

1940

M. E. Hamilton v. Salt Lake City : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

---00000---

MRS. M. E. HAMILTON,
Appellant,

-vs-

No. 6215

SALT LAKE CITY, a
municipal corporation,
Respondent.

---00000---

Appeal from the District Court
of the Third Judicial District
in and for Salt Lake County
State of Utah
Hon. M. J. Bronson, Judge

---00000---

APPELLANT'S BRIEF

---00000---

STATEMENT OF THE CASE

On March 23, 1938, appellant, a woman 75 years of age, while walking upon the public sidewalk on the south side of Second South Street, near No. 114 East Second South in Salt Lake City, Utah, caught her foot in a hole which existed in the sidewalk at that time and place

(Tr. 26, 30, 35, 41, 47). As a result

he fell and broke her right ankle (Tr. 28, 29, 7, Ab. 10, 16). The hole in which appellant fell is situated upon a line about 12 or 14 inches wide, marked on each side by a seam in the pavement, and running northerly and southerly across the sidewalk from an outlet or water drain at the curb on the north to a manhole on the south. This manhole has "The City Engineer" marked on it (Tr. 39, 40, 41, Ab. 17, 18).

On April 12, 1938, appellant presented the following claim in writing, signed by her, to the City Commission of Salt Lake City:

Salt Lake City, Utah

April 13, 1938

Honorable Board of City Commissioners

City and County Building

Salt Lake City, Utah

Gentlemen:

On March 23d at 8:30 AM while walking just west of 114 East End South, through a defect in the sidewalk at that location I was injured by falling and having certain ~~damages~~ ~~fractures~~ ~~made~~ my ankle to

such an extent that I have had to have
same in a cast, and move about on crutches
since said injury. In view of the fact,
that since said date I have been confined
at my residence and have suffered extreme
pain I feel that I should be compensated
for such injury to the extent of not less
than \$500.

Respectfully submitted for
your immediate consideration,

(Signed) Mrs. M. E. Hamilton

(Tr. 31, 42, 43, 44, 45, 49, Ab. 11, 19, 20, 21, 24, 25).

This document was designated by the City
Commission "Petition No. 292, 1933," and referred
to the Department of Public Affairs and Finance
of Salt Lake City (Tr. 42, 43, 45, Ab. 19).
Appellant did not thereafter nor at any other
time receive any payment from respondent on
account of her injury (Tr. 32, 35, Ab. 12).
Consequently, on March 17, 1933, she commenced
this action against the respondent (Tr. 1-3,
Ab. 1-5). A demurrer interposed by the respon-
dent on the ground that the complaint did not
state facts sufficient to constitute a cause
of a
the Court (Tr. 6, 9,

Ab. 5-7). In her Complaint, appellant prayed judgment for \$2500.00, a sum in excess of that demanded by her in the written claim presented to the City Commission (Tr. 3, Ab. 5).

At the trial of the case on September 11, 1930, before the Court, sitting with a jury, the testimony of appellant and one other witness, William Perry Sturges, was adduced in appellant's behalf and the parties entered into a stipulation regarding testimony of the City Clerk or Recorder of Salt Lake City. No evidence for the respondent was offered or introduced (Tr. 28-43, 45, Ab. 8-19). In addition to the facts above stated, which stand uncontradicted in the record, appellant offered certain other testimony essential to her right of recovery, which was excluded by the Court. These matters are set forth in the Statement of Error hereafter. At the conclusion of appellant's evidence, the Court granted respondent's motion for a directed verdict on the ground that the appellant "did not file a claim which is required by law she must file before she can maintain an action against Salt Lake City" (Tr. 45, 46, Ab. 21, 22).

Judgment was entered on the directed verdict for the respondent and appellant takes this appeal from said judgment (Tr. 21, 23, Ab. 28, 29, 30).

STATEMENT OF ERROR

The following errors upon which appellant relies for a reversal of the judgment of the court below were committed by said Court at the trial of the case:

1. The Court struck from the record the testimony of appellant that subsequent to the filing of her claim, Mr. Irvine, the respondent's attorney, offered her \$25.00 to settle the case. Said testimony was given in response to the question whether appellant had ever been notified that her claim was allowed (Tr. 32, Ab. 11, 12, 30).

2. The Court struck from the record the testimony of appellant that she was never notified by the respondent that her claim was not in proper legal form (Tr. 33, 34, Ab. 12, 13, 14, 30).

3. The Court refused to permit appellant to testify whether anyone had ever requested her

to amend or correct her claim (Tr. 34, Ab. 14, 10).

4. The Court refused to permit appellant to testify whether she had suffered any pain or disability on account of her injury since the filing of her said claim with the City Commission (Tr. 34, 35, Ab. 14, 15, 30, 31).

5. The Court refused to permit appellant to testify regarding her reason for claiming damages in her Complaint in excess of the amount requested by her in her said claim filed with the City Commission (Tr. 35, Ab. 15, 16, 31).

6. The Court refused to permit appellant's witness, William Perry Sturges, to testify whether the sidewalk at the point where appellant's injury occurred was free from cracks and irregularities (Tr. 42, Ab. 18, 31).

7. The Court concluded, and stated its conclusion to the jury, that the appellant did not file a claim which is required by law to be filed before she can maintain an action against Salt Lake City (Tr. 45, Ab. 31, 31).

8. The Court directed the jury to return a verdict in favor of the respondent and against

be appellant (Tr. 45, 46, Ab. 21, 22, 31, 32).

9. The Court entered judgment in favor of the respondent and against the appellant, no cause of action (Tr. 31, Ab. 26, 27, 32).

STATEMENT OF QUESTIONS INVOLVED

The general question is, of course, whether the facts proved or offered to be proved made a case for the jury, and so whether the Court erred in directing a verdict for respondent. Respondent's motion for a directed verdict was made upon three grounds as follows:

1. That from all of the evidence and from the pleadings it does not appear that there is a cause of action against Salt Lake City;

2. That there has not been established by the evidence any negligence on the part of Salt Lake City;

3. That it does not appear from the evidence that a claim in the form required by Section 15-7-76, Revised Statutes of Utah, 1933, was filed with Salt Lake City, the defendant, within the time and in the manner required by the provisions of said statute, and, therefore, the alleged action of the plaintiff is barred by

provisions of Section 15-7-76 and 15-7-77, Revised Statutes of Utah, 1933.

It cannot be seriously urged upon appeal by respondent that the first two grounds of its motion will sustain the Court's order granting a directed verdict, (although these grounds will be considered briefly hereafter) for the reason that respondent did not argue these two grounds at the trial or call the Court's attention to any of the alleged defects in the pleadings or the evidence, and for the further reason that the court, in announcing its decision from the bench, expressly stated that the verdict was directed for the reason that appellant "did not file a claim which is required by law", as contended in the third ground of respondent's motion.

The fundamental issue in the case is therefore: Did the facts proved or offered to be proved at the trial show a compliance with the statute regarding filing of claims against municipalities? Sec. 15-7-76, Revised Statutes of Utah, 1933. If not, did the facts proved or offered to be proved tend to show a waiver by the respondent of the defects, or alleged defects,

n appellant's written claim presented to the City Commission? In either case, if such was the inference to be drawn from the testimony offered, the Court was in error in making the rulings complained of in the first, second, third, seventh, eighth and ninth assignments of error.

