

2000

Mary Wheeler and Peter Srbova v. Mark Mcpherson and Kane County: Reply Brief

Utah Supreme Court

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Recommended Citation

Reply Brief, *Wheeler v. Mcpherson*, No. 20000795.00 (Utah Supreme Court, 2000).

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IN THE UTAH SUPREME COURT

MARY WHEELER and PETER SRBOVA, :

• Plaintiffs/Appellants, : Appellate Case No. 20000795-SC

vs. ;

MARK MCPHERSON and KANE COUNTY, : Argument priority 15

Defendants/Appellees. :

APPELLANTS REPLY BRIEF

APPEAL FROM JUDGMENT OF THE FIFTH DISTRICT COURT HONORABLE G.

RAND BEACHMAN PRESIDING

FILED
UTAH SUPREME COURT

MAY 21 2001

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ARGUMENT

Defendants admission, “Defendants agree with the majority of Plaintiffs’ ‘Statement of the Case,’” is no small admission. For therein the defendants admit, of course, that the plaintiffs have suffered an injury for which the defendants are potentially liable, but defendants also freely admit that plaintiffs filed a notice of claim within five months of the accident, that the notices of claim were sent to and received by the county clerk’s office, that Holly Ramsay of the county clerk’s office signed for the notices, that a Kane County Commissioner called plaintiff’s counsel in regards to the claims, that Ms. Hutton, the attorney representing Kane County on this claim acknowledged her possession of the claims and requested further information, and that Kane County Attorney, Mr. Winchester, identified Ms. Hutton as the proper party to whom all information should be sent. Nevertheless, the defendants argue that plaintiffs’ claims should be summarily defeated.

The defendants admit to plaintiffs’ statement of the case expressly with only one real exception. Apparently, defendants wish to dispute that the notice of claim was delivered to the Kane County Court Clerk, although in its brief, defendant admits that the notice was received by the employees of the county clerks office. See plaintiffs’ brief at page 6. Defendants do not dispute that the same person, Holly Ramsay, who provided the

only affidavit in support of defendants' motion to dismiss which states that she is an employee of the county clerk's office, is the same person who signed for the receipt of the notices of claim. Therefore, the notice was in fact delivered to the county clerk's office. The real dispute in this matter is the effect of plaintiffs' failure to "direct" the notice to the county clerk, so far as that term is construed to mean that the notice must bear the clerk's name, since there is no real dispute that the notices were sent to the address of the county clerk.

Because the facts and circumstances of this case present a scenario where the purposes of the notice statute have been fully met, and circumstances exist upon which the plaintiffs reasonably relied that they had fulfilled the notice requirements, the trial court's grant of defendant's motion to dismiss must be reversed.

I. PLAINTIFFS' NOTICE OF CLAIM WAS SUFFICIENT

Defendants allege that plaintiffs' failure to "direct" the notice to the county clerk renders the notice fatally defective. Defendants' analysis ignores two salient facts. First, to accept defendants analysis this court must hold that unless the county clerk's name is found on the notice, the notice is defective. In this case the notice was addressed to the office where the county clerk is found. In this sense the notice was "directed" and "delivered" to the office of the county clerk.

Second, defendants' analysis wholly ignores the fact that the Kane County Attorney expressly instructed to whom all correspondence should be sent. The defendants had already received written confirmation that that designee already possessed the notice of claim.

The County Attorney had authority to confirm the person to act upon the notice of claim. The defendants in no way distinguish or rebut the statutory or case law foundation offered by the plaintiffs for the proposition that the county attorney acts on behalf of the county as an entity. See Salt Lake County Commission v. Salt Lake County Attorney, 1999 UT 73, 985 P.2d 899, Utah Code Ann. §§ 17-18-1(7)(a)(1995) and 17-18-1.5(5)(a)(1997). Instead, defendants first wrongly infer that plaintiffs rely solely on the Bischel¹ decision, while ignoring the other authority offered by the plaintiffs. Second, defendants fail to recognize the proposition in Bischel for which the case was cited:

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.

Bischel, 907 P.2d at 278. This exact conclusion can be found in the present case.

Defendants have never claimed the notice was not given within the one year period **and**

¹Bischel v. Merritt, 907 P.2d 275 (Utah App. 1995).

that the defendants acted on that notice. The defendants have suffered no prejudice, and the defendants will suffer no prejudice if this matter is remanded.

Instead of addressing plaintiffs' arguments regarding the authority of the county attorney to act on behalf of the county as an entity, defendants attempt to provide case law in their favor, but ignore the most elementary distinction between the facts of Bellonio v. Salt Lake City Corp.,² and the present factual scenario. In Bellonio, the notice was sent to the airport attorney, an attorney representing the **entity of the airport**, and not to the city attorney or any person representing the city, where the **city was the entity** concerned. In other words, the Bellonio case presents a scenario where **no** notice was given to the proper entity. Thereby, defendants missed the critical distinction in Bellonio, where the court found that the airport attorney was not the agent for the city.

