-4-101 to 63A-4-206.

[6] Statutes ⇨214
 361 ----

361VI Construction and Operation

361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction

361k214 In General.

In interpreting statute, court first examines its plain language and will resort to other methods of statutory interpretation only if court determines that language is ambiguous.

[7] States ☞ 197

360 ----

360VI Actions

360k194 Conditions Precedent to Action Against State

360k197 Presentation of Claim.

Term "agency concerned." employed in Governmental Immunity Act requirement that "agency concerned" be given notice of tort claim, was not clear on its face, requiring appellate court to interpret requirement in manner consistent with overall purpose of Act; there could be more than one agency responsible for injury, and term was not necessarily limited to those having fault responsibility. U.C.A.1953, 63-30-12.

[8] States ☞ 197

360 ----

360VI Actions

360k194 Conditions Precedent to Action Against State

360k197 Presentation of Claim.

Primary purpose of notice of claim requirement, in connection with suits against state, is to afford responsible public authorities opportunity to pursue proper and timely investigation of merits of claim and to arrive at timely settlement, if appropriate, thereby avoiding expenditure of public revenue for costly and unnecessary litigation. U.C.A.1953, 63-30-12.

[9] States ☞ 197

360 ----

360VI Actions

360k194 Conditions Precedent to Action Against State

360k197 Presentation of Claim.

"The agency concerned," as used in statute requiring that notice of tort claims against state be filed with "the agency concerned," refers to an any agency with legitimate interests in claim and legal proceedings which might result therefrom. U.C.A.1953, 63-30-12.

[10] States ☞ 197

360 ----

360VI Actions

360k194 Conditions Precedent to Action Against State

360k197 Presentation of Claim.

Tort claimant had satisfied requirement, of Governmental Immunity Act, that notice of claim be filed with "the agency concerned," by filing notice with the Department of Risk Management, even though other agencies were alleged to have caused injuries; Department was empowered to handle claims on

behalf of state, and was to receive notice of claims served on other agencies. U.C.A.1953, 63-30-12, 63A-4-101 to 63A-4-206; Utah Admin.Code R37-1-1.

[11] States ☞ 197

360 ----

360VI Actions

360k194 Conditions Precedent to Action Against State

360k197 Presentation of Claim.

Receipt of actual notice of claim does not satisfy requirement that tort claimant notify "the agency concerned" as required by the Governmental Immunity Act. U.C.A.1953, 63-30-12.

*668 Brent D. Young, Provo, for appellant.

Jan Graham and Debra J. Moore, Salt Lake City, for appellees.

Before DAVIS, JACKSON and ORME, JJ.

OPINION

ORME, Associate Presiding Judge:

Harold Brittain appeals the trial court's order dismissing his personal injury claim for failure to file notice in accordance with the Utah Governmental Immunity Act. We reverse and remand.

FACTS

On February 4, 1991, Brittain was injured when he fell down some icy steps at the Department of Employment Security (Job Service) in Provo, Utah. Shortly after the accident, James Christiansen, a claims adjuster and investigator, contacted Brittain and indicated he would be handling the claim on behalf of Job Service and the Utah Division of Risk Management. On March 11, 1991, Brittain, through his attorney, filed notice of his claim with both the attorney general and the Division of Risk Management. Brittain alleged that melting snow had dripped off the roof of the building and frozen on the steps, that the Division of Facilities Construction and Management (DFCM) was negligent in approving the design and construction of the building, and that both DFCM and Job Service were negligent in maintaining the building and its premises. Christiansen met with Brittain's attorney on March 12, 1991, to discuss settling Brittain's claim. From mid-April through the end of August of 1991, those discussions continued. During

that time, Christiansen sent Brittain's attorney six separate letters reaffirming that he was acting as an agent on behalf of Job Service and Risk Management. The settlement discussions failed and Brittain, having sent timely notice of his claim to both the Utah Attorney General and Risk Management, filed this action.

On June 4, 1992, after fifteen months of settlement discussion and extensive discovery, and only four days before the case was to be tried, the State filed a motion to dismiss on the ground that Brittain had failed to file notice of claim with either Job Service or DFCM as required by the Utah Governmental Immunity Act. *See* Utah Code Ann. §§ 63-30-1 to -38 (1993 & Supp.1994). The trial court, ruling from the bench, granted the State's motion, reasoning that filing notice of claim with Risk Management did not fulfill the necessary requirement of filing notice with "the agency concerned." *Id.* § 63-30-12. Brittain appeals from this order.

ISSUE

The sole issue presented is whether, given the facts of this case, the trial court erred by concluding that Brittain's serving notice of claim upon Risk Management did not constitute service upon the agency concerned as required by Utah Code Ann. § 63-30-12 (1993).

STANDARD OF REVIEW

[1][2][3] We will uphold a trial court's grant of a motion to dismiss "only where it clearly appears that the plaintiff or plaintiffs would not be entitled to relief under the facts alleged or under any state of facts they could prove to support their claim." *Prows v. State*, 822 P.2d 764, 766 (Utah 1991). On appeal, we accept the facts alleged in the complaint as true, and consider those facts and all reasonable inferences drawn therefrom, in a light most favorable to plaintiff. *Demond v. FHP*, 849 P.2d 598, 599 (Utah App.1993). Key to our decision is the interpretation of the statute imposing a notice requirement as a prerequisite to bringing an action against the State. The trial court's interpretation of a statute is a legal conclusion which we review for correctness, according no particular deference to the trial court. *Jerz v. Salt Lake County*, 822 P.2d 770, 771 (Utah 1991).

GOVERNMENTAL IMMUNITY

The doctrine of sovereign or governmental

immunity--requiring the consent of the State in order to subject it to suit in its own courts--is a deeply rooted and well recognized *669 doctrine of American common law. *See Madsen v. Borthick*, 658 P.2d 627, 629 (Utah 1983). The doctrine is a carryover from medieval times, and reflects the notion that the sovereign, in whom reposed ultimate governmental powers, was simply incapable of doing wrong. (FN1) The Utah Governmental Immunity Act, *see* Utah Code Ann. §§ 63-30-1 to -38 (1993 & Supp.1994), which went into effect in 1966, codified the common law principle of sovereign immunity and created various exceptions to the doctrine. *Madsen*, 658 P.2d at 629-30.