The questions presented by the fourth, fifth and sixth assignments of error are as follows:

In an action against a city for damages due to the defective condition of a sidewalk of said city, may the plaintiff who prays judgment for damages in excess of the amount demanded in his written claim, presented to the City Commission as required by law, introduce evidence which shows the reason for his increased demand?

In the same case, may plaintiff show whether the sidewalk, at the point where the injury occurred, was free from cracks and irregularities?

ARGUMENT

The questions above stated may be best considered in the order suggested by the following outline:

I. The Complaint States a Cause of Action.

II. The Facts Proved or Offered to be Proved

A. There was sufficient evidence of an injury to appellant, caused by the negligence of respondent, to make a case for the jury.

B. Appellant's action is not barred by the statute regarding filing of claims.

III. Appellant Should Have Been Permitted to Show Cause for Increasing her Demand.

IV. Appellant Should Have Been Permitted to Show the Condition of the Sidewalk at the Place where the Injury Occurred.

* * * * *

I. The Complaint States a Cause of Action.

It is alleged clearly in the complaint that appellant suffered injuries which were proximately caused by the negligence of the respondent in leaving the hole in the sidewalk open, unrepaired and in a dangerous condition (Complaint Paras. II-VI). Compliance with the provisions of §§ 5-7-76, R. S. of U. 1933, which is prerequisite to the maintaining of an action in such cases, is explicitly stated in paragraph VII of the com-

defect was not only negligently permitted to remain unrepaired, but that it was created and wrought about, in the first place, by the acts of respondent's agents. Mr. Sturges testified that the hole in which appellant fell is situated upon a line about 12 or 14 inches wide, marked on each side by a seam in the pavement, and running northerly and southerly across the sidewalk from an outlet or water drain at the curb on the north to a manhole on the south; that this manhole has "The City Engineer" marked on it; that at the point where appellant fell it looks like common concrete put in a little hole about 18 inches long and 10 inches wide; and that the surface at that point was rough and the pavement surrounding the hole was smooth (Ab. 17, 18). The natural inference to be drawn from this testimony is that the defect was caused by installation or repairs to a portion of the city's water & sewage system. Certainly it is evidence of notice to the respondent of the existence of the defect. Even if this testimony were wholly lacking, the Court's attention is invited to

114 P. 311 and Bay v. Salt Lake City, 72 U. 412; 80 P. (2d) 886; 119 A.L.R. 153, which hold that constructive notice of the defect may be sufficient and that whether the city had notice of the defect, actual or constructive, is a matter for the jury to determine. In the case at bar, as in the Taylor case, supra, the sidewalk where the defect existed was "in the heart of the city, and at a place where there was much travel."

The testimony of appellant and Mr. Sturges is uncontradicted that appellant was injured by falling in the hole above described. On the question whether the facts proved or offered to be proved sufficiently showed that the respondent's negligence was a legal cause of appellant's injury, see 2 Restatement of the Law of Torts, § 451 and 32, Illustration 8.

Certainly, therefore, there was sufficient evidence of respondent's negligence, and that said negligence was the proximate cause of the injury to appellant, to take the case to the jury.

B. Appellant's action is not barred by the statute regarding filing of claims.

Article 12 of Chapter 7, Revised Statutes

of Utah, 1933, upon which respondent relies as a bar to the action is herewith set out in full:

ARTICLE 18

CLAIMS FOR DAMAGES

15-7-76. Time for Presenting--Contents--Condition Precedent to Action.

Every claim against a city or incorporated town for damages or injury, alleged to have been caused by the defective, unsafe, dangerous or obstructed condition of any street, alley, crosswalk, sidewalk, culvert or bridge of such city or town, or from the negligence of the city or town authorities in respect to any such street, alley, crosswalk, sidewalk, culvert or bridge, shall within thirty days after the happening of such injury or damage be presented to the board of commissioners or city council of such city, or board of trustees of such town, in writing, signed by the claimant or by some person authorized to sign the same, and properly verified, stating the particular time at which the injury happened, and designating and describing the particular place in which it occurred, and also particularly describing the cause and circumstances of the injury or damages, and stating, if known to claimant, the name of the person, firm or corporation, who created, brought about or maintained the defect, obstruction or condition causing such accident or injury, and the nature and probable extent of such injury, and the amount of damages claimed on account of the same; such notice shall be sufficient in the particulars above specified to enable the officers of such city or town to find the place and cause of such injury from the description thereof given in the notice itself without extraneous inquiry, and no action shall be maintained against any city or town for damages or injury to person or property,

unless it appears that the claim for which the action was brought was presented as aforesaid, and that such governing body did not within ninety days thereafter audit and allow the same. Every claim, other than claims above mentioned, against any city or town must be presented, properly itemized or described and verified as to correctness by the claimant or his agent, to the governing body within one year after the last item of such account or claim accrued, and if such account or claim is not properly or sufficiently itemized or described or verified, the governing body may require the same to be made more specific as to itemization or description, or to be corrected as to the verification thereof.

(C. L. 17, Paragraph 816.)

15-7-77. Failure to File, a Bar--Amendment of Claim.

It shall be a sufficient bar and answer to any action or proceeding against a city or town in any court for the collection of any claim mentioned in section 15-7-76, that such claim had not been presented to the governing body of such city or town in the manner and within the time specified in section 15-7-76; provided, that in case an account or claim, other than a claim made for damages on account of the unsafe, defective, dangerous or obstructed condition of any street, alley, crosswalk, way, sidewalk, culvert or bridge, is required by the governing body to be made more specific as to itemization or description, or to be properly verified, sufficient time shall be allowed the claimant to comply with such requirement.

(C. L. 17, Paragraph 817.)

Analysis of Sec. 15-7-76 above set forth

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78 requirements with

which the claimant must comply in order to bring himself within the provisions of the statute. These will be considered separately as follows:

1. The claim must be presented to the Board of City Commissioners within thirty days after the happening of the injury. The evidence is undisputed that appellant's injury happened on March 23, 1938, and that her claim was filed with the City Commission on April 12, 1938.

(Tr. 36, 38, 42, 43, 45; Ab. 9, 17, 19)

2. The claim must be in writing. This point is undisputed. (Exhibit "A"; Tr. 40; Ab. 24, 25).

3. The claim must be signed by the claimant or by some person authorized to sign the same. The testimony is undisputed on this point. (Tr. 31; Ab. 11)

4. The claim must state the particular time at which the injury happened. Appellant states in her claim that the injury happened "on March 23d at 9:30 AM." The claim is dated April 12, 1938. (Tr. 49; Ab. 24, 25) Surely,

respondent cannot contend that the omission to

state the year in the body of the claim is a fatal defect therein or a non-compliance with the statute. The claim should, of course, be read as a whole and in view of all the circumstances of the case. It is submitted that this is not only a substantial but a literal compliance with the terms of the statute. *Dunn v. Boise*, 45 Ida. 362, 202 P. 507; *Murphy v. City of St. Paul*, (Winn.) 153 N.W. 612. See also, *Connor v. Salt Lake City* and *Titus v. Montessano*, cited in next paragraph.

