

1988

Virginia Yearsley v. Officer Dean Jensen, Officer Steven Wallerstein, and Officer Sheldon Smith : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

John T. Caine; Richards, Caine and Allen; Attorney for Appellant.

Joy Sanders; Andrew M. Morse; Snow Christensen and Martineau; Dale J. Lambert; Robert K. Hlder; Christensen, Jensen, and Powell; Attorneys for Respondent.

Recommended Citation

Brief of Respondent, *Yearsley v. Jensen*, No. 88045 (Utah Court of Appeals, 1988).
https://digitalcommons.law.byu.edu/byu_ca1/797

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO.

IN THE UTAH COURT OF APPEALS

880145-CA
VIRGINIA YEARSLEY,

Plaintiff/Appellant,

vs.

OFFICER DEAN JENSEN, ET AL,

Defendants/Respondents.

:

:

:

:

:

Case No. ~~88029~~

880145-CA

146

BRIEF OF APPELLANT

Appeal from the decision of the Second
Judicial District Court, the Honorable
David E. Roth, sitting without a jury,
on granting Defendants' Motion for
Summary Judgment

JOY L. SANDERS
ANDREW M. MORSE
Attorneys at Law
Attorneys for Respondent
10 Exchange Place
P.O. Box 45000
Eleventh Floor
Salt Lake City, Utah 84145

JOHN T. CAINE of
RICHARDS, CAINE & ALLEN
Attorney for Appellant
2568 Washington Boulevard
Ogden, Utah 84401

DALE J. LAMBERT
Attorney at Law
Attorney for Respondent
175 South West Temple
Clark Leaming Building
Salt Lake City, Utah 84101

APR 12 1988

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction in this case is conferred upon this Court pursuant to Sec.78-2a-3 (2)(h) UCA (1953 as amended) and pursuant to decision of the Utah Supreme Court dated March 4, 1988.

IN THE UTAH COURT OF APPEALS

VIRGINIA YEARSLEY,	:	
Plaintiff/Appellant,	:	Case No. 88029
vs.	:	
OFFICER DEAN JENSEN, ET AL,	:	
Defendants/Respondents.	:	

BRIEF OF APPELLANT

Appeal from the decision of the Second
Judicial District Court, the Honorable
David E. Roth, sitting without a jury,
on granting Defendants' Motion for
Summary Judgment

JOHN T. CAINE of
RICHARDS, CAINE & ALLEN
Attorney for Appellant
2568 Washington Boulevard
Ogden, Utah 84401

JOY L. SANDERS
ANDREW M. MORSE
Attorneys at Law
Attorneys for Respondent
10 Exchange Place
P.O. Box 45000
Eleventh Floor
Salt Lake City, Utah 84145

DALE J. LAMBERT
Attorney at Law
Attorney for Respondent
175 South West Temple
Clark Leaming Building
Salt Lake City, Utah 84101

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE NATURE OF THE CASE.....	1
DISPOSITION IN THE COURT BELOW.....	1
STATEMENT OF THE ISSUES SOUGHT TO BE REVIEWED.....	2
STATEMENT OF THE FACTS.....	2
SUMMARY OF THE ARGUMENT.....	6

POINT I

THE COURT ERRED IN DENYING PLAINTIFF'S REQUEST TO AMEND HER COMPLAINT AT THE PRETRIAL HEARING WHICH WOULD HAVE DEFEATED DEFENDANTS' STATUTE OF LIMITATIONS ARGUMENT.....	6
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---

POINT II

THE COURT ERRED IN DETERMINING THAT THE DEFENDANTS' ACTIONS OF AUGUST 28TH AND 29TH CONSTITUTED A CONTINUOUS TORT WHICH CLAIM WOULD HAVE SURVIVED THE STATUTE OF LIMITATIONS ARGUMENT.....	10
CONCLUSION.....	13

TABLE OF AUTHORITIES

CASES

<u>Kenneth L. Baker v. Burbank, Glendale, Pasadena Airport Authorities</u>	
705 P.2d 866, (1985 California).....	10
<u>Shores v. Branch</u>	
720 P.2d 239, (1986 Montana).....	12

OTHER AUTHORITIES

63-30-13 USC (1953 as amended).....	9
-------------------------------------	---

IN THE UTAH STATE COURT OF APPEALS

VIRGINIA YEARSLEY, :
Plaintiff/Appellant, : Case No. 88029
vs. :
OFFICER DEAN JENSEN, ET AL, :
Defendants/Respondents:

STATEMENT OF THE NATURE OF THE CASE

This was an action sounding in tort that was originally filed by the Plaintiff as an action against three (3) police officers from three (3) different jurisdictions for assault and other improper conduct that arose from an incident that happened at Plaintiff's home on the late evening hours of August 28, 1983 and the early morning hours of August 29, 1983.