[4] Scores of Utah cases have interpreted this Act and defined the requirements necessary to overcome the State's immunity. (FN2) Among these many cases, courts have, periodically, had occasion to interpret the Act's notice requirements. *See, e.g., Cox v. Utah Mortgage & Loan Corp.*, 716 P.2d 783, 785-86 (Utah 1986); *Madsen*, 658 P.2d at 630; *Sears v. Southworth*, 563 P.2d 192, 193-94 (Utah 1977); *Scarborough v. Granite Sch. Dist.*, 531 P.2d 480, 482 (Utah 1975); *Lamarr v. Department of Transp.*, 828 P.2d 535, 540-42 (Utah App.1992); *Kabwasa v. University of Utah*, 785 F.Supp. 1445, 1446-47 (D.Utah 1990). Strict compliance with the notice requirement has typically been necessary to maintain an action against the State. *See Sears*, 563 P.2d at 194; *Scarborough*, 531 P.2d at 482. While defects in the form or content of notices of claim do not always act to bar a claim, *see Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1179, 1183 (Utah 1983); *Spencer v. Salt Lake City*, 17 Utah 2d 362, 363-64, 412 P.2d 449, 450 (1966), courts have consistently barred claims in situations where either no notice or only one of the two required notices was filed. *See Lamarr*, 828 P.2d at 541; *Kabwasa*, 785 F.Supp. at 1446-47. However, until now, no reported Utah decision has barred a claim when two notices, free of defects, were timely filed. Thus, this appeal presents an issue of first impression and necessitates our careful review of the notice of claim requirements within the Utah Governmental Immunity Act. *See* Utah Code Ann. §§ 63-30-11 to -13 (1993).

NOTICE OF CLAIM

The Governmental Immunity Act provides that

[a]ny person having a claim for injury against a governmental entity, or against an employee for an act or omission occurring during the performance

of his duties, within the scope of employment, or under color of authority shall file written notice of claim with the entity before maintaining an action, regardless of whether or not the function giving rise to the claim is characterized as governmental.... The notice of claim shall be ... directed and delivered to the responsible governmental entity according to the requirements of Section 63-30-12 or 63-30-13.

....

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*

Utah Code Ann. §§ 63-30-11, -12 (1993) (emphasis added).

[5] Under these sections, a plaintiff must give timely notice to both the attorney general and "the agency concerned" in order to maintain an action against the State. Neither party disputes that appropriate notice was sent to the attorney general. It is also undisputed that notice was sent to the Division of Risk Management within one year after the claim arose. The trial court found that such notice was deficient because it concluded Risk Management was not "the agency concerned" within the meaning of section 60-30-12. To assess the accuracy of this conclusion we must determine what the Legislature, *670 in promulgating section 63-30-12, intended to include within the term "the agency concerned." (FN3)

A. Serving Notice on the Agency Concerned

[6] To interpret a statute, we first examine its plain language and will resort to other methods of statutory interpretation only if we determine that the language is ambiguous. *State v. Vigil*, 842 P.2d 843, 845 (Utah 1992); *Krauss v. Department of Transp.*, 852 P.2d 1014, 1018 (Utah App.), *cert. denied*, 862 P.2d 1356 (Utah 1993). The State contends that serving notice on "the agency concerned" plainly requires serving notice on the agency allegedly at fault for the claimant's injuries. However, the Legislature chose not to employ fault-based terminology into the notice requirement of section 63-30-12; instead, it employed the more nebulous and far broader language of "the agency concerned." If the Legislature had intended to require

a claimant to serve notice on the agency allegedly at fault, it would have used different language, perhaps requiring that notice be sent to the agency that would have been liable if it were a private party. (FN4)

[7] Moreover, the Legislature's decision to employ singular usage and require notice to "the agency concerned" is inconsistent with a fault-based scheme. Unlike the imprecise word "concerned," fault is a more technical concept and fault is frequently shared by multiple parties. If fault were at the heart of determining to whom notice should be sent, singular usage would be avoided and the statute would clearly require that in cases, like the instant one, where two or more agencies are claimed to be at fault, more than two notices of claim would be required--one to the attorney general and an additional notice of claim to every agency which might be at fault. However, the State does not contend, nor do the statute or prior cases suggest, that more than two notices are ever required. (FN5)

Because the term "agency concerned" is not clear on its face, we will interpret the notice requirement of section 63-30-12 in a manner consistent with the overall purpose of the Utah Governmental Immunity Act. As explained by the Utah Supreme Court, "[i]t is necessary to consider the policy of the notice requirement so that in any particular case the facts can be evaluated to determine if the intent of the statute has been accomplished." *671 *Stahl v. Utah Transit Auth.*, 618 P.2d 480, 482 (Utah 1980).

B. Purpose of Notice

[8] "[T]he primary purpose of a notice of claim requirement is to afford the responsible public authorities an opportunity to pursue a proper and timely investigation of the merits of a claim and to arrive at a timely settlement, if appropriate, thereby avoiding the expenditure of public revenue for costly and unnecessary litigation." (FN6) *Stahl v. Utah Transit Auth.*, 618 P.2d 480, 482 (Utah 1980). *See Sears v. Southworth*, 563 P.2d 192, 193 (Utah 1977); *Spencer v. Salt Lake City*, 17 Utah 2d 362, 364, 412 P.2d 449, 450 (1966). Serving notice on the attorney general is intended to ensure that the State's legal needs are met. (FN7) *See Lamarr v. Department of Transp.*, 828 P.2d 535, 541 n. 6 (Utah App.1992). Furthermore, filing notice of claim tends to minimize the difficulties that may arise due to changes in administrations. *Sears*, 563 P.2d at 193. Lastly, the requirement that the notice be in writing protects against the passage of time obscuring memory and

distorting a plaintiff's recollection of the events which are at the heart of the claim. (FN8) *See Stahl*, 618 P.2d at 482.

[9] Having ascertained the purposes of the notice requirement, we next must establish a working definition of the term "agency concerned" in order to evaluate the adequacy of notice in this case. Because the term "agency concerned" is not defined by statute, we turn to its commonly understood meaning. The word "concerned" is defined as meaning "interested." *Webster's Third New International Dictionary* 470 (1976). Thus, the statute's requirement that plaintiff must file notice of claim with "the agency concerned" is met by filing notice with any one of potentially several agencies with a legitimate interest in plaintiff's claim and the legal proceedings which might result therefrom.

ADEQUACY OF NOTICE IN THIS CASE

[10] We now assess Brittain's contention that the notice he filed with Risk Management in this case constituted compliance with section 63-30-12 in light of both the broad language of that section and the aforementioned policy considerations.

A. Risk Management is Agency Concerned

The duties of Risk Management mandate it take an active role in Brittain's claim and clearly suggest it is an agency concerned. To begin with, Risk Management is authorized by law to handle Brittain's claim, representing the interests of the State. Risk Management is empowered with broad-based authority to handle claims on behalf of the State. *See Utah Code Ann. §§ 63A-4-101 to -206* (1993); *Utah Admin.Code R37-1-1 to -5* (1994). The Legislature has authorized Risk Management to "adjust, settle, and pay claims." *Utah Code Ann. § 63A-4-102(1)(c) *672* (1993). Directly relevant to the case at bar, if suit is brought against a state agency pursuant to the Utah Governmental Immunity Act, the agency shall immediately forward to Risk Management any notice of claim it receives. *Utah Admin.Code R37-1-3(B)* (1994). The risk manager is also required to supervise the state-funded risk management fund. *Utah Code Ann. § 63A-4-201(1)(a)* (1993). This fund is used to pay all costs authorized by the risk manager relating to property, liability, fidelity and other risks. *Id. § 63A-4-201(1)(b)*. Moreover, "[i]n managing and defending claims against covered entities, the Risk Management Fund will consider their interests, but the final determination as to claim management, defense

and settlement shall be *exclusively* with the Risk Management Fund." *Utah Admin.Code R37-1-1* (1994) (emphasis added).