5. The claim must designate and describe the particular place in which the injury occurred. The words of appellant's claim in this respect are:

" . . . just West of 114 East End South, through a defect in the sidewalk at that location . . . " (Tr. 40; Ab. 25).

In this respect, see *Connor v. Salt Lake City*, 26 U. 242; 78 P. 479, in which the material part of the claim submitted by plaintiff read as follows:

"I hereby present to the City Council of Salt Lake City, a claim for damages for personal injuries by me sustained,

on or about January 15, 1902, while walking on the sidewalk at and along First West Street, between Seventh and Eighth South, in said city, through the negligence of said city in suffering and permitting a fence, fencing material and obstructions to be upon and along said sidewalk."

In holding the notice sufficient, both as to statements of time and place, the Court said:

In determining the sufficiency of such a notice the court is not bound by its terms alone, but may examine it in the light of extraneous evidence showing the situation and surroundings, and thus determine whether it sufficiently apprised the municipality of the location and nature of the alleged defect or obstruction which caused the accident. Doubtless the principal purpose of the notice is to afford the proper officers an opportunity to look into the facts and circumstances connected with the occurrence; to preserve the evidence of the existing conditions; to determine the liability of the municipality; and, in case liability exists, to effect a settlement without resort to litigation. When, therefore, such a notice is not misleading, but advises the municipality promptly of the accident and claim, so as to afford an opportunity for investigation, it is sufficiently definite, and satisfies the purpose and requirements of the law. It is true, in this case the accident is stated in the notice to have occurred "on or about January 15, 1902," the precise time not being stated, but the evidence shows that the occurrence did actually take place on the night of the day mentioned, and there is nothing to show that any other

accident happened on or about that time or at that place. Nor is it claimed or shown that any officer was in any way misled in any investigation because of the failure to state the exact time. The statement as to time, therefore, cannot be held to have been prejudicial. So the notice fails to state the exact spot where the accident occurred, simply stating that it happened on "First West between Seventh and Eighth South" streets; but both the notice and the evidence show that the obstruction was of such a character that no officer, in the exercise of ordinary care, could walk or drive along the street at the place stated without observing the dangerous condition of the sidewalk where the injury occurred. It is clear that the notice did not mislead the municipality, and, considering it in its entirety, we are of the opinion that it was sufficiently definite to subserve the purpose of the statute, and that it was properly admitted in evidence.

The case quoted from was decided under Section 112, Revised Statutes of Utah, 1898, which, so far as applicable, read:

"All claims . . . shall . . . be presented to the city council . . . properly verified, describing the time, place, cause, and extent of the damage or injury; . . ."

It is true that the statute applicable to the case at bar differs from the above, by reason of amendments. (Laws of Utah, 1905, Ch. 8; p. 5, enacting the statute in its present form). However, it has never been construed

in respect to the specific question here considered. The chief difference is that the present statute has been furnished with an express rule of construction:

" . . . such notice shall be sufficient in the particulars above specified to enable the officers of such city or town to find the place and cause of such injury from the description thereof given in the notice itself without extraneous inquiry . . ." - Section 15-7-73 above set forth.

It is submitted that this is the exact rule employed by the Court in the Connor case, *supra*, and that the claim in the case at bar measured by this rule satisfies the statute. Even if the amendment is held to require a more literal compliance with the statute, appellant's claim is in terms so much more detailed than that in the Connor case that there can be no doubt as to its sufficiency. See also *Titus v. Montesano*, 108 Ark. 606, 181 P. 43; *Hagle v. Billings*, 80 Mont. 178, 260 P. 717; *Savannah v. Holman*, 43 Ga. App. 14, 156 S.E. 64; *Buchmeier v. Davenport*, 138 Iowa 623, 116 N.W. 606; *East Chicago v. Gilbert*, 19 Ind. App. 613, 103 N.E. 29.

8. The claim must particularly describe

the cause and circumstances of the injury. The words of the claim are:

" . . . through a defect in the sidewalk at that location I was injured by falling and having certain bones fractured near my ankle . . . " (Tr. 40; Ab. 25).

The sufficiency of the claim in this respect should be determined by the same considerations which govern the matters of stating time and place. See the Connor case, *supra*. It is submitted that appellant's claim satisfies the above requirement. How could appellant have set forth the cause and circumstances of the injury more fully without introducing a great amount of unimportant detail, which could be no further protection to the municipality? Surely, a claimant is not required to plead a cause of action in his claim according to the legal rules of pleading. And the liability of the municipality is surely not determined from the face of the claim, itself, as though it were a negotiable instrument. The requirement that it must be sufficient to enable the officers of the city to find the defect without extraneous inquiry requires ~~something~~ more of the city than a mere

examination of the written claim for determining liability. In this connection, and also with reference to paragraphs 4 and 5, above, see *Vermeule v. Corning*, 186 App. Div. 806, 174 N.Y.S. 220, affirmed 230 N.Y. 535, 130 N.E. 903, reversing 166 N.Y.S. 546, where the city defended upon the ground that the claim was not itemized as required by statute. The claim had never been audited, paid, nor formally rejected. The Court said;

" . . . if the common council regarded the account as insufficiently itemized; it owed a duty to the plaintiff to bring it to his attention. No complaint having been made to the form of the claim when presented, we must assume therefore that it accorded to the common council all the information that body desired, and was a sufficient compliance with the technical requirement of the statute . . . "

7. The claim must state, if known to claimant, the name of the person, firm or corporation who created, brought about, or maintained the defect, obstruction or condition causing such injury. Appellant's claim does not expressly designate any person, firm or corporation who created, brought about, or maintained

the defect in this case. Here, again, is a portion of the statute which has not been construed by this Court. The legislative intent in requiring this particular information to be furnished by the claimant seems clearly to be for the purpose of advising the municipality whether its liability has arisen through the wrongful act of any third person. Where the city's liability gives rise to a remedy in the city against some third party tortfeasor, it is entirely reasonable to require the original claimant, as a prerequisite to his right of recovery, to furnish such information to the city as will enable it to pursue its own cause of action, if such information is known to the claimant. The existence of such a remedy in favor of the city cannot, however, diminish or affect its own liability to the injured person, provided the negligence of the city in failing to discover and repair the defect is a legal cause of the injury. 2 Restatement of the Law of Torts, §§418, §1 and 432, Illustration 5; Bean v. Portland, 69 Maine 467, 34 Atl. 361. Since the statute requires the statement of this information only

"if known to claimant" and since the possible connection of third parties with appellant's injury can have no bearing upon her cause of action, the purpose of the statute has been satisfied. Where the evidence tends to show, as in this case, that the defect was created by the affirmative acts of the respondent's agents or servants, the act of filing the claim, in itself, designates the person, firm or corporation responsible--the respondent. It has been held that no claim of any sort need be filed where the defect in the street or sidewalk was caused by the affirmative acts of the city's agents or servants. *Eliot v. Franklin*, 140 Tenn. 228, 204 S.W. 808; *Williams v. Nashville*, 145 Tenn. 666, 228 S.W. 86. This result was reached notwithstanding that the statute (Public Acts of Tennessee, 1913, ch. 85) made no such exception. Conceded that the result is somewhat extreme, the above cases are competent authority for the view that the city is presumed to have notice of defects that it created itself, and that, therefore, the purpose of the statute, as declared by this Court, is

more readily satisfied by the statements of the claim. This view is unanimously supported by the decisions of seventeen other states, which are collected in an excellent annotation at 50 A.L.R. 1193. These cases should also be considered in connection with the question of notice discussed at pages 12 and 13, supra.