DISPOSITION IN THE COURT BELOW

Following the filing of a Notice of Readiness For Trial, after discovery had been completed and just immediately prior to a Trial which had been set for some time, Defendants' filed a Motion to Dismiss on the basis of certain statute of limitations violations.

The Plaintiff sought to amend the Complaint to allege a continuous tort of false imprisonment and other unlawful conduct.

Following two (2) hearings, on September 14, 1987 and November 2, 1987, the Motion to Amend was denied and the Defendants' were granted Summary Judgment.

That Judgment was filed on November 16, 1987 and an appeal

was taken to the Supreme Court on December 16, 1987 which transferred the case to this Court on March 4, 1988.

STATEMENT OF THE ISSUES SOUGHT TO BE REVIEWED

1. Whether the concept of continuous tort is applicable to the allegations of this case.

2. Whether the Court erred in not granting Plaintiff's request to amend the Complaint prior to Trial.

STATEMENT OF THE FACTS

(The following fact statement is taken from the pleadings in the case, including Plaintiff's Affidavit and the Memoranda supplied at the time of the Summary Judgment Hearings. There has been no Evidentiary Hearing in the case and therefore, citations will not be to an Evidentiary Transcript, but the facts are based upon the allegations contained in those various pleadings.)

In the late evening hours, approximately 10:30 p.m., of August 28, 1983, the Plaintiff, along with other friends were returning the Plaintiff's home located in Washington Terrace, Utah from a boating excursion at Pineview Reservoir east of Ogden, Utah.

At that time, Plaintiff was a passenger in a motorhome which was driven by her boyfriend, Jerry Wells. The motorhome was owned by him and registered to him.

That upon entering Washington Terrace City, a Washington Terrace police officer pulled behind the motorhome and pulled up to the motorhome as it parked in front of the Plaintiff's home.

Plaintiff exited the motorhome and entered her home. Shortly thereafter, apparently the officers had probable cause to

believe that Jerry Wells had been driving while intoxicated and proceeded to arrest him and also proceeded to attempt to arrest others who they believed were involved in public intoxication.

Subsequent to the Plaintiff entering her home, the Washington Terrace officers called for assistance from officers from Riverdale City and South Ogden City, adjacent jurisdictions. At this time, no arrest was made of the Plaintiff. The officers entered her home, without knocking and without any authorization and initially requested that she move the motorhome.

After informing the officers that the motorhome did not belong to her, a verbal argument ensued. The Plaintiff was then accosted initially by Washington Terrace officers and then by Riverdale officers and South Ogden officers and was physically beaten and abused. Plaintiff was dragged from the interior of her home to the porch and then out onto the driveway area and subdued.

At this time, Plaintiff was not arrested, but was transported by the officers to the McKay Dee Hospital, which was approximately ten (10) miles away. Plaintiff was not released from the McKay Dee Hospital until approximately 1:00 a.m. on August 29, 1983. Following her release, Plaintiff was then handcuffed, placed into a patrol car and taken to the Weber County Jail in Ogden where she was booked at approximately 1:30 a.m. on August 29, 1983.

At that time, Plaintiff was formally arrested on a number of charges, including resisting arrest, interfering with an officer

and disturbing the peace. Plaintiff remained incarcerated in the Weber County Jail until she was able to arrange bail and was released shortly before noon on August 29, 1983.

The officers then proceeded to file Complaints with the Washington Terrace City Attorney's Office and a prosecution then ensued on misdemeanor counts for the above referenced charges.

At the time of Plaintiff's trial, some two (2) months later, all charges but one, the disorderly conduct, was dismissed and Plaintiff plead guilty to a plea bargain arrangement to that charge.