Given this broad-based authority, it cannot be seriously argued that Brittain's claim did not directly and fundamentally concern Risk Management. On the contrary, Risk Management's responsibility and involvement were substantial. Therefore, we can only conclude that Risk Management had a legitimate interest in plaintiff's claim and, by definition, qualified as an "agency concerned."

B. Purpose of Providing Notice was Met

[11] Moreover, Brittain fulfilled the purposes of section 63-30-12 by filing notice of his claim with the attorney general and Risk Management. (FN9) Considering the duties delegated to Risk Management, it appears the state entity entrusted with investigating and settling or defending the claim received the requisite notice in a timely manner and well within the one-year period imposed by the statute. Filing notice with Risk Management in no way inhibited the possibility of settling the claim without resort to litigation. In fact, given the powers and responsibilities the Legislature has bestowed upon Risk Management, the opposite is true. Filing notice with Risk Management facilitated settlement discussions by providing notice to the agency responsible for investigating and settling the claim and obviated the risk that Job Service or DFCM would fail to forward the notice to Risk Management as required by law. *See Utah Admin Code. R37-1-3(B)* (1994). Indeed, the record indicates that Risk Management actively pursued settling Brittain's claim.

Finally, we wish to reiterate that this is not a case where the notice of claim was defective in form or content. (FN10) Recognizing the need for written notice to protect against the unreliability of memory, the notice of claim was preserved in writing, accurately recording Brittain's account of the accident. This is also not a case where plaintiff either gave no notice or filed only one of the two required notices. (FN11) Here, plaintiff filed two **673*. notices, one with the attorney general and the other with Risk Management. Finally, this is not a case where notice of claim was not filed within the one-year period. (FN12) It is undisputed that plaintiff sent both notices well within one year from the date his claim arose.

CONCLUSION

Given the facts of the case before us and the powers the Legislature has bestowed upon Risk Management, we conclude that Brittain filed notice of claim on an agency concerned by filing notice with Risk Management. Therefore, the trial court erred in concluding that Brittain failed to comply with section 63-30-12 of the Utah Governmental Immunity Act. Accordingly, we reverse and remand for trial on the merits.

DAVIS and JACKSON, JJ., concur.

(FN1.) This underlying premise has, of course, long since been rejected. Indeed, the American Revolution resulted from the perception of most American colonists that the British sovereign had perpetrated any number of wrongs. See *The Declaration of Independence* (U.S.1776).

(FN2.) A brief recap of how this doctrine evolved can be found in *Condemarin v. University Hospital*, 775 P.2d 348, 349-51 (Utah 1989).

(FN3.) The State contends that because the current version of section 63-30-12 was enacted in 1965 and went into effect in 1966, the requirement of filing notice with the agency concerned could not have been meant to refer to Risk Management, which was not created until 1981. However, when Risk Management was created, the Legislature gave it powers and responsibilities that suggest it can readily fit within the term "agency concerned" for purposes of section 63-30-12. See *Utah Code Ann.* §§ 63A-4-101 to -206 (1993) (defining powers and duties of Risk Management). See also *Utah Admin.Code R37-1-1 to -5* (1994) (administrative rules establishing policies and procedures of Risk Management). We should assume that when the Legislature created Risk Management it did so advisedly, fully aware of the impact this would have on existing law. See *Greenhalgh v. Payson City*, 530 P.2d 799, 801 (Utah 1975). See also *Adkins v. Division of State Lands*, 719 P.2d 524, 525-26 (Utah 1986) (holding plaintiff need not file notice in accordance with section 63-30-12 because Division of State Lands had statutory authority to decide dispute prior to the creation and enactment of the Governmental Immunity Act).

(FN4.) See, e.g., *Utah Code Ann.* § 63-30-11(1) (1993) (providing that "[a] claim [against the State] arises when the statute of limitations that would apply if the claim were against a private person begins to run"). See also *Utah Code Ann.* §

63-30-4(1)(b) (1993) (providing that if the State waives its immunity from suit, "consent to be sued is granted, and liability of the entity shall be determined as if the entity were a private person").

(FN5.) In the instant case, Brittain alleges that the Division of Facilities Construction and Management (DFCM) was negligent in approving the design and construction of the building, and that both DFCM and Job Service were negligent in maintaining the building and its premises. Thus, Brittain claims that while DFCM is responsible for creating the dangerous condition, both DFCM and Job Service share the blame for allowing the dangerous condition to remain. Under the State's fault-oriented view, no reason exists why Brittain would not be required to file three notices of claim--one with the attorney general, one with the DFCM, and one with Job Service. Nonetheless, the statute contemplates that only two notices be sent and the State does not contend otherwise in this appeal.

(FN6.) In the instant case, this purpose was fully accomplished well in advance of any notice being given. Within days of this accident, the sovereign's agent contacted plaintiff and, with commendable responsibility, set about to investigate what happened and to settle the claim without need for litigation. The main purpose of the statute having been met, this appeal is reduced to evaluating whether plaintiff has abided by the technical provisions of the Utah Governmental Immunity Act--a statute with which plaintiffs must strictly comply in order to overcome the State's immunity.

(FN7.) The Attorney General has a duty to "defend all causes to which the state ... is a party." *Utah Code Ann.* § 67-5-1(1) (1993).

*673_ (FN8.) The Utah Supreme Court has previously stated that the notice of claim requirement is also intended to provide the State with the opportunity to promptly remedy any defect before additional injury occurs. See *Sears v. Southworth*, 563 P.2d 192, 193 (Utah 1977). However, the plain language of section 63-30-12 is contrary to the notion that one of its purposes is to allow for prompt remedial measures. Section 63-30-12 allows one year to file a notice of claim. If the Legislature intended to require a notice of claim to facilitate the prompt correction of potentially dangerous defects or conditions, it certainly would have required that plaintiff notify

the State of the hazard in a far more expeditious manner than anytime within one year of the incident.

For example, in the case before us, Brittain was injured on February 4, 1991, when he slipped on the ice at Job Service. He had one year to file notice of claim with the State. *See* Utah Code Ann. § 63-30-12 (1993). The dangerous condition could have remained for several more weeks, but in any event it would certainly have melted away long before the one-year period had expired.

(FN9.) This court has previously stated "that actual notice cannot cure a failure to comply with the notice provisions of the Governmental Immunity Act." *Lamarr v. Department of Transp.*, 828 P.2d 535, 541 (Utah App.1992). Although not expressly stated in *Lamarr*, the rationale behind this rule of strict compliance is clear--the purpose of the notice of claim is not simply to provide information about the facts of the incident that led to the claim being asserted, which facts the affected agencies may already know. Instead, the purpose of the notice statute is to make the State aware that a plaintiff actually intends to assert a claim. Such notice allows the State to investigate and settle the claim in advance of litigation being commenced. Therefore, that Job Service immediately notified Risk Management about Brittain's accident and that both had actual notice of the incident at the heart of Brittain's claim is not dispositive. What matters is

that Brittain notified Risk Management--the agency concerned with investigating and settling or defending the asserted claim.