8. The claim must state the nature and probable extent of the injury. The words of appellant's claim are:

"I was injured by falling and having certain bones fractured near my ankle to such an extent that I have had to have same in a cast, and move about on crutches since said injury. In view of the fact, that since said date I have been confined at my residence and have suffered extreme pain I feel that I should be compensated (etc.) . . ."
(Tr. 49; Ab. 25).

The sufficiency of this statement should not need argument. It is a fair, clear and unequivocal description in laymen's language of appellant's injury and the physical condition caused thereby. See the cases collected in annotation at 106 A.L.R. 655.

9. The claim must state the amount of damages claimed on account of the injury. The

words of the claim are;

"I feel that I should be compensated for such injury to the extent of not less than \$100.00" (Tr. 49; Id. 25).

is a prayer for judgment in a complaint, appellant's "feelings" in the matter, as above stated, would probably not be a sufficient demand or claim upon which to grant relief. If, however, appellant is to be held to the strict requirements of the rules of pleading, it is submitted that she should also be given the same opportunity for hearing upon the sufficiency of form, and for amendments to her claim. Appellant's claim is not to be judged by the rules of pleading, however. In addition to the authorities above cited, the following cases indicate the almost unanimous rule of construction applied to such claims by the courts of this country: *Atlanta v. Hawkins*, 45 Ga. App. 847, 166 S.E. 268; *Wise v. Whittenhall*, 140 Okla. 100, 222 P. 222; *Canon v. Fitzpatrick*, 55 N. I. 147, 131 Atl. 80; *Hanshan v. Janesville*, 137 Wis. 1, 116 N.W. 94; *Moyer v. Oshkosh*, 131 Wis. 226, 126 N.W. 373. Summarized, the rule is that the statutes requiring filing of claims, being in derogation of the

claimant, must be construed strictly against the municipality, and liberally in favor of the claimant; that the rules of pleading do not apply to the claims or notices and therefore, no great formality is required in stating them; that the purpose of the statutes is the same as stated by this Court in the Connor case, supra; and that a substantial compliance is sufficient. "A construction which preserves a bona fide claim so that it may be passed upon by a competent tribunal is to be preferred to a construction which cuts it off without trial." Moyer v. Oshkosh, supra. Measured by this rule, appellant's claim clearly demands compensation of \$300.00 for her injury.

10. The claim must be "properly verified." This requirement, although stated in the first part of the statute, has been reserved for last consideration under the question of the legal sufficiency of appellant's claim, for the reason that appellant's failure to verify the claim by her oath seems to be the ground upon which respondent placed its chief reliance in moving for

Appellant's claim was not "verified" within the usual legal meaning of the term, since the statute does not specify what is a proper verification, it is not clear what would constitute, in all cases, a sufficient compliance. In the case of *White v. Heber City*, 82 U. 547; 36 P. (2d) 333, it is held by this Court that claims presented under the statute in question need not be verified like pleadings. See also the annotation in 116 A.L.R. at 587 citing the *White* case. However, the most reasonable construction of the statute would seem to require that claimant's oath to the truth of the facts stated be attached to the claim, and since appellant did not make oath of any kind to the claim filed by her she does not contend that the claim contains a verification within the meaning of the statute, as it has been construed. The point is raised here merely to emphasize that respondent's position rests as much as does appellant's upon implications drawn from, or construction of the statute, rather than upon an express declaration of legislative intent.

The principal purpose of the statute, as stated in the Connor case above cited, 26 U. 240; 70 P. 472, is "to afford the proper officers an opportunity to look into the facts and circumstances connected with the occurrence; to preserve the evidence of the existing conditions; to determine the liability of the municipality; and, in case liability exists to effect a settlement without resort to litigation." (Underlining supplied) This statement was quoted and applied without change to the statute as it now stands in White v. Hober City, above cited, 32 U. 547, 26 P. (2d) 333 at 335. Doubtless, the purpose of the legislature in making the requirements of the claim more specific by the amendments of 1908 was to afford the municipality a more effective means of protecting itself against fraudulent or unjust claims. At any rate, it is well settled in this state that if the "principal purpose" of the statute is accomplished, a municipality may waive defects in the claim. Bowman v. Ogden City, 33 U. 196, 23 P. 361; Moran v. Salt Lake City, 33 U. 407, 173 P. 708; Burton v. Salt Lake City, 33 U. 188, 153 P. 443, 51 A.L.R. 334;

Husband v. Salt Lake City, 32 U. 461, 80 P. (2d) 491.

It has been shown by the matters hereinabove considered that the principal purpose of the statute was accomplished by the presentation of appellant's claim in this case. The remaining question is, therefore: Did the respondent waive appellant's failure to "properly verify" her claim or; Is respondent estopped from setting up the defects in the claim as a defense in an action at law? The doctrine of estoppel applies to a city the same as to any other person. *Vermoule v. Comings*, above cited, 180 App. Div. 806, 174 N.Y.S. 820, affirmed 230 N. Y. 508, 130 N.E. 903, reversing 123 N.Y.S. 546.

Appellant presented her claim within the time prescribed by law. It was handled by the respondent by the usual method adopted for the disposition of such claims, being numbered and referred to the Department of Public Affairs and Finance. The purpose of its reference to this department does not appear, but this fact, together with the negotiations had between the

respondent and the City Attorney's Office, show conclusively that the respondent had notice of the filing of the claim and took some action thereon. The claim was never rejected by the respondent, nor did respondent at any time make objection to the form in which the claim was filed nor request that it be amended or corrected in any particular. It was not shown at the trial that the respondent was prejudiced in any way by any alleged insufficiency of the claim. On the contrary, the facts proved or offered to be proved show that the respondent was apparently quite satisfied to determine its own liability, and to deal with appellant, upon the basis of the claim as filed. Can a municipality be permitted to deal with the claimant as though it were about to settle the claim on its merits, ostensibly treating the claim as valid, until the original time for filing has expired, so that the claimant has no further opportunity to comply with the procedural requirements of statute, and later, having so misled the claimant, attempt to avoid liability on the ground that a technical requirement

has not been observed, raising such defense for the first time upon the trial of the case? We think not. Especially not where it can be shown that the city's motive is to produce just such a result by misleading the claimant, and thus making unavailable to him his legal remedy.

In the case at bar, the city was advised by counsel in its dealings with appellant. It cannot be said that respondent's action with respect to the claim was taken unadvisedly. This is no mere case of inadvertent silence. The respondent's silence, together with the action taken regarding the claim, including the offer to pay appellant \$25.00 in settlement of respondent's liability, constitute a plain representation to appellant respecting the validity of her claim. Upon this representation appellant relied, and said reliance was obviously to her detriment, if she is now to be denied her remedy against the respondent. Stated in another way, respondent's acts, through its officers and agents, would have been clearly understood by any reasonable man (and were so understood by appellant) to mean that the respondent did not

intend to rely upon any defects in appellant's written claim but that it waived any such defect.