At the time of the plea bargain, there was no agreement on the part of the Plaintiff that she would not take legal action against the City, the various police agencies and the officers involved, nor was there any factual determination by the Court that the charge of disturbing the peace justified any of the officers actions, either prior to or subsequent to the alleged conduct.

The Plaintiff initially filed her Notice of Claim against Riverdale, Washington Terrace and South Ogden Cities and the named officers in this case, Dean Jensen, Wallerstein and Steve Smith, on August 29, 1984. All Cities were served on the same day.

Plaintiff contended that no City specifically responded, either affirmatively or negatively to the Notice of Claim and the lawsuit was initiated on November 27, 1985.

Following the initiation of the lawsuit, all three (3)

entities and the three (3) named officers were represented by counsel. Interrogatories were submitted which were answered by the Plaintiff, numerous settlement discussions were entertained, but none came to fruition and a period of almost two (2) years passed when the matter was finally set for trial.

That some three (3) weeks before the trial was set to begin, the Defendants, for the first time, filed Motions for Summary Judgment, claiming that the statute of limitations had been violated.

The basis of the claim was that the focus of the lawsuit was on the actual assault of the Plaintiff by the Defendants, which occurred at the time the officers entered her home and drug her therefrom at approximately 10:30 p.m. or 11:00 p.m. on August 28, 1983.

Plaintiff took the position at the initial hearing, on September 14, 1987, that it considered the incident as one continuous incident, beginning in the late evening hours and continuing through her transportation to the jail, the booking and her incarceration in the jail until noon on the 29th.

Plaintiff requested from the Court that the Complaint be amended to conform to the facts. The Court took this matter under advisement and allowed the Plaintiff to prepare an amended Complaint.

At that time, the Court also ruled, without objection from the Plaintiff, that based upon the present status of the law of the State of Utah, that the Cities could not be individually held

as responsible parties in the lawsuit and that the only parties which could remain in the lawsuit, pending a ruling on the statute of limitations problem, was the three (3) officers. Accordingly, the Cities were dismissed. In the amended Complaint, Plaintiff alleged the tort of false imprisonment and false arrest as part of the continuing actions of the tortuous conduct of the Defendants.

The matter was then continued to November 2, 1987ⁱ for further hearing. On November 2, 1987, the Judge denied the Plaintiff the opportunity to raise false imprisonment and false arrest, claiming that it changed the basic character of the lawsuit and further, found that the conduct, although beginning on the 28th and continuing to the 29th, was not of such a continuous tortuous nature that it could be brought into a suit for which the claim was filed on the 29th and therefore, determined that the claim was outside the statute of limitations and did not reach the other factual issues of the case.

Summary Judgment was therefore granted and it is from that decision that the Plaintiff appeals.

SUMMARY OF THE ARGUMENT

The Court erred in refusing to allow Plaintiff to amend the Complaint prior to the trial to conform to the facts.

POINT I

THE COURT ERRED IN DENYING PLAINTIFF'S
REQUEST TO AMEND HER COMPLAINT AT THE
PRETRIAL HEARING WHICH WOULD HAVE
DEFEATED DEFENDANTS' STATUTE OF LIMITATIONS
ARGUMENT

It is a well settled rule in the Trial Courts of this State, that because Utah is a Notice rather than a code pleading State, that the Courts have broad discretion to allow either party to a lawsuit to amend its pleadings, either prior to the Trial or even during or at the end of Trial to conform the facts and evidence presented, as long as parties are not prejudiced therefrom.

In this case, Plaintiff contends that the Court abused its discretion in not allowing an amendment to the Complaint prior to a trial.

There is no question that Plaintiff's original Complaint in this action focused on the issue of assaultive behavior, a deliberate and intentional tortuous act by the Defendants. However, it is also clear, and Defendants were certainly on notice, that the acts complained of were in the course of their duties as police officers when they effected an arrest and later, after returning the Plaintiff who they had beaten severely enough to require hospitalization, booked into a jail and incarcerated her for a period of time and then later prosecuted her for alleged offenses.

All of the Defendants knew that the lawsuit arose out of this conduct, although it was not specifically plead. Interrogatories were requested of the Plaintiff by some of the Defendants and were provided to counsel for all Defendants, where Plaintiff specifically addressed the issue of what happened to her on the late evening hours of the 28th and the early morning hours of the 29th of August, 1983.