(FN10.) *See, e.g., Cox v. Utah Mortgage & Loan Corp.*, 716 P.2d 783, 786 (Utah 1986) (letter to city council proposing city take legal action not sufficient as notice of claim); *Scarborough v. Granite Sch. Dist.*, 531 P.2d 480, 482 (Utah 1975) (school principal's submission of written report to school district, although based on claimant's conversation with principal, did not satisfy notice requirement).

(FN11.) For example, in *Lamarr v. Department of Transportation*, 828 P.2d 535 (Utah App.1992), the defect which barred plaintiff's claim was that plaintiff did not file two written notices of claim. In *Lamarr*, plaintiff served UDOT, but failed to serve notice of claim on the attorney general. *Id.* at 540-41. Likewise, in *Kabwasa v. University of Utah*, 785 F.Supp. 1445, 1446-47 (D.Utah 1990), plaintiff's claim was barred because he served only one of the two required notices. Finally, in *Madsen v. Borthick*, 658 P.2d 627, 628 (Utah 1983), plaintiff failed to file any notice of claim with either the attorney general or the agency concerned.

(FN12.) *See Richards v. Leavitt*, 716 P.2d 276, 277 (Utah 1985) (per curiam); *Sears v. Southworth*, 563 P.2d 192, 194 (Utah 1977).

*449 412 P.2d 449

17 Utah 2d 362

Supreme Court of Utah.

Frances SPENCER, Plaintiff and Appellant,
 v.
SALT LAKE CITY, a municipal corporation of the
State of
Utah, Defendant and Respondent.
 No. 10485.
 March 18, 1966.

Action to recover from city for injuries sustained when plaintiff tripped on a defective sidewalk and fell. The Third District Court, Salt Lake County, Stewart M. Hanson, J., granted city's motion to dismiss claim. Plaintiff appealed. The Supreme Court, McDonough, J., held that claim against city which gave time, place, and stated generally the nature of the alleged defect and the injury was not rendered insufficient by its failure to state the amount of damages claimed, since city was given essential facts enabling it to make proper investigation.

Dismissal vacated and case remanded for trial.

West Headnotes

- [1] Municipal Corporations ☞ 755(1)
 268 ----
 268XII Torts
 268XII(C) Defects or Obstructions in Streets
 and Other Public Ways
 268k755 Nature and Grounds of Liability
 268k755(1) In General.

The city is liable for negligence in performing duty of maintenance of streets and sidewalks. U.C.A.1953, 10-7-77.

- [2] Time ☞ 8
 378 ----

378k7 Days
 378k8 In General.

Claim against city filed on July 27 for injuries sustained on June 27 when plaintiff tripped on a defective sidewalk was filed within 30 days allowed by statute governing such suit. U.C.A.1953, 10-7-77.

- [3] Municipal Corporations ☞ 812(6.1)
 268 ----
 268XII Torts
 268XII(C) Defects or Obstructions in Streets

and Other Public Ways
 268k810 Actions for Injuries
 268k812 Notice of Claim for Injury
 268k812(6) Form and Sufficiency
 268k812(6.1) In General.

(Formerly 268k812(6))

Claim against city for injuries sustained when plaintiff tripped on defective sidewalk and fell, which gave time, place, and stated generally the nature of the alleged defect and the injury, was not rendered insufficient by its failure to state the amount of damages claimed, since city was given the essential facts which would enable it to make proper investigation. U.C.A.1953, 10-7-77.

*450 [17 Utah 2d 363] Thomas A. Duffin, Salt Lake City, for appellant.

Homer Holmgren, City Atty., A. M. Marsden, Asst. City Atty., Salt Lake City, for respondent.

McDONOUGH, Justice:

Plaintiff Frances Spencer sued Salt Lake City alleging that on the night of June 27, 1964, she suffered injuries when she tripped and fell on a defective sidewalk where tree roots had raised it about four to six inches in front of 463 Douglas Street.

(1) Our statutes impose upon the City the duty of maintenance of streets and sidewalks, and it is established that the City is liable for negligence in performing this duty; see *Nyman v. Cedar City*, 12 Utah 2d 45, 361 P.2d 1114. Section 10-7-77, U.C.A.1953 provides that a person must file a claim within 30 days after the injury.

At pre-trial the district court granted the City's motion to dismiss on the ground (a) that the plaintiff had not filed her claim within 30 days; and (b) that the claim which was filed was insufficient in that it did not state the amount of damages claimed.

(2) As to (a), it is alleged that the accident occurred on June 27, 1964. The claim is dated July 25, 1964, and was filed with the City Recorder on July 27, 1964. This is within the 30 days allowed by the statute.

(3) As to (b): The claim gave the time, place and stated generally the nature of the alleged defect and the injury. Even if the fact that the amount of damages was not stated be regarded as a defect, that [17 Utah 2d 364] surely should not be considered as rendering the

claim a complete nullity. There is a wide difference between presenting no claim at all and presenting one of the kind shown here which evidently fulfills the main purpose of the statute: of giving the City the essential facts as soon as reasonably possible after the injury so that it will have ample opportunity to make a proper investigation. See Hurley v. Town of Bingham, 63 Utah 589, 228 P. 213. In such circumstances as this it is the duty of the court to look to substance rather than to technicality in order that plaintiff may have a fair adjudication of her claim. It seems unreasonable and capricious to deprive her entirely of that opportunity for failing to specify the amount of damages she suffered within 30 days of her injury when it is obvious that

neither she nor anyone else would know just what those figures were at that time.

Inasmuch as the plaintiff filed her claim within the 30 days allowed by statute, and the claim was sufficient to constitute substantial *451. compliance with the statute and apprise the City of the essentials thereof, it is our opinion that the dismissal was in error. It is vacated and the case remanded for trial. No costs awarded.

HENRIOD, C. J., and CROCKETT, WADE, and CALLISTER, JJ. concur.

IN THE
UTAH COURT OF APPEALS

GREAT WEST CASUALTY Company, Lloyd
Morris, and Judy K. Morris,
Plaintiffs and Appellants,

v.

UTAH DEPARTMENT OF TRANSPORTATION
and Does I-X,
Defendants and Appellees.

No. 20000010-CA
FILED: 02/23/01
2001 UT App 54

Third District, Salt Lake Department
The Honorable Tyrone Medley

ATTORNEYS:

Preston L. Handy, Murray, and Michael F.
Richman, Salt Lake City, for Appellants
Mark L. Shurtleff and Nancy L. Kemp, Salt Lake
City, for Appellees

Before Judges Jackson, Davis, and Orme.

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

ORME, Judge:

¶1 Great West Casualty Company challenges the trial court's grant of the Utah Department of Transportation's motion for summary judgment, premised on the inadequacy of notice under Utah's sovereign immunity scheme. With some reluctance, we affirm.