It is true, of course, that ordinarily an offer of compromise is not admissible in an action at law against the party making the offer, for the purpose of proving liability. But the testimony of appellant regarding respondent's offer of settlement was not offered in evidence for that purpose, and the rule does not bar admission of testimony regarding such offers, when the purpose for which it is sought to be introduced is proper. There are two situations in which an offer of payment made by the defendant is admissible in evidence against him:

First: Where the offer admits the existence of the fact sought to be proved, whether that fact be the ultimate liability of the defendant, the amount of damage, waiver of certain rights or some other matter in issue. This rule applies even though the admission is made as a part of an offer of compromise; *Hartford Bridge Co. v. Spranger*, 4 Conn. 142; *Ketcher v. Love*, 19 Mo. 542, 36 P. 153; *Whitney v. Cleveland*, 13 Cal. 558, 91 P. 175; *McCune v. Clements*, 137

Kans. 681, 21 P. (2d) 696; Stanley v. Bonty, 142 Kans. 498, 83 P. (2d) 637; Long v. Pierce County, 22 Wash. 330, 61 P. 142; and many other cases digested in the American Digest System at Evidence, Key No. 213 (4). In such cases, the rule is no exception from the rule regarding offers of compromise but merely an application of the rule regarding evidential admissions made by a party, since most offers of compromise are not true admissions but are merely hypothetical concessions made by the party to avoid vexatious litigation and to buy his peace without reference to his legal rights or liabilities. This is the true distinction and the reason for non-admissibility of offers of compromise unless they contain admissions of actual fact or unless material for some other purpose. It should be noted, however, that an admission of liability may be made in the course of negotiations for settlement without litigation, in which case it is receivable in evidence, as above pointed out. In the case at bar, appellant was not permitted to give sufficient testimony to show whether respondent's

offer of compromise. Deciding the question most strongly against appellant, the Court should have received sufficient evidence to make such a determination possible, and if doubt remained, the question should have gone to the jury under proper instructions. The following cases are authority for the proposition that the question is a proper one for the jury's determination; Donley v. Bailey, 48 Colo. 373, 110 P. 63; Passing v. Ordway, 100 Iowa 611, 68 N.W. 1013; Langdon v. Ahrens, 166 Iowa 636, 147 N.W. 940; Prussel v. Knowles, 4 Howard (3 Miss.) 90; Finn v. New England Tel. & Tel. Co., 101 Maine 279 at 286, 64 Atl. 490; Gagne v. New Haven Road Construction Co., 87 N.H. 163, 178 Atl. 613; Phoenix Assurance Co. Ltd. of London, Eng. v. Davis, (C.C.A. Tex.) 67 F. (2d) 824. As distinguished from judicial admissions (i.e., stipulations, admissions in the pleadings, etc.) an evidential, or extra-judicial, admission of fact, such as there may have been in this case, is never conclusive upon the party against whom it is received but is only admitted in evidence for whatever probative value it may have and may

always be contradicted or explained. The rule is applicable when the admission is contained in an offer of compromise. "Offers of compromise to pay a sum of money by the way of compromise, as a general rule are not admissible against the party making the offer; but if admitted, it is clear that the offer is open to explanation, no matter whether it was by letter or by oral communication." West v. Smith, 101 U.S. 263, 26 L. Ed. 809 at 813. See also, Chamberlain v. Iba, 181 N.Y. 486, 74 N.E. 481; Smith v. Hayfield, 183 Ill. 447, 45 N.E. 157. There could, therefore, have been no error in permitting such testimony to go to the jury. On the contrary, since the facts sought to be proved were directly material to the question of respondent's liability, the Court erred in making the rulings complained of in the first, second and third Assignments of Error, the matters complained of in the second and third Assignments being material to the question of admissibility of the offer, insofar as they tend to show what else took place at the time the offer was made.

payment is admissible is where the offer is relevant, independent of the question of liability, to prove some fact in issue, such as waiver, reliance upon an alleged promise, due diligence, agency, etc. This is true whether the offer of payment is an offer of compromise making merely hypothetical admissions, or an actual admission of liability. *Watson v. Reed*, 129 Ala. 308, 29 So. 837; *Loveman v. Birmingham Ry. L. & P. Co.*, 149 Ala. 315, 43 So. 411; *Shore v. Steiner*, 173 Ala. 363 at 373, 57 So. 700 at 703; *Dierks Lumber & Coal Co. v. Tellett*, 178 Ark. 100, 10 S.W. (2d) 5; *Lucas v. Parsons*, 27 Ga. 393 at 399; *Austin v. Long*, 5 Ga. App. 531, 63 S.E. 64; *McIntosh v. Patton*, 12 Ga. App. 305, 77 S.E. 6; *Blissard Bros. v. Grover's Canning Co.*, (Iowa) 140 N.W. 973; *St. Louis & S. P. R. Co. v. Stone*, 70 Kans. 505, 97 P. 471; *Hopkins v. Rodgers*, 91 N.Y.S. 749; *Gould v. Dwelling House Ins. Co.*, 134 Pa. 570, 19 Atl. 733, 19 Am. St. Rep. 717; *Hechan v. Comm'l. Casualty Ins. Co.*, 165 S.C. 496, 165 S.E. 194; *Lynde v. Browning*, 3 Tenn. Civ. App. 262. A Utah case directly in point is *Holt v. Great Eastern Casualty Company*, 53 U.

543, 173 P. 1166. In that case, plaintiff, having an accident insurance policy with the defendant, was injured and claimed indemnity under the policy. The policy provided that written notice should be given the defendant, and proof of loss made, within a certain time and in a certain manner as a prerequisite to defendant's liability. This was not done, and the plaintiff contended that defendant, by acknowledging receipt of plaintiff's letters and advising him with respect to his claim, and by offering payment of a certain sum in full settlement, had waived the defects in the notice and proof of loss. He was sustained by the Court in this contention and a judgment for plaintiff was affirmed. In a federal case with facts very similar to the Holt case, supra, the plaintiff having suffered injury and made improper claim under his policy, received the following letter from defendant's agents:

"Dear Sir:

We have just received the decision of the Travelers Accident Company on your case. It is as follows: They agree to pay you for four weeks' compensation. This would be for a

length of time in which they claim the rupture would be cured as well as it ever would be. They offer this amount as a compromise; for the company does not admit that you have established the fact that the rupture was caused by the accident referred to in your proofs sent to them. Shall we send and get the money-- \$100--for you? Let us hear at once.

Truly,"

the Court said:

" . . . If the offer to compromise is accompanied by a waiver, it may be given in evidence, not to prove the offer, but to prove the waiver. To establish the latter I think the letter in question is admissible in evidence.