There is no question that all parties to the suit knew before any of the Summary Judgment Motions were filed, that the entirety of the offense covered a two (2) day period and involved an assault, an arrest, an incarceration and a prosecution.

Yet Defendants, through counsel, at the time of the hearing, expressed dismay that counsel was now attempting to amend to specifically address the false imprisonment and false prosecution issues.

It is Plaintiff's contention that in effect, under Utah law and the common practice in the Courts, that the Complaint could have been amended at the time of trial to encompass these issues, but the amendment was made before trial, no one was prejudiced, all the evidence was preserved, it did nothing to change the case, except that it completely destroys any argument that the Defendants had with respect to the statute of limitations of the initial Notice of Claim, without even contemplating the issue of continuous tort, if in fact the Complaint was amended, to allow for false imprisonment, false arrest and improper prosecution, these actions clearly took place on the 29th, not on the 28th and Plaintiff's Notice was therefore, within the statute of limitations.

In effect, in this case, the Court had to determine whether to completely cut the Plaintiff off from any remedy because of the one year statute of limitations violation or to allow in its discretion, the amendment and preserve the case so that the merits could be addressed.

Plaintiff contends that the Court should examine legislative and historical reasons for the statute of limitations. Essentially, the statute of limitations was enacted to encourage judicial economy and to encourage the bringing of lawsuits with expedition and in a timely fashion so that all parties to the lawsuit will have fresh evidence and be able to sustain their position without the lapse of time.

The statute in question here is 63-30-13, which allows a one (1) year period to sue a municipality or an employee thereof for actions arising out of their work. Therefore, we are not talking about a two, three, four, six or seven year statute of limitation as many others.

Even considering the evidence in the light more favorable to the Defendants, the case was filed just (1) day or just a few hours after the one year lapse of the statute.

Every equitable argument in this case argues in favor of allowing an amendment so that Plaintiff's case can be heard. This is simply not a case where the evidence is stale, where undue delay was caused, but simply if anything, a mistake on the part of the Plaintiff as to the sequence of events surrounding a very unpleasant experience for her.

The Court, sitting as a Court of equity, should have allowed the amendment which would have therefore, allowed Plaintiff's Claim to have been timely under the applicable statute of limitations period.

POINT II

THE COURT ERRED IN DETERMINING THAT THE DEFENDANTS' ACTIONS OF AUGUST 28TH AND 29TH CONSTITUTED A CONTINUOUS TORT, WHICH CLAIM WOULD HAVE SURVIVED THE STATUTE OF LIMITATIONS ARGUMENT

Plaintiff contends strongly, that the actions of the officers in this case constituted a continuous sequence of events which began at the very least, at approximately 10:30 p.m. on August 28, 1983 and ended at approximately 1:30 a.m. on August 29, 1983.

The Plaintiff takes the position that this entire episode was a continuing tortuous act, beginning the verbal and battery at her home, continuing in the police vehicle and ending with the arrest, booking and incarceration at the Weber County Jail.

The Defendants did not deny that the matter extended over a period of two to three hours on both dates, but claimed that the Plaintiff could not recover for any specific actions which took place on the 28th, but only those which took place on the 29th and the Court of course, determined that if it was limited to those actions and the Court refused to allow the Plaintiff to amend the Complaint to focus on only those issues.

Although the Plaintiff has found no Utah cases bearing directly on this issue, the Court is directed to the following cases and their analysis:

Kenneth L. Baker v. Burbank, Glendale, Pasadena Airport Authorities, 705 P.2d 866, (1985) California. In this case, the Supreme Court of California discussed the tort of nuisance and

recognized that with respect to tortuous acts and the statute of limitations, a Trial Court must make a finding as to whether the tortuous act is continuing or permanent, because this has a direct bearing on the statute.

If in fact the tort is considered permanent, that is to say the type by where one act a permanent injury is done and damages are assessed once and for all, then the statute runs from that time. If however, it is continuing in nature, as in this case, where the nuisance was noise and continued over a period of time, then the statute, if filed properly, includes any damages accruing within the statutory period proceeding, the commencement of the action.