In contrast, in the present circumstances the county attorney is the agent of the county. Here, that county attorney instructed that all communication and correspondence should go through its attorneys. Those same attorneys had already acknowledged possession and receipt of the notice of claim. Most importantly, the correct entity had received and acted upon the notice.

A similar distinction can be found in the recent case of Thimmes v. Utah State

²911 P.2d 1294 (Utah App. 1996).

University, 2001 UT App 93, 417 Utah Adv. Rep., where the Utah Court of Appeals refused to apply the principles of Bischel where the plaintiff could not even name a person who had given them direction regarding notices of claim. In contrast, in the present circumstances the documentary evidence is clearly before this court that the county attorney for Kane county was the party who had the authority to tell the plaintiffs where to direct their communication.³

Defendants have in no wise argued that Kane County did not have an opportunity to settle this matter without the expense of litigation. Nor have the defendants argued that the notices were untimely or otherwise defective. In fact, the attorneys for Kane county acted upon the notices of claim. Thus, the defendants cannot argue that the purposes of the notice of claim statutes have not been fulfilled. See Rushton v. Salt Lake County, 1999 UT 36, ¶ 20, 977 P.2d 1201.

Conspicuously absent from the defendants' analysis is any argument that they have been prejudiced in any way. In the present circumstances, addressing the notices to the county commissioners in no way inhibited the settlement of plaintiffs' claims without resort to litigation. The county attorney turned the entire matter over to its insurance

³ The Thimmes case is attached to defendants' brief. Plaintiffs would note that they believe it is inappropriate for case law to be attached to a brief which has counsel's notations within the body of the opinion.

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. Thus, once the Kane county attorney directed that all further communication and correspondence go through Ms. Hutton, no further claim or notice was required.

The county attorney had the authority, real or apparent, to confirm the person to possess and act on the notice of claim. Defendants in the present matter have in no wise distinguished the case law, or more importantly, the statutory provisions which provide that the county attorney is the legal advisor of the county and must act upon all claims against the county. In the present circumstances, Kane County Attorney, Mr. Winchester clearly had the statutory authority to direct the plaintiffs that all communication and correspondence should go to Ms. Hutton. This court has unequivocally held that the county attorney represents the entity of the county. Salt Lake Count Commission v. Salt Lake County Attorney, 1999 UT 73, ¶ 17 and 19, 1985 P.2d 899.

Defendants claim that the holding of Brittain v. State by and through Utah Dept. of Employ., 882 P.2d 666 (Utah App. 1994) has no application to the present case. Once again, defendants ignore the proposition for which Brittain was offered. First, Brittain explained the purposes of the notice requirements of the Governmental Immunity Act,

that is, to “afford the responsible public authorities an opportunity to pursue a proper and timely investigation” and “to arrive at a timely settlement if appropriate” to avoid the expenses of litigation. Brittain, 882 P.2d at 671. Again, there is no question but that those purposes have been fulfilled in the present case.

Further, Brittain essentially allowed for substantial compliance with the statutory notice requirements. The Brittain court’s holding, in the final analysis, was that the plaintiff had fulfilled the requirements of the notice statute because way the plaintiff had viewed the statute was reasonable. In the present case, the purposes of the statute were fulfilled and the plaintiffs acted reasonably in relying upon the representations of the Kane County attorney and the written confirmation of the attorneys hired for Kane County that they possessed the notices.

Finally, it is hardly inappropriate for the plaintiffs to cite the case of Stahl v. Utah Transit Auth., 618 P.2d 480 (Utah 1980) when reviewing the purposes of the Governmental Immunity Act where this and other Utah appellate courts have cited the case for similar purposes. See Larson v. Park City Mun. Corp., 955 P.2d 343 (Utah 1998); Bellonio, 911 P.2d at 1297; Bischel, 907 P.2d at 278; Brittain, 882 P.2d at 671. Further, while the Stahl court did not rest its opinion on the doctrine of estoppel, the court did review the facts and circumstances of the case in that light. Lastly, plaintiffs maintain

that the distinction between the Transit Act and the Governmental Immunity Act does not survive scrutiny. Both statutes provide that notice “shall” be filed within a proscribed period. This court should take this opportunity to adopt a common standard for such notice requirements.

Because the facts and circumstances of this case present a scenario where the purposes of the notice statute have been fully met, and circumstances exist upon which the plaintiffs reasonably relied that they had fulfilled the notice requirements, the trial court’s grant of defendant’s motion to dismiss must be reversed.