BACKGROUND

¶2 The facts are undisputed. On October 20, 1997, Lloyd Morris was driving a truck on Interstate 80 when he came upon a cow in the highway. He struck the cow and rolled the truck. Both Lloyd and his wife Judy, a passenger in the vehicle, were injured, and the vehicle was damaged. The truck was owned by M&P Transportation and insured by Great West Casualty Company. Great West compensated M&P for the damage done to the truck.

¶3 On May 13, 1998, pursuant to the Utah Governmental Immunity Act, *see* Utah Code Ann. §§63-30-1 to -38 (1997 & Supp. 2000), Morris filed a notice of claim against the Utah Department of Transportation (UDOT). *See* Utah Code Ann. §63-30-11 (Supp. 2000).¹ The claim asserted that the cow's foray onto the highway resulted from UDOT's negligence in maintaining its roadside fence and that "[Morris] sustained serious injury to his person as well as significant damage to his semi-tractor in this collision The damage to claimant's semi exceeds \$48,000.00." Neither Great West nor M&P ever filed their own notice of claim for the vehicle damage.

¶4 UDOT denied Morris's claim, so on February 10, 1999, Morris and his wife filed a personal injury suit against UDOT.² The complaint was later amended to add Great West, which sought to recover from UDOT the sum it paid M&P for the vehicle damage.

¶5 On October 8, 1999, UDOT moved for summary judgment against Great West, arguing that Great West's failure to file a notice of claim barred it from pursuing a lawsuit against UDOT. Great West opposed this motion by arguing that the notice of claim filed by Morris was sufficient to put UDOT on notice of the property damage claim now being asserted by Great West. The trial court granted UDOT's Motion for Summary Judgment. Great West appeals.³

ISSUE AND STANDARD OF REVIEW

¶6 The sole issue on appeal is whether Great West can rely upon a timely notice of claim filed by Morris, on his own behalf, that identifies the loss sustained by Great West but fails to reference Great West as a party to the claim. Summary judgment is proper only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Harward v. Utah County*, 2000 UT App 222, ¶6, 63 P.3d 1140. We review summary judgment determinations for correctness, according no particular deference to the trial court, and evaluate the facts and inferences in the light most favorable to the non-moving party. *See Tallman v. City of Hurricane*, 1999 UT 55, ¶1, 985 P.2d 892.

ANALYSIS

¶7 Great West argues that Morris's notice of claim was legally sufficient to notify UDOT of Great West's property damage claim. Relying upon *Moreno v. Board of Education*, 926 P.2d 886 (Utah 1996), Great West contends that, as the real party in interest, it should be able to "piggyback" on Morris's notice of claim for the vehicle damage.

¶8 The Governmental Immunity Act requires that [a]ny person having a claim for injury against a governmental entity, or against its employee for an act or omission occurring during the performance of the employee's duties, within the scope of employment, or under color of authority shall file a written notice of claim with the entity before maintaining an action

Utah Code Ann. §63-30-11(2) (Supp. 2000). A notice of claim must contain "(i) a brief statement of the facts; (ii) the nature of the claim asserted; and (iii) the damages incurred by the claimant so far as they are known." *Id.* § 63-30-11(3)(a). In addition, the notice "shall be . . . signed by the person making the claim or that person's agent, attorney, parent, or legal guardian[.]" *Id.* §63-30-11(3)(b)(i). The notice of claim must be filed with both the attorney general and the agency concerned within one year after the claim arises, or the claim is barred. *See id.* §63-30-12. *See also Rushton v. Salt Lake County*, 1999 UT 36, ¶18, 977 P.2d 1201 ("Failure to file such notice [of claim] deprives the court of subject matter jurisdiction.").

¶9 Utah courts have held that the notice provisions of the Governmental Immunity Act are to be strictly construed and that "full compliance with its requirements is a condition precedent to the right to maintain a suit." *Scarborough v. Granite Sch. Dist.*, 531 P.2d 480, 482 (Utah 1975). In general, even in situations where a governmental agency may be given actual notice of a party's claim, the party must still file a notice of claim in full compliance with the statute in order to pursue its claim. *See Rushton*, 1999 UT 36 at ¶19.

¶10 However, the Utah Supreme Court in *Moreno*

did loosen the standard for evaluating the adequacy of notices of claim to something less than "strict compliance" in certain situations.⁴ *Moreno* involved the drowning of a boy named Bill in a swimming pool owned and operated by Jordan School District. See 926 P.2d at 887. Several years before, the Morenos were awarded permanent custody and guardianship of Bill, but the parental rights of Bill's natural mother, Laura Bartlett, were never terminated. See *id.* Following Bill's death, the Morenos filed a notice of claim, *on their own behalf*, seeking to recover damages for the wrongful death of "their" child under Utah Code Ann. §78-11-6 (1996).⁵ See 926 P.2d at 887. When the school district denied the Morenos' claim, they filed a wrongful death suit in district court. See *id.*

¶11 The school district moved for summary judgment, arguing that the Morenos could not maintain their wrongful death action because they were Bill's guardians, not his heirs. See *id.* At the same time, Bartlett sought to intervene in the action, asserting that she was the real party in interest. See *id.* at 887-88. However, Bartlett had never filed a notice of claim--timely or otherwise--and the school district argued that her failure barred her claim and therefore she should not be allowed to intervene. See *id.* at 888.

¶12 The trial court denied the school district's summary judgment motion, ruling that the Morenos could bring the action on their own behalf. See *id.* The trial court also denied Bartlett's intervention motion, ruling that the Morenos were the real party in interest. See *id.*

¶13 On appeal, the Supreme Court found that section 78-11-6 gave the Morenos the right to bring a wrongful death action but *only* "in behalf of the ward's heirs," *id.* at 890, in this case Bill's natural mother, Bartlett. See *id.* at 889-90. Because the Morenos had the authority as Bill's guardians to maintain an action for his wrongful death, albeit not in their own behalf, then "it follows that the guardian ha[d] the authority to file the prerequisite notice of claim." See *id.* at 892.

¶14 Despite her failure to file a notice of claim, the Supreme Court allowed Bartlett to "piggyback" on the Morenos' notice of claim and intervene in the action they filed. See *id.* The Court held that the notice of claim was sufficiently in compliance with section 63-30-11 for Bartlett to pursue her claim despite a clear defect in the notice: it claimed damages for *the Morenos'* loss instead of for Bartlett, the legally viable claimant. See *id.*; Utah Code Ann. §63-30-11(3)(a)(iii) (Supp. 2000) (providing notice must state "damages incurred *by the claimant* so far as they are known") (emphasis added). Overlooking the technical defect in the notice of claim, the Court found that the notice of claim gave the school district sufficient notice of all the facts surrounding the claim, the nature of the claim, and the amount of damages that would be sought--even though the Court noted that Bartlett's damages might well be less than those sought by the Morenos--and was therefore "legally sufficient to support the maintenance of [Bartlett's] wrongful death action." *Id.*

¶15 As a practical matter, and despite UDOT's protestations to the contrary, *Moreno* undeniably served to loosen the strict compliance standard for notices of claim in certain situations.⁶ How-

as Great West argues in this appeal. The *Moreno* holding turns on one key concept, namely, the *standing of the party who files the notice of claim*. Only parties with standing to bring an action can file an effective notice of claim. See *Moreno*, 926 P.2d at 892. *Moreno* holds that so long as the filing party had standing to bring the suit, and thus had authority to file the claim, a third party entitled to all or a portion of the same claim may piggyback on the filing party's notice of claim and maintain an independent suit against the State. This is true even if the notice of claim does not name the third party as a claimant, and thus is not in strict compliance with the statute. The effect of *Moreno* is, in essence, to supplant the "strict compliance" standard with a standard of "pretty strict compliance" in cases of multiple claimants with standing to sue on the same claim.