The Court further states that:

It has been recognized that in doubtful cases, the Plaintiff should have the election to treat the nuisance tort as either permanent or not. (Id at 871)

Applying this rationale to the case at bar, it is the Plaintiff's contention that the tortuous acts followed one continuing activity. That is to say, beginning with the unlawful entry of the Plaintiff's home, the assault, battery and verbal use, the forcing the Plaintiff to the hospital, the force used in taking Plaintiff in the police vehicle to the jail, the booking into the jail, the arrest and the charging, all were a continuous act with different parts. The Defendants were all involved through all stages of the proceedings. There was not a break in the activity to the extent that the Plaintiff was left alone, or that the Defendants' actions stopped and they proceeded in some

different action. But, these Defendants were with this Plaintiff from approximately 10:30 p.m. on the 28th until 1:30 a.m. on the 29th, a three (3) hour continuum.

This does not fit the concept of a permanent tort and clearly, based upon that rational, as long as the statute is applicable to the 29th if any actions took place during the continuing period, even before that time, they would be included. Thus, the actions for battery, verbal abuse and the forced taking of the Plaintiff from her home, although taking place on the 28th, would be included in the entire tortuous act.

This Court should also consider the case of Shores v. Branch, 720 P.2d 239 (1986) Montana. The Montana Court held that torts can be recognized as continuing when the tortuous act can be readily abated, even though it is not. Thus, in a continuing tort, recovery may be had for damages occurring within the statutory period proceeding the commencement of the action.

In this case, the tortuous acts could have been readily abated. Initially, following the confrontation at the house, the officers could have left. They could have left the Plaintiff after she was treated at the hospital. They could have returned her to her home and taken no further action. Instead, rather than abating their conduct, they continued on a course which eventually resulted in the Plaintiff's arrest and incarceration in the Weber County Jail.

Plaintiff strongly contends therefore, that all the allegations in this case constitute a continuing tort. That the

actions beginning on the night of the 28th and ending on the early morning hours of the 29th were part of one continuing episode. From the time of the initial trespass to the booking in the Weber County Jail. There was no abatement and therefore, any of the Defendants' actions which were part of the continuum beginning on the 28th can be brought within the filing on the 29th.

The Court was therefore, in error in not treating this as a continuing tort and allowing the case to proceed on the merits.

CONCLUSION

The Trial Court basically decided a case which had been pending for almost two years after discovery had been taken and no Motions had been filed by the Defendants approximately three (3) weeks prior to Trial on a Motion for Summary Judgment based upon lack of jurisdiction due to the application of the one year statute of limitations required to file a claim against a governmental entity of its employee.

The Court, in reviewing while Plaintiff concedes that the statute of limitations is jurisdictional, the Court is a Court of equity, has the discretion to consider all the facts in reviewing an argument concerning the statute of limitations to determine whether or not the Plaintiff in a case will be barred from its just remedy due to a strict limitation filing.

In this case, Plaintiff provided the Court with two options with which to allow the case to continue on the merits. The first was the amendment of the Complaint prior to Trial to

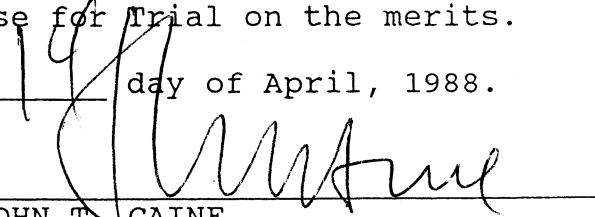
comport with the facts to include the activities of the 29th of August, along with those of the 28th. Although this did not change the complexity of the case, nor the basic facts, the witnesses all of which had been known to the Defendants and their counsel for in excess of two (2) years and did not in any way prejudice the presentation of all the evidence on the merits from either side, the Court chose not to allow this, even though Courts have readily allowed this practice in Utah, both before, during and at the end of Trial.

The Court clearly abused its discretion in that decision. Notwithstanding that improper ruling, the Court could have also treated, and without deciding that issue, the actions complained of in the original Complaint and the Complaint as it was allowed to be amended by the Court as one continuing tortuous act, thus bringing in the allegations of the 28th to those of the 29th.

The Court refused to this and again, Plaintiff believes committed prejudicial error.

Wherefore, Plaintiff respectfully request that this Court review the applicable law as it applies to this case and determine that in fact the Court made an error in not allowing either the amending of the Complaint or treating the matter as continuous tort and return the case for Trial on the merits.