II. THE TRIAL COURT SHOULD HAVE ALLOWED FURTHER DISCOVERY

The defendants in this matter have failed completely to rebut the arguments of the plaintiffs regarding the trial court’s failure to allow further discovery pursuant to Utah Rule of Civil Procedure 56 (f). Instead, the defendants simply state the question before the court was one of jurisdiction, no discovery could be allowed. However, defendants’ analysis fails to recognize that once they filed an affidavit with their motion it became a motion more properly treated under Rule 56. As previously stated in plaintiffs’ brief, when matters outside the pleadings are considered, any motion under Rule 12 of the Utah Rules of Civil Procedure is more properly treated as one for summary judgment under

Rule 56. Thayne v. Beneficial Utah, Inc., 874 P.2d 120 (Utah 1994). Defendants simply wish to ignore this court's decision in Shunk v. State, 924 P.2d 879 (Utah 1996). In Shunk, this court reviewed a governmental immunity case where matters were examined outside the pleadings and held that the motion was decided under Rule 56.

The defendants have in no wise proffered any case law or analysis whatsoever that would indicate that no discovery should be allowed. Even though this court can rest its decision to reverse the trial court in this regard squarely upon the rules themselves and prior precedent, this court should also take the opportunity to expressly hold that on issues of jurisdiction, in order to give the parties a truly fair day in court, and thereby ensure due process, the parties should be allowed to conduct discovery in order to litigate the jurisdictional issues. Absent such an opportunity, the courts are simply inviting situations where a record is incomplete as to the true facts of the matter.

It would truly be a hollow realm of jurisprudence for this court to recognize that governmental entities can be estopped from claiming a defect in notice and at the same time sustain a trial court in abrogating the rights of plaintiffs to conduct any discovery into the facts which might plainly exhibit a clear basis for estoppel to apply. In the present case, the record already provides a basis for reversal. One must only wonder at what further information may have been garnered had discovery been allowed.

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

There is no dispute in the present matter that a notice of claim was presented months before it would have been due and delivered to Kane County by way of the Kane County Clerk's office. Ms. Holly Ramsay of the county clerk's office signed for the certified letters enclosing the notice of claims. It is further undisputed that the defendants acted upon these notices of claim: a county commissioner contacted plaintiff's counsel, the county attorney wrote to plaintiff's counsel acknowledging possession of the notices of claim, and the attorneys hired for Kane County likewise acknowledged possession of the notices of claim and requested further information. Defendants in no wise argue to this court that strict compliance is the best rule of the State of Utah. Instead, the sole argument of the defendants is that strict compliance has been the rule of law for some time, should therefore be honored as tradition, and should therefore be rashly enforced in the present circumstances.

However, as outlined in plaintiffs' principle brief, the strict compliance requirement in Utah is judicially created. In fact, plaintiffs have pointed out that this court accepted substantial compliance as the standard prior to its setting forth the strict compliance standard. Spencer v. Salt Lake City, 17 Utah 2d 362 , 412 P.2d 449 (1966).

Since this is the court which invented the strict compliance standard for the State of Utah, this court can remedy the harsh results that standard creates by adopting the substantial compliance standard, as long as the notice of claim is found to be timely.

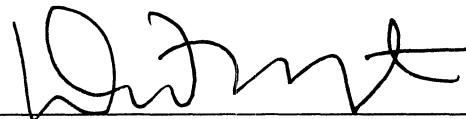
Citizens should be able to bring claims against the government where the government or its agents have acted negligently. While limitations must be placed on meritorious claims, those limitations can reasonably be fulfilled by requiring strict compliance with the timing provisions of the statute, but allowing for substantial compliance as to the form of the notice and its delivery. After all, a plaintiff must meet two effective statutes of limitation to bring a claim; first, the notice of claim must be timely, and second the lawsuit itself must be filed within a year of the denial, express or implied, of the claim. See Utah Code Ann. §§ 63-30-14 (1965) and 63-30-15(2)(1987).

The factual background of this case shows how a better standard leads to more just results. This court can continue to enforce the time requirements of the notice. There must be a deadline somewhere in order for stability to be obtained. Likewise, this court can continue to expect litigants to give notice to the appropriate entity. Clearly, an entity cannot act upon a notice it never receives. However, where the correct entity timely receives the notice and is afforded an opportunity to act thereon, the standard of substantial compliance should be adopted.

CONCLUSION

Because Kane County, the entity concerned, received the notice of claim, and more particularly, because the person whom the county attorney designated to be 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 be remanded for trial.

DATED AND SIGNED this 21st day of May, 2001.

A handwritten signature in black ink, appearing to read 'D. Mortensen', is written over a horizontal line.

DAVID N. MORTENSEN

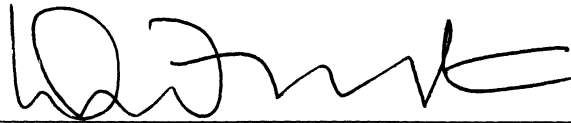
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Mailing Certificate

I hereby certify that I mailed two (2) true and correct copies of the foregoing Reply Brief of Appellant with postage prepaid thereon the 21st day of May, 2001, to the following:

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DAVID N. MORTENSEN