But is this letter sufficient evidence that the defendant has waived the right to insist on the notice as a condition precedent? In this letter, the objection to the payment of the whole claim, as well as the denial of liability to pay any part of it, was not made on the ground that the proper notice had not been given, but solely on the ground that the total inability on the part of the plaintiff to perform any kind of business continued only four weeks after the accident, and that the proofs furnished by the plaintiff to the defendant did not establish the fact that the injury of which the plaintiff complained was the result of the accident to which he attributed it. We may perhaps well ask, if the defendant was disposed to resist the payment on the ground that the formal notice had not been given, why was not this objection noticed in the letter? And why did the company make the "decision" mentioned in the letter on other grounds

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than the want of notice, as it seems was done? And may we not here well apply the maxim that "Expressio unius est exclusio alterius?" *Unthank v. Travelers Insurance Co., (C.C., Dist. of Ind.) 33 Fed. Cas. No. 16,795.*

See also the cases cited by the Court in the Unthank case, *supra*. It is upon this independent relevancy of the offer to the issue of waiver that appellant's chief reliance is placed in making her First Assignment of Error. The respondent's offer is material to show that no attempt was made to avoid liability by reason of non-compliance with the statute and that respondent's conduct was such as to lead appellant to believe that no such attempt would be made. Under this rule of admissibility, the testimony was receivable without further explanation or foundation, since its relevancy appears from the matters already in the record. In a sense, this rule arises from the same considerations as that regarding admissions of fact above discussed, since although the city's position may have been an offer of compromise as to ultimate liability, it was, in addition, an admission of fact regarding the city's treatment of the claim. However, it should again be pointed

out that even if this Court may disagree as to the question of independent relevancy, the Court below was still in error in excluding the testimony, because appellant was not permitted to give sufficient testimony to show whether the offer was an admission of liability (independent of the waiver) or a mere offer of compromise.

Although many other states have statutes requiring the presentation of claims to a municipality as a prerequisite to the commencement of an action, we have been able to find no such statute identical with our own and for this reason many of the cases construing these statutes present different issues from those involved here. However, a number of these cases, which we believe to be in point, are reviewed hereafter.

We wish especially to call the Court's attention to the case of *Griswold v. Iudington*, 116 Mich. 401, 74 N.W. 663, which is indistinguishable from the case at bar. The statutes in that case were as follows:

No city subject to the provisions of this Act shall be liable in damages sustained by any person in

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such city, either to his person or property, by reason of any defective street, sidewalk, crosswalk or public highway, or by reason of any obstruction, ice, snow or other encumbrance upon such street, sidewalk, crosswalk or public highway, situated in such city, unless such person shall serve or cause to be served, within sixty days after such injury shall have occurred, a notice in writing upon the clerk or deputy clerk of said city, which notice shall set forth substantially the time when, the place where, such injury took place, the manner in which it occurred, and the extent of such injury as far as the same has become known, and that the person receiving such injury intends to hold such city liable for such damages as may have been sustained by him. Act 215, Public Acts of 1895, Sec. 1, Chapter 22.

. . . No account or claim or contract shall be received for audit or allowance unless it shall be accompanied by a certificate of an officer of the corporation, or an affidavit of the person rendering it, to the effect that he verily believes that . . . the sums charged . . . are reasonable and just, and that to the best of his knowledge and belief no set-off exists, nor payment has been made on account thereof, except such as are endorsed or referred to in such account or claim . . . It shall be a sufficient defense in any court, to any action or proceeding for the collection of any demand or claim against the city for personal injury or otherwise, that it has never been presented, certified to or verified as aforesaid, to the council for allowance; or if such claim is founded on contract, that the same was presented without the affidavit or certificate as aforesaid, and rejected

for that reason; or that the action or proceeding was brought before the council had a reasonable time to investigate and pass upon it. Act 215, Public Acts of 1888, Sec. 20, Chapter 8. (Underlining supplied).

The plaintiff was injured by falling in a hole in the sidewalk of defendant city. Within the statutory time he presented to the city clerk, as required by statute, a written claim in the form of a letter addressed to the common council stating the time, place, manner and extent of the injury and claiming damages in the sum of \$5,000.00. The claim or letter was not certified, sworn to or verified in any manner. The claim was rejected but no reason was given therefor by the city. At the trial, the Court refused to permit the plaintiff to testify to conversations had between himself and members of the city council, subsequent to the filing of his claim. Plaintiff was asked "whether at your interview . . . with the mayor of the city or with the clerk of the city, or with the supposed committee that you had the conference with, or with anybody else connected with the city, any question was made upon the ground

at your claim had not been sworn to." This
is objected to and the objection sustained.
Upon the motion of defendant, the Court directed
verdict against the plaintiff. Upon appeal
the plaintiff claimed, among other things, that
(1) the claim presented to the common council
substantially complied with the statute and (2)
there was some evidence to go to the jury tend-
ing to show a waiver by the council of the fact
that the claim was not sufficiently verified or
certified. Although holding that the verifica-
tion is a condition precedent to the commence-
ment of an action, the Court also held that it
may be waived, and said:

But we are satisfied that the court
was in error in holding that there
was no evidence of waiver by the
common council of the right to insist
upon a verified claim being presented.
The plaintiff gave testimony tending
to show that the claim was served upon
the city clerk and mayor on December
17, 1896. The council held this claim
until January 20, 1897. In the mean-
time it is apparent that several meet-
ings of the council were held at
which this claim was up for discussion;
and plaintiff offered proof on the
trial tending to show (which testimony
was ruled out by the court) that after
the claim was referred to the council,
and in order to avoid the taking of for-
mal action, the officers were asked to

remain after the council closed, and did remain and a committee was then informally appointed to consider the claim, and did consider it; that this committee met with plaintiff and his counsel, and the matter was fully discussed; that no objection was made by this committee, or were made by the common council, to the claim on the ground that it was not verified. It appears that one of the aldermen notified plaintiff that the council had informally appointed a committee "to look into the liability of the city and report the same at its next meeting." Plaintiff sought to show what that committee reported back to the council. This was not permitted. The council appointed this committee, and had the claim of plaintiff under advisement until after the time for filing a new and verified claim had elapsed, and then notified plaintiff that no damages would be offered for the injuries. A waiver is a mixed question of law and fact, and each case must necessarily depend upon its own peculiar circumstances and surroundings. It is a question for the court to determine whether there is any evidence tending to show a waiver; but when there is any evidence, the jury must determine what the intent of the party was, as a waiver is usually one of intent, as indicated by the acts and declarations of the party. (Citing cases). We are unable to say, as a matter of law, that there was no evidence in the case showing an intent on the part of the council to waive the fact that the claim was not verified . . . We think the question of waiver was one of fact for the jury, under all the circumstances stated.

The decision of the trial court was reversed and a new trial awarded. The evidence offered to show waiver in the case at bar is

even stronger than that in the Griswold case, supra, since rather than making an express rejection of the claim, the respondent made an offer of payment to appellant on her claim in this case. For the reason, therefore, that the court below refused to receive or submit to the jury for its consideration the evidence tending to show a waiver by respondent of the defect in appellant's claim, precisely as in the Griswold case, supra, the error complained of in the first, second, third, seventh, eighth and ninth assignments of Error is apparent.