RESPECTFULLY SUBMITTED this 19 day of April, 1988.


JOHN T. CAINE
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of the above and foregoing Brief to the counsel for the Defendants, Joy L. Sanders, Andrew M. Morse, Attorneys at Law, 10 Exchange Place, Eleventh Floor, P.O. Box 45000, Salt Lake City, Utah 84145, and Dale J. Lambert, Attorney at Law, 175 South West Temple, 510 Clark Leaming Building, Salt Lake City, Utah 84101, postage prepaid this _____ day of April, 1988.

JOHN T. CAINE
Attorney for Appellant

Appendix

63-30-13

STATE AFFAIRS IN GENERAL

Compliance with section.

Complaint alleging that tax commission and its agent acted maliciously and arbitrarily in attempting to enforce payment of excise taxes and in compelling plaintiff to supply a surety in greater amount than was reasonable to ensure payment of the tax, requesting damages both compensatory and punitive was fatally defective in that it did not allege compliance with this section; tax commission and its agent were immune from suit for damages where the acts complained of were performed in good faith and within the statutory authority granted to them. *Roosendaal Constr. & Mining Corp. v. Holman*, 28 Utah 2d 396, 503 P.2d 446 (1972).

Plaintiffs complied with this section where,

within a year after the cause of action arose, they filed notice of claim with the attorney general and the agency concerned on the same day they filed the original complaint with the court, and amended complaint alleging compliance with the Governmental Immunity Act was filed, as a matter of right, within one year after denial of the claim or after the end of the 90-day period in which the claim is deemed to have been denied. *Johnson v. Utah State Retirement Office*, 621 P.2d 1234 (Utah 1980).

Quiet title actions.

Notice of a claim for quiet title complies with this section if it is given not more than one year after plaintiff's right to possession has been disturbed or encroached upon by the state. *Ash v. State*, 572 P.2d 1374 (Utah 1977).

COLLATERAL REFERENCES

Am. Jur. 2d. — 72 Am. Jur. 2d States, Territories, and Dependencies §§ 124, 126.

C.J.S. — 81A C.J.S. States §§ 269, 271, 272, 310.

A.L.R. — See A.L.R. Annotations set forth under § 63-30-11.

Key Numbers. — States ⇌ 174, 177, 197.

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 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, or before the expiration of any extension of time granted under Subsection 63-30-11(4).

History: L. 1965, ch. 139, § 13; 1978, ch. 27, § 7; 1983, ch. 131, § 3.

Amendment Notes. — The 1983 amendment inserted "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"; substituted "claim arises" for "cause of action arises";

and added "or before the expiration of any extension of time granted under Subsection 63-30-11(4)."

Cross-References. — Actions arising out of contractual rights or obligations not subject to this section, § 63-30-5.

Mailing claims to state or political subdivisions, § 63-37-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Claims barred.
Claims by minors.
Claims for death.
Construction and application.
Contract action.
Estoppel.
Full compliance required.
Necessity for presentation of claim.
Notice.

Claims barred.

Trial court pro against county wh not filed with the the year following injuries. *Yates v. 1* ter, 617 P.2d 352

Claims by minors.

Failure of a mino time provided in th minor's claim as th during minority by Bd., 568 P.2d 746

Claims for death.

In cases involving utory period would date of death of the as that is the date u cruces to the person party entitled to r death. *Nelson v. Lc* 135 P.2d 259 (1944 law).

Construction and

Neither actual kno of circumstances wh four-year-old child's accident nor minorit with necessity of filin against county in wl death was due to in and an improperly timely claim against even though county h ployee allegedly advis rectly, that highway tained by state, resul claim against state. *Va* 158, 506 P.2d 435 (1974)

Contract action.

An action on a con claim permitted under of such claim must be of this section. *Baugh v. 1* 291, 495 P.2d 814 (1973)
Tenured teacher see: lowing decision to tern no claim for breach of verse result at admin ived for by the Order Procedure Act, § 53-5: where he filed his noti statutory period after te

Appendix

JOY L. SANDERS
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant Officer
Wallerstein
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

ANDREW M. MORSE
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant Officer
Jensen
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

DALE J. LAMBERT
ROBERT K. HILDER
CHRISTENSEN, JENSEN & POWELL
Attorneys for Defendant Officer
Smith
175 South West Temple, Suite 510
Salt Lake City, Utah 84101
Telephone: (801) 355-3431

IN THE SECOND JUDICIAL DISTRICT COURT FOR WEBER COUNTY

STATE OF UTAH

VIRGINIA YEARSLEY,

Plaintiff,

vs.