¶16 Morris's notice of claim does not encompass Great West's claim and bring it within *Moreno*'s safety net because Morris lacked standing to bring a suit, and thus to file an effective notice of claim, for *damage to the vehicle*. At oral argument, both sides acknowledged that Morris was simply an employee of the actual owner of the truck, M&P Transportation, and had no colorable claim to recover for damages to the vehicle. Morris therefore had no authority to file the requisite notice of claim for damage to the truck, and neither M&P nor its insurer, Great West, could piggyback on Morris's notice of claim, as he had standing to pursue only a claim for personal injury.⁷

¶17 Although we are confident this is the correct result given controlling case law, the result is admittedly somewhat troubling in light of the fact that Morris's notice of claim, like the notice of claim in *Moreno*, fulfilled its intended purpose and gave UDOT "timely notice" of the property damage claim against it so that UDOT could "conduct an investigation" to see if the claim had merit. *Moreno*, 926 P.2d at 892. Yet, because of Morris's lack of standing to pursue a claim for damage to the truck, Great West is not allowed to rely on the otherwise sufficient notice of claim, and UDOT avoids any responsibility for the property damage resulting from an accident that was allegedly its fault.

¶18 Aside from the niceties of prior case law adopting and reiterating a "strict compliance" standard found nowhere in the governing statute, if a technically deficient notice of claim nonetheless does what such a notice is designed to do and provides the State with enough information to become aware of the incident, conduct an investigation, and make an informed decision about its liability, the State should not be so quick to hide behind the cloak of "sovereign immunity." That doctrine arose when the monarch was rather antagonistic to his subjects and wished to insulate the treasury from the just claims of the peasantry, who were expected to embrace the fiction that "the King can do no wrong." We know better now, and in modern America, where the state enjoys a much more benevolent relationship with its citizens and has a more realistic view of its own fallibility, the enlightened sovereign should be willing to accept responsibility for its negligence when the deficiencies in a notice of claim do not actually prejudice its ability to investigate a claim, evaluate its merit, and resolve it in timely fashion. Such an adjustment in the

of the Legislature and not this court.

CONCLUSION

¶19 The trial court properly granted UDOT's motion for summary judgment against Great West. Even though the standard of "strict compliance" concerning notices of claim has been softened in some circumstances by *Moreno*, Great West could not rely on Morris's

notice of claim in light of his lack of standing to recover damage to the truck.

¶20 Affirmed.

Gregory K. Orme, Judge

¶21. I CONCUR:

James Z. Davis, Judge

JACKSON, Associate Presiding Judge (concurring):

¶22 Unlike the majority, I have no reluctance whatsoever in affirming the trial court, and cannot agree with my colleagues' broader interpretation of *Moreno v. Bd. of Educ.*, 926 P.2d 886 (Utah 1996).

¶23 There is no question here that Great West did not file a notice of claim. Thus, only by bootstrapping itself onto Morris's notice of claim may Great West maintain its lawsuit against UDOT. Accordingly, Great West suggests that under the *Moreno* case, Great West may step into Morris's shoes as the real party in interest regarding the property damage claim. Great West analogizes from *Moreno* because in that case, although the Morenos' notice of claim was filed on their own behalf, the supreme court ruled the notice was "legally sufficient to support the maintenance of this wrongful death action" by the child's natural mother. *Moreno*, 926 P.2d 886, 892 (Utah 1996) (separate opinion of Howe, J., joined by Stewart, Associate C.J., and Durham, J.). The supreme court reasoned that "[s]ince [Utah Code Ann. §]78-11-6 authorizes a guardian to maintain an action for the wrongful death of his ward, it follows that the guardian has the authority to file the prerequisite notice of claim." *Id.*

¶24 The majority's interpretation of *Moreno* accepts the analogy, and seems to stand for the proposition that one party's notice of claim would be allowed to cover a party who did not file a notice of claim when each party has standing to pursue the same claim. Nevertheless, the holding in *Moreno* is readily distinguishable from our case. Great West has asserted no statutory or other legal basis, as the Morenos had, under which Morris was authorized to maintain an action or file a notice of claim for Great West. Thus, the supreme court in *Moreno* did not articulate a "substantial compliance" standard, but rather allowed one party's notice of claim to cover a party who did not file a notice of claim *only* when the first party was legally authorized (e.g., by statute) to bring a lawsuit *on behalf of the second party*. See *Moreno*, 926 P.2d at 892. Great West therefore may not piggyback on Morris's notice of claim to avoid the responsibility of filing its own notice. This comports with the case law mandating strict compliance with the Governmental Immunity Act's notice-of-claim provisions. See *Rushton v. Salt Lake County*, 1999 UT 36, ¶19, 977 P.2d 1201; *Moreno*, 926 P.2d at 891.

¶25 Accordingly, I conclude the trial court correctly granted UDOT's motion for summary judgment against Great West. I would affirm without reluctance.

Norman H. Jackson, Associate Presiding Judge

1. As a convenience to the reader, and because the provisions in effect at the relevant times do not differ materially from the provisions currently in effect, we cite to the most recent statutory codifications throughout this opinion.

2. In his complaint, Morris did not seek to recover for the property damage to the vehicle.

3. The Morrises have settled their claims with UDOT and are no longer involved in the case.

4. Consideration of the Supreme Court's *Moreno* decision requires some care. *Moreno* yielded two opinions—Justice Russon's lead opinion and Justice Howe's separate opinion. The Court unanimously concurred in portions of Justice Russon's opinion, and a majority of the Court concurred in Justice Howe's opinion. On the issue primarily relevant to this case, Justice Russon's lead opinion did not have majority support, but his opinion concludes with a helpful summation of the majority's position on that same issue. While relying solely on portions of the opinions concurred in by a majority of the Court, we do not in our citations distinguish between Justice Russon's and Justice Howe's opinions.

5. This section states that "a parent or guardian may maintain an action for the death or injury of a minor child when the injury or death is caused by the wrongful act or neglect of another."