In the case of Wright v. Portland, 118 Mich. 25, 76 N.W. 141, the plaintiff offered to prove that the claim was presented; that it was acted upon by the council and a committee appointed to investigate the claim; that plaintiff appeared before the president of the council and tried to make an adjustment; that the only objection to the payment of the claim was to the amount, and not because it was not verified or certified to, as required by statute. This offer of proof was refused. The Court said;

The only question necessary to be decided is: Did the offered proof raise a question of waiver, which ought to have been submitted to the jury? It is insisted on the part of the village that the village council cannot waive the provisions of the statute. It is said: "the right of waiver is subject to the control of public policy, which cannot be set aside or contravened by any arrangement or agreement of the parties, however expressed,"--citing 26 Am. and Eng. Enc. Law, 535. A reference to this authority shows what the writer had in mind when he read what follows: "Thus, an agreement waiving the defense of usury is void, and so also is the ratification of a forgery or a waiver of a violation of Sunday laws," etc. We do not see how any question of public policy is involved here, so as to affect the question of waiver. Had this claim been allowed and paid, we do not think it could be said an illegal claim or one contrary to public policy had been adjusted, simply because the claim was not verified. This requirement of the statute is for the benefit of the village, and is a matter which may be used by it, by way of defense. (Citing cases) . . . In this case, if counsel could show what he offered to show, the question should have been submitted to the jury to decide whether there was a waiver on the part of the council. Judgment is reversed, and a new trial ordered.

In the case of Warner v. Wyandotte, 175 Mich. 88, 141 N.W. 568, the claim presented by the plaintiff was as follows:

Wyandotte, October 13, 1910

To the Mayor and Council of the City
of Wyandotte

Dear Sirs:

On Sunday, September 11th, as I was going from the drug store I was running on the south side of Middle Avenue, at the north end of Flowers' store, I caught my foot on the rise in the walk and fell and hurt me so I have not been able to walk since, and I think the city should help me.

Yours truly,
Hiram Warner
48 Grove Street

Although this claim is obviously defective in several respects, it was held that the defects had been waived by the city by a course of dealing with the plaintiff very similar to that in the case at bar.

The case of *Bowles v. Richmond*, 147 Va. 720, 13 S.E. 803, affirming 147 Va. 720, 120 S.E. 450, is of particular interest here. The statute in that case was as follows:

No action shall be maintained against the said city for damages for an injury to any person or property alleged to have been sustained by reason of the negligence of the city, or of any officer, agent or employee thereof, unless a written statement, verified by the oath of the claimant, his agent or attorney, of the nature of the claim and of the time and place at which the injury is alleged to have occurred or been received shall have been filed with

the city attorney of said city within six months after such cause shall have accrued. Acts of 1910, Page 122, Sec. 10-g.

The plaintiff filed a claim which satisfied the statute, except that it was unverified. It was held that the defect had been waived by a rejection of the claim on the sole ground of contributory negligence and as authority for the holding, the Court cited, among other cases, *Downen v. Ogden City*, 33 B. 106, 93 P. 561. It was said by the Virginia Court:

While the courts are unanimous that giving the notice is a condition precedent to the right to bring the suit, still recognizing that the reason of the law is the life of the law, they hold that the statute should have a liberal construction, and a substantial compliance with it is sufficient. . . . The contention of the city, however, is that the failure to verify the notice makes the notice void and equivalent to no notice. Affidavits to notices and proceedings are frequently required by the statute law, and practice of the courts, so that whether the requirements of affidavits in such cases are directory or mandatory has been settled by adjudication. The rule of reason and principle applicable in the construction of such provisions of law is very clearly annunciated by Judge Cooley in Cooley's Const. Lim., and quoted with approval by the Supreme Court of Appeals in the case of *Jackson v. Dotson*, 110 Va. 48, 65 S.E. 484 (which was a case involving the sufficiency of an affidavit to a

plea required by statute), as follows: Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly regarded as mandatory, and if the act is performed but not in the time nor in the precise mode indicated, it will be sufficient if that which is done accomplishes the substantial purpose of the statute."

The notice with affidavit as provided in the city's charter was for the information of the city attorney, and he was not required to act until proper notice was served upon him, but if he acted upon the notice without affidavit, and every substantial purpose thereof has been accomplished, and he denied in writing all liability of the city, it is in the highest degree technical to hold the affidavit to the notice a condition precedent (when he did not so regard it) to the right of the plaintiff to bring her suit, and does not prevent the case to the court for trial according to the very right . . .

There is nothing sacrosanct about these notices, faith and fair intent must prevail. Here a notice was given in all respects regular except that it was not verified. That notice was not merely received but it was acted on after full investigation. Petitioner was told that the city was not liable, not because of want of verification, but because of contributory negligence. In other words, the plaintiff was told, no matter what may be the form of your petition you have no claim upon its merits and the city will pay you nothing. It would violate every principle of fair dealings for the city to say you may have had a claim but with the way we have

distracted your attention from a fatal technical omission in your notice. We have lulled you to sleep and now your day of grace has passed

...

The power to waive notice or its formalities as an act of grace is not to be confused with waiver by way of estoppel after action has actually been taken.

Those parts of the opinion not quoted above are also especially commended to the Court's consideration, as they contain a valuable discussion of the cases cited by the city as authority for a different result.

In addition to those above cited, the following cases are authority for the contention that the conduct of the respondent constituted a waiver of the right to insist upon a literal compliance with the terms of the statute:

Crumbley v. Jacksonville, 103 Fla. 406, 135 So. 885, affirmed 135 So. 486; Ribbe v. Miami, 103 Fla. 732, 130 So. 371; Germaine v. Muskegon, 105 Mich. 213, 63 N.W. 76; Kriseler v. LeValley, 122 Mich. 376, 81 N.E. 160; Foster v. Belleaire, 127 Mich. 13, 86 N.W. 323; Morlan v. Marcelins, 150 Mich. 400, 114 N.W. 236; Moore v. Detroit, 164 Mich. 243, 120 N.W. 715; Draper v. Spring-
wells, 164 Mich. 243, 120 N.W. 715; Farley v.

Lockport, 51 Misc. 417, 113 N.Y.S. 708; People v. Justice, 147 N.Y.S. 287; Cawthorn v. Houston, (Tex.) 251 S.E. 701.

The decisions of this Court show clearly that the law of Utah is in accord with the above authorities. In *Bowman v. Ogden City*, 33 U. 196, 13 P. 561, although the plaintiff was not permitted to recover, on the ground that there had been an accord and satisfaction between himself and the city, it was nevertheless held that his failure to verify his claim could not be used as a defense by the city. In so holding, the Court said;

The plaintiff's claim was not properly made out as provided by the statute in several particulars, principally because it was not verified, and the extent of his injury or damage not sufficiently described. The city council, however, did not decline to consider it, nor to investigate the facts, because the claim was not properly made out. On the contrary, it treated the claim, and acted upon it, as though it had been in full compliance with the statute. In such case the defects of the claim presented were waived, and were not thereafter available as a defense to the action.

The above holding was cited with approval

In *Worran v. Salt Lake City* (1918) 33 U. 407, 173 P. 702, although the plaintiff in that case was not permitted to recover, since he had failed to prove the giving of notice of any sort to the city or that the city had taken any action upon the matter.

The case of *Burton v. Salt Lake City* (1926) 19 U. 188, 253 P. 443, 31 A.L.R. 384 was an action for damages through the death of plaintiff's daughter, caused by the negligence of the city. Plaintiff filed her claim within time and the city urged as one ground of defense that the same was insufficient in certain particulars. There is some doubt as to whether it is necessary to file a claim in such cases or not, without deciding this point, the Court held that the city had waived the defects by failing to call them to plaintiff's attention.