OFFICER DEAN JENSEN, OFFICER
STEVEN WALLERSTEIN, and OFFICER
STEVEN SMITH,

Defendants.

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
SUMMARY JUDGMENT

Civil No. 94172

This matter having come on for hearing before the Honorable
David E. Roth on the 2nd day of November, 1987, plaintiff being

represented by John T. Caine, defendant Dean Jensen being represented by Andrew M. Morse, defendant Steven Wallerstein being represented by Joy L. Sanders, and defendant Steven Smith being represented by Dale J. Lambert, the Court having heard oral argument, having reviewed the memoranda, exhibits, and affidavits, and with good cause appearing therefor, does now enter its:

FINDINGS OF FACT

1. That during the late evening hours of August 28, 1983, the defendant police officers were acting in the course and scope of their duties when an altercation broke out at plaintiff's home. Prior to midnight on the 28th, plaintiff was arrested, handcuffed, placed in a police vehicle, and taken to McKay Dee Hospital where she was examined for possible injuries resulting from the altercation with police.

2. The certified copy of plaintiff's medical records from McKay Dee Hospital shows that she was admitted for her examination at 11:38 p.m. on August 28, 1983. After the examination was completed, she was transferred to the Weber County Sheriff's Department where she was booked at 1:20 a.m. on August 29, 1983.

3. On August 29, 1984, Plaintiff filed a notice of claim alleging trespass and assault. The notice of claim was filed one year and one day after the alleged trespass and assault.

4. All acts complained of in plaintiff's Complaint occurred on August 28, 1983.

5. Plaintiff's notice of claim did not comply with Utah Code Ann. § 63-30-13 (1965 as amended).

6. Plaintiff pled guilty to and was convicted of disorderly conduct as a result of the altercation on August 28, 1983.

From the foregoing Findings of Fact, the Court hereby enters its:

CONCLUSIONS OF LAW

1. That the plaintiff's claims arising from the alleged assault and trespass on August 28, 1983, are barred by plaintiff's failure to comply with the notice of claim provisions of Utah Code Ann. § 63-30-13 (1965 as amended).

2. That since plaintiff's arrest occurred on August 28, 1983, an Amended Complaint as requested by plaintiff, to include a claim for false or unlawful arrest would also be barred by plaintiff's failure to comply with Utah Code Ann. § 63-30-13 (1965 as amended).

3. Although plaintiff has requested leave to amend to include a claim for malicious prosecution, that cause of action is quite different from the causes of action defendants were put on notice of in plaintiff's notice of claim and in

plaintiff's Complaint and would, therefore, be improper as well as untimely.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED, AND DECREED that defendants' Motion for Summary Judgment is granted and that plaintiff's Complaint is dismissed with prejudice, no cause of action, without costs.

DATED this 16 day of November, 1987.

BY THE COURT:

David E. Roth
David E. Roth
District Court Judge

APPROVED AS TO FORM:

SNOW, CHRISTENSEN & MARTINEAU

By Joy L. Sanders
Joy L. Sanders
Attorneys for Defendant
Wallerstein

11/5/87
Date

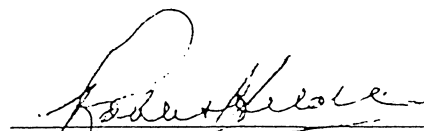
SNOW, CHRISTENSEN & MARTINEAU

By Andrew M. Morse
Andrew M. Morse
Attorneys for Defendant
Jensen

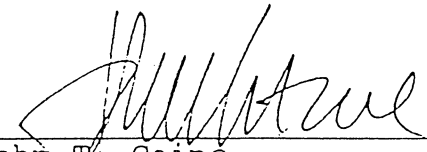
11-6-87
Date

SNOW, CHRISTENSEN & MARTINEAU

By


Dale J. Lambert
Attorneys for Defendant
Smith

6 Nov. 87
Date


John T. Caine
Attorney for Plaintiff

11-10-87
Date

SCMJLS194