6. Significantly, the rule requiring "strict compliance" with the notice requirements of the Governmental Immunity Act does not come from the language of the act itself. See Utah Code Ann. §§63-30-1 to -38 (1997 & Supp. 2000). Instead, the "strict compliance" standard was first applied to Utah's Governmental Immunity Act by the Utah Supreme Court in *Scarborough v. Granite School District*, 531 P.2d 480, 482 (Utah 1975). The shift in *Moreno* from a blanket "strict compliance" standard for notices of claim to more of a "substantial compliance" standard, at least in certain situations, is fully consistent with the more charitable view taken in many other jurisdictions, which require only substantial compliance with the notice requirements of the state's governmental immunity statute. See, e.g., *Brasher v. City of Birmingham*, 341 So. 2d 137, 138 (Ala. 1976); *Woodsmall v. Regional Transp. Dist.*, 800 P.2d 63, 69 (Colo. 1990) (en banc); *Washington v. City of Columbus*, 222 S.E.2d 583, 589 (Ga. Ct. App. 1975); *Vermeer v. Sneller*, 190 N.W.2d 389, 394 (Iowa 1971); *Carr v. Town of Siubuta*, 733 So. 2d 261, 263 (Miss. 1999).

7. The result would be different if Morris could have shown that he had an interest in the truck supporting a claim for some portion of the damage. For example, had Morris been leasing the truck, been in a joint venture with M&P, or been the owner/operator of the truck, then he would have had standing to pursue a claim and thus could have filed an effective notice of claim. Even as an employee driving the truck, Morris might have had standing if he could have shown either that his employment contract with M&P held him responsible to pay for damage to the truck or that M&P had informed him, after the accident, that they intended to hold him responsible for the damage. No such additional factor, however, is present in this case.

ADDENDUM C

Ivie and Young

48 North University Avenue
Post Office Box 657
Provo, Utah 84603
(801) 375-3000
Fax (801) 375-3067

R. PHIL IVIE*
SHERMAN C. YOUNG†
S.W. FENSTERMAKER
JEFFERY C. PEATROSS
DAVID N. MORTENSEN
RYAN J. TAYLOR
JANET Z. SCHETSELAAR‡
DARREN J. MEACHAM

DALLAS H. YOUNG, JR.
OF COUNSEL

* ALSO ADMITTED IN NEVADA
† ALSO ADMITTED IN COLORADO
‡ ALSO ADMITTED IN WYOMING

RAY H. IVIE
(1892-1971)

LEGAL ASSISTANTS

SUSAN PEART
JAMIE BURNHAM
MONICA BROADBENT

February 11, 1999

Mr. Stephen R. Crosby
Kane County Commissioner
76 North Main Street
Kanab, Utah 84741

NOTICE OF CLAIM

RE: Claimant: Mary Wheeler & Petra Srbova
Date of Loss: 09-27-98

Dear Mr. Crosby:

Mary Wheeler and Petra Srbova hereby gives notice of claim against Kane County. This notice arises out of a motor vehicle accident involving Mary Wheeler and Petra Srbova who were passengers in a motor vehicle being operated by Dale Wheeler. That vehicle struck a vehicle being operated by Kane County employee, Mark R. McPherson. The accident happened on State Road 89 at approximately 3/10 of a mile east of milepost 52.

Both Mary Wheeler and Petra Srbova received serious injuries, including soft tissue damage. In addition, Mrs. Wheeler suffered a collapsed lung and pneumothorax. Mary Wheeler has incurred medical expenses of approximately \$8,000 and Petra Srbova has incurred medical expenses of approximately \$5,000.

Sincerely yours,

IVIE & YOUNG

JEFFERY C. PEATROSS

JCP/jlb
cc: Utah Association of
Counties Insurance Mutual

9814-2J94

Z 110 949 656



**Receipt for
Certified Mail**

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Stephen P. Crosby
10 N. Main
Kamrar, VT 04741
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1.10

1.10

\$ 2.53
2/11/99

PS Form 3800, March 1993

Ivie and Young

48 North University Avenue
Post Office Box 657
Provo, Utah 84603
(801) 375-3000
Fax (801) 375-3067

R. PHIL IVIE*
SHERMAN C. YOUNG†
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‡ ALSO ADMITTED IN WYOMING

February 11, 1999

Mr. Joe C. Judd
Kane County Commissioner
76 North Main Street
Kanab, Utah 84741

NOTICE OF CLAIM

RE: Claimant: Mary Wheeler & Petra Srbova
Date of Loss: 09-27-98

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Sincerely yours,

IVIE & YOUNG

JEFFERY C. PEATROSS

JCP/jlb
cc: Utah Association of
Counties Insurance Mutual

9814-2J94

Z 110 949 657



**Receipt for
Certified Mail**

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City/State/Zip: Reno, NV	
P.O. Box and Zip: 84741	
Postage	\$ 33
Certified Fee	1.10
Special Delivery fee	
Restricted Delivery Fee	
Return Receipt showing to Whom & Date Delivered	1.10
Return Receipt Showing to Whom Date and Addressee's Address	
TOTAL Postage & Fees	\$ 2.53
Postmark or Date 2/11/79	

PS Form 3800, March 1993

Ivie and Young

48 North University Avenue
Post Office Box 657
Provo, Utah 84603
(801) 375-3000
Fax (801) 375-3067

R. PHIL IVIE*
SHERMAN C. YOUNG†
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RYAN J. TAYLOR
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(1892-1971)

RAY H. IVIE
(1921-1990)

DALLAS H. YOUNG, JR.
OF COUNSEL

* ALSO ADMITTED IN NEVADA
† ALSO ADMITTED IN COLORADO
‡ ALSO ADMITTED IN WYOMING

February 11, 1999

Mr. Norman Carroll
Kane County Commissioner
76 North Main Street
Kanab, Utah 84741

NOTICE OF CLAIM

RE: Claimant: Mary Wheeler & Petra Srbova
Date of Loss: 09-27-98

Dear Mr. Carroll:

Mary Wheeler and Petra Srbova hereby gives notice of claim against Kane County. This notice arises out of a motor vehicle accident involving Mary Wheeler and Petra Srbova who were passengers in a motor vehicle being operated by Dale Wheeler. That vehicle struck a vehicle being operated by Kane County employee, Mark R. McPherson. The accident happened on State Road 89 at approximately 3/10 of a mile east of milepost 52.

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Sincerely yours,

IVIE & YOUNG



JEFFERY C. PEATROSS

JCP/jlb
cc: Utah Association of
Counties Insurance Mutual

9814-2J94

Z 110 949 658



**Receipt for
Certified Mail**

No Insurance Coverage Provided
Do not use for International Mail
(See Reverse)

Norman Carroll	
710 N. Main	
Kamoh, UT 84741	
Postage	\$.33
Certified Fee	1.10
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	1.10
Return Receipt Showing to Whom Date and Addressee's Address	
TOTAL Postage & Fees	\$ 2.53
Postmark or Date 2/11/99	

PS Form 3800, March 1993

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3. Article Addressed to: Mr. Norman Carroll Kane County Commissioner 710 N. Main Kanab, UT 84744	4a. Article Number 2110949658	4b. Service Type <table border="0"> <tr> <td><input type="checkbox"/> Registered</td> <td><input type="checkbox"/> Insured</td> </tr> <tr> <td><input checked="" type="checkbox"/> Certified</td> <td><input type="checkbox"/> COD</td> </tr> <tr> <td><input type="checkbox"/> Express Mail</td> <td><input checked="" type="checkbox"/> Return Receipt for Merchandise</td> </tr> </table>	<input type="checkbox"/> Registered	<input type="checkbox"/> Insured	<input checked="" type="checkbox"/> Certified	<input type="checkbox"/> COD	<input type="checkbox"/> Express Mail	<input checked="" type="checkbox"/> Return Receipt for Merchandise
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5. Signature (Addressee)	7. Date of Delivery 2-12-99							
6. Signature (Agent) A. Ramsey	8. Addressee's Address (Only if requested and fee is paid)	Thank you for using Return Receipt Service.						
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Is your RETURN ADDRESS completed on the reverse side?