In *Husband v. Salt Lake City* (1937) 32 U. 49, 66 P. (2d) 491 at 499, the Court said:

It appears from the complaint that the claim was presented to the defendant city; that the city acted upon the claim as presented and denied the same. The basis for denying the claim does not appear. Apparently no request was made to make the claim more specific

in any particular, which request the city could have made had it so desired. It would appear, from aught that is revealed by the complaint, that the city acted upon the claim as presented and waived any defects now urged by it. (Citing the Bowman and Burton cases, supra.)

Counsel will undoubtedly urge that (1)

there have been amendments to the statute since the decision in the *Rowman* case, *supra*, and (2) that the claims made in the *Moran*, *Burton* and *husband* cases, *supra*, belong to a different class of claims than that in the case at bar, according to the definition of the statute. These facts, however, are not sufficient grounds for a distinction between the cases cited and the instant case. In the first place, the rule of the *Rowman* case has been cited with approval or applied by this Court to the statute as it now stands, at least three times (in the *Moran* and *husband* cases, *supra*, and *Harley v. Town of Vingham*, which is considered below). It has also been applied by the Courts of other states to statutes more similar to our present statute than to the statute as it stood in 1903 (laws of 1903, Chapter 13, page 10). For example,

Bowler v. Richmond, supra. In the second place, let us consider whether the division of the claims into two classes has any bearing upon the issue here.

The first class defined by the statute consists of those claims for damages or injury alleged to have been caused by the defective, unsafe, dangerous or obstructed condition of any street, alley, crosswalk, sidewalk, etc., or from the negligence of the city authorities in respect thereto. Rules regarding the filing of such claims are provided. It is to this portion of the statute that appellant's brief is directed. The second class of claims consists of "every claim, other than claims above mentioned," and with respect to these it is provided that "if such account or claim is not properly or sufficiently itemized or described or verified, the governing body may require the same to be made more specific as to the itemization or description, or to be corrected as to the verification thereof." (Underlining Supplied). Section 17-7-78, set forth at Pages 14 and 15. ~~It will be noted that this is a~~

mere directory provision and it would be highly unreasonable to argue that because a similar provision is not made with respect to claims of the first class that the city has no right to request further information or more specific description of the injury, etc., in respect to such claims. Where the claim is bona fide and not fraudulent or unjust, and where the purpose of the statute is satisfied, as in this case, the city may, if it sees fit, deal with the claimant without resort to established procedure, provided the interests of justice and the public are subserved thereby. Moreover, appellant has never contended that the statute should be so construed as to extend her time for making proper claim, nor does she seek to put the city in a position where it is virtually under a duty to see that she does comply with the statute. Appellant contends merely that the city may not represent to her that it has waived or intentionally overlooked the defects in her claim and then raise the defense of non-compliance with the statute for the first time on the trial of the case. When in time the claim belongs

the first or second class, and since the law is not mandatory upon the city to handle either class of claims by a method distinct from the other, the cases above cited are valid authority for appellant's position.

With final reference to the question whether appellant's action is barred by the statute, it should be pointed out that the result sought by appellant would not effect a nullification of the statute but merely its proper application. As pointed out by the Court in *Murley v. Town ofingham* (1924) 65 U. 827, 228 P. 213, "There is a wide distinction between presenting a defective claim which at least names the time, place, and circumstances of the injury and in presenting no claim at all. In the first supposed case a municipality is at least notified sufficiently to investigate the merits of the claim, which, evidently, is the main purpose of the statute. In the second supposed case the city receives no notice at all, and the very purpose of the statute is defeated." The Court further said, in applying the rule of the *Lowman* case, *supra*:

"waiver or estoppel may be found in the face of mandatory statute. For instance, statutes of limitation ordinarily are mandatory both in form and effect. Nevertheless, they may be waived or the party may be estopped from relying upon them." Recovery was denied, as indicated, for the reason that plaintiff filed no claim of any sort. The ruling was proper and entirely in accord with the propositions of law stated by appellant. Since the claim in the Hurley case was for injuries caused by an obstruction in the defendant's street, it falls within the first class of claims under the statute and shows clearly the correctness of appellant's contention respecting the authority of the Moran, Burton and Husband cases, supra.

From the foregoing, it appears that the testimony offered by appellant, which was received by the Court below in the rulings complained of in the first, second and third Assignments of Error, was material, relevant and competent on the question of waiver and that the refusal of the Court to receive said testimony resulted in the erroneous ruling complained of in the

seventh, eighth and ninth assignments of Error.

III. Appellant Should Have Been Permitted to Show Cause for Increasing her Demand.

The case of *Harger v. Salt Lake City*, 86 U. S. 101 P. 233, 15 A.L.R. 5, holds clearly that claimant may not recover an amount greater than that stated in his claim presented to the City Commission, unless he pleads and proves a proper excuse for claiming such greater amount. See also *Sweet v. Salt Lake City*, 45 U. 300, 134 P. 1167 and *Hurley v. Town of Bingham*, supra. Although this rule may be contra to the weight of authority (see the cases collected in annotation at 75 A.L.R. 1511), we assume that it is now the law of this jurisdiction and that, therefore, it is necessary for appellant to bring herself within its terms in order to recover any amount in excess of \$500.00. Appellant's reason for her increased demand is pleaded in Paragraph III of her complaint (Tr. 2, 3; Ab. 3, 5). The testimony offered by appellant, which was refused by the court below and assigned as error in the fourth and fifth assignments of error, 34, 35; Ab. 15.

(6), was a proper attempt to sustain the allegations of the complaint and to make a record sufficient to sustain a verdict greater than \$500.00, if the jury should find that appellant's damage was actually greater. Unless we have misunderstood the holding in the Berger case, supra, the ruling was clearly error and should not need further argument.

IV. Appellant Should Have Been Permitted to Show the Condition of the Sidewalk at the Place where the Injury Occurred.

Testifying on behalf of appellant, the witness, William Perry Sturges, was asked, "was the sidewalk at that point (where the injury occurred), Mr. Sturges, free from cracks and irregularities?" This was objected to by counsel for the respondent "on the ground it is immaterial, irrelevant, and incompetent." (Tr. 12; Ab. 18). Obviously, the testimony of a qualified witness as to the condition of the sidewalk where the injury occurred can be neither immaterial, irrelevant nor incompetent. The statute allows recovery for injuries caused by the defective condition of a sidewalk. Proof

of the defective condition is not only material and relevant, but an absolute essential to plaintiff's prima facie case. Notwithstanding that this was called to the attention of the Court below, the objection to the testimony was sustained. The witness had shown himself qualified through personal observation of the place in question at the time of the accident. The competency of the requested answer cannot be doubted. The Court's ruling, therefore, which is complained of in the sixth Assignment of Error was clearly wrong.

CONCLUSION

For the reasons above set forth, appellant submits that the Court below erred in all the particulars specified in the Assignments of Error; that such error was prejudicial in each instance assigned; and that the judgment is, therefore, erroneous and contrary to law and should be reversed and set aside and a new trial granted to Appellant in accordance with her prayer.

Respectfully submitted,

DRAPER, BOYDEN & DRAPER
Attorneys for Appellant