SENDER: <ul style="list-style-type: none"> • Complete items 1 and 2 for additional services. • Complete items 3, a & b. • Print your name and address on the reverse of this form so that we can return this card to you. • Attach this form to the front of the mailpiece, or on the back if space does not permit. • Write "Return Receipt Requested" on the mailpiece below the article number. • The Return Receipt will show to whom the article was delivered and the date delivered. 		I also wish to receive the following services (for an extra fee): <ol style="list-style-type: none"> <input type="checkbox"/> Addressee's Address <input type="checkbox"/> Restricted Delivery Consult postmaster for fee.						
3. Article Addressed to: Joe C. Judd Kane County Commissioner 710 N. Main Kanab, UT 84744	4a. Article Number 2110949657	4b. Service Type <table border="0"> <tr> <td><input type="checkbox"/> Registered</td> <td><input type="checkbox"/> Insured</td> </tr> <tr> <td><input checked="" type="checkbox"/> Certified</td> <td><input type="checkbox"/> COD</td> </tr> <tr> <td><input type="checkbox"/> Express Mail</td> <td><input checked="" type="checkbox"/> Return Receipt for Merchandise</td> </tr> </table>	<input type="checkbox"/> Registered	<input type="checkbox"/> Insured	<input checked="" type="checkbox"/> Certified	<input type="checkbox"/> COD	<input type="checkbox"/> Express Mail	<input checked="" type="checkbox"/> Return Receipt for Merchandise
<input type="checkbox"/> Registered	<input type="checkbox"/> Insured							
<input checked="" type="checkbox"/> Certified	<input type="checkbox"/> COD							
<input type="checkbox"/> Express Mail	<input checked="" type="checkbox"/> Return Receipt for Merchandise							
5. Signature (Addressee)	7. Date of Delivery 2-12-99	Thank you for using Return Receipt Service.						
6. Signature (Agent) A. Ramsey	8. Addressee's Address (Only if requested and fee is paid)							
PS Form 3811, December 1991 U.S. GPO: 1993-352-714								

DOMESTIC RETURN RECEIPT

Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and 2 for additional services.
- Complete items 3, a, & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

MR. STEPHEN R. CRISLEY
KANE COUNTY COMMISSIONER
710 NORTH MAIN
KARAB, UT 84744

4a. Article Number

2 110949 050

4b. Service Type

☐ Registered ☐ Insured

☒ Certified ☐ COD

☐ Express Mail ☒ Return Receipt for Merchandise

7. Date of Delivery

2-7-88

5. Signature (Addressee)

6. Signature (Agent)

H. Ramsey

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, December 1991 U.S. GPO: 1993-352-714

DOMESTIC RETURN RECEIPT

Thank you for using Return Receipt Service.

Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and 2 for additional services.
- Complete items 3, a, & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

Utah Association of Counties
Insurance Mutual
529 E. So. Vine Street
53977
SLC, UT 84107

4a. Article Number

2 110949 050

4b. Service Type

☐ Registered ☐ Insured

☒ Certified ☐ COD

☐ Express Mail ☒ Return Receipt for Merchandise

7. Date of Delivery

5. Signature (Addressee)

FRANKLIN W. H.

8. Addressee's Address (Only if requested and fee is paid)

Thank you for using Return Receipt Service.

RECEIPT

ADDENDUM D



STIRBA AND
HATHAWAY

A PROFESSIONAL LAW CORPORATION

215 SOUTH STATE STREET • SUITE 1150
SALT LAKE CITY • UTAH 84111
TELEPHONE: 801 364-8300
FACSIMILE: 801 364-8355

LINETTE BAILEY HUTTON

March 8, 1999

Jeffery C. Peatross
IVIE & YOUNG
48 North University Avenue
P. O. Box 657
Provo, Utah 84603

*Re: Your Clients: Mary Wheeler & Petra Srbova
Our Clients: Kane County and Mark R. McPherson
D/Loss: 9-27-98*

Dear Mr. Peatross:

We are in receipt of your correspondence entitled "Notice of Claim" dated February 11, 1999. In this document you indicate that your clients have "incurred medical expenses" as a result of a motor vehicle accident on the above date. In order for my client to consider such a claim, it is necessary that the claimant provide us with some proof of injury, and evidence of medical expenses exceeding the PIP limit. Please provide us with these records, or, in the alternative, please provide us with the names of the claimants' health care providers and have your clients each sign the enclosed medical records releases.

Please be advised that this does not constitute an acceptance or denial of the "Notice of Claim," nor does it confirm or verify the sufficiency of the claimants' notice of claim as required by the Governmental Immunity Act, Utah Code Ann. § 63-30-1 *et seq.*

Sincerely,

STIRBA & HATHAWAY

Linette B. Hutton

CONSENT TO RELEASE OF MEDICAL RECORDS

TO:

I HEREBY authorize and request you to release to **STIRBA & HATHAWAY**, a copy of any and all records in your possession regarding **MARY WHEELER** including but not limited to laboratory reports and evaluations, nurses' notes and physicians' orders, medications and graphics, specialty services, patient evaluations, consultations and correspondence, operating room records, admissions and discharge records, progress notes and diagnostic studies, radiology/x-ray reports & evaluations, MRI's, and scans, outpatient and/or inpatient records, billing and office notes, history and physical report records, emergency room records, and any additional documents or things not listed above.

A photocopy of this authorization shall be accepted as granting the same authority as the signed original.

MARY WHEELER

DOB: _____

SSN: _____

STATE OF UTAH)
 : ss
County of Salt Lake)

SUBSCRIBED and SWORN to before me this ____ day of _____, 1999.

NOTARY PUBLIC
My Commission Expires: _____

ADDENDUM E

Kane County Attorney's Office
76 North Main
Kanab, Utah 84741

20 March 1999

Jeffery C. Peatross
Ivie and Young
P. O. Box 657
Provo, UT 84603

RE: Mary Wheeler & Petra Srbova

Dear Mr. Peatross:

As you are no doubt aware, Kane County has turned the claim over to its claim adjusters, who have in turn retained Linette B Hutton. Please direct all further communications and correspondence to Ms. Hutton. Thank you.

Sincerely,



Colin R. Winchester
KANE COUNTY ATTORNEY

cc: Linette B. Hutton
Lamont Smith