

1986

# Le Ann Schultz v. Weldon Conger : Reply Brief

Utah Supreme Court

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860181

IN THE SUPREME COURT  
FOR THE STATE OF UTAH

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LE ANN SCHULTZ,

Plaintiff and  
Appellant,

v.

WELDON CONGER,

Defendant and  
Respondents.

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APPELLANT'S REPLY BRIEF

Supreme Court No. 860181

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**FILED**

**JAN 14 1987**

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT  
FOR THE STATE OF UTAH

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LE ANN SCHULTZ ,	)	
	)	
Plaintiff and	)	APPELLANT'S REPLY BRIEF
Appellant,	)	
	)	
v.	)	
	)	
WELDON CONGER,	)	Supreme Court No. 860181
	)	
Defendant and	)	
Respondents.	)	
	)	

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## SUMMARY OF ARGUMENT

### I.

IF CONDUCT IS NOT UNIQUELY GOVERNMENTAL  
IN NATURE, THERE IS NO IMMUNITY AND  
NO NEED FOR NOTICE

The recent decisions of this Court have held that if conduct is not uniquely governmental in its nature, there is no immunity. Where there is no immunity, there is no need to provide notice. In this case, the conduct is the driving of a motor vehicle. This is not uniquely governmental in its nature. Even Conger concedes that driving a vehicle is not uniquely governmental in its nature.

### II.

IMMUNITY EXTENDS TO AN EMPLOYEE IN THE  
SCOPE AND COURSE OF EMPLOYMENT ONLY IF THE ACTIVITY IS  
UNIQUELY GOVERNMENTAL IN ITS  
NATURE

An employee is immune from suit while acting within the scope and course of his employment, only if the activity is not uniquely governmental in its nature. This Court, in Doe v. Arguelles, 716 P.2d 279 (Utah 1985) has held that an employee may be immune in some capacities and not in others. This is so despite the fact that in both capacities, he is acting within the scope and course of his employment.

### III.

#### A.

WHERE THERE IS NO IMMUNITY,  
THERE IS NO NEED TO GIVE NOTICE

Conger argues that the Notice of Claim requirement of Utah Code Annotated, Section 63-30-11 (1953, as amended) is mandatory in all respects. While Schultz does not dispute the fact that notice is mandatory where there is immunity

which has been waived, when there is no immunity, there is no need to give notice. This is exactly what happened in Cox v. Utah Mortgage & Loan Corporation, 716 P2d 783 (Utah 1986). Thus, in this case, where the conduct complained of was not uniquely governmental in its nature, there is no immunity and no need to provide notice.

B.

THE NOTICE GIVEN BY STATE FARM SATISFIES THE  
MANDATES OF THE UTAH GOVERNMENTAL IMMUNITY ACT.

There is no question in this case that State Farm Insurance gave notice of claim to the county concerning this accident. Thus, the County was on notice of an accident with injuries and the purposes of the notice requirement as set forth in Sears v. Southworth, 563 P.2d 192 (Utah 1977) have been met. This is not a case where no notice was given at all or notice was given to the wrong entity. The proper entity received notice and had the opportunity to act upon it. That notice, therefore satisfies the requirements of the Act.

C.

DUE PROCESS REQUIRES NOTICE PRIOR TO THE  
TAKING AWAY OF VESTED RIGHTS

Since Buttrey v. Guaranteed Securities Corp., 78 Utah 39 300 P.1040 (1931), a cause of action has been a vested right in Utah. Due process requires notice, at a minimum, before a vested right is taken away or reduced. A cause of action for negligence has a four-year statute of limitations. A cause of action involving a governmental entity has only a one-year statute of limitations. Where the claimant has no notice or

knowledge that a governmental entity is involved, it is a violation of due process to reduce the vested right from four years to one year.

IV.  
THE GOVERNMENTAL IMMUNITY ACT VIOLATES  
EQUAL PROTECTION OF THE LAW, AS APPLIED TO THE  
FACTS OF THIS CASE

While the Governmental Immunity Act is valid and constitutional on its face, it may be unconstitutional as applied to the facts of this case. In particular, Utah Code Annotated, Section 63-30-13 (as amended), violates equal protection as applied to the facts of this case. This section gives governmental employees immunity which they had never enjoyed before. In this case, the conduct complained of is driving a vehicle. This conduct is performed each day by many people who are not governmental employees. To grant immunity to a government employee for performing the same acts as those performed by non-government employees, who enjoy no immunity, violates the equal protection clauses of both the state and federal constitutions.

The Act also violates the equal protection clause in the sense that Utah statutes require every motor vehicle to be insured. Utah Code Annotated, Section 63-30-29.5 (1953, as amended) also extends that insurance coverage to employees both in the scope and course of employment and without the course and scope of employment. To the extent that a claimant has a one-year statute of limitations against an employee in the course and scope of his employment, but a four year statute against an employee without the course and



scope of his employment, despite the fact that identical insurance coverage is mandated by law, this section violates the equal protection clauses of the state and federal constitutions.

#### ARGUMENT

##### I. IF CONDUCT IS NOT UNIQUELY GOVERNMENTAL IN ITS NATURE, THERE IS NO IMMUNITY AND NO NEED FOR NOTICE

Schultz has argued that driving a motor vehicle is conduct that is not uniquely governmental in nature. Conger has agreed with this assessment. [Respondent's brief, pp. 3] The recent decisions of this Court indicate that there is no immunity, unless the conduct is uniquely governmental in its nature. See Standiford v. Salt Lake City Corp., 605 P.2d 1230 (Utah 1980) and subsequent cases as cited in Point I of Appellant's brief. Conger argues that notice is still required since Utah Code Annotated Section 63-30-7 (1953, as amended) waives immunity for the negligent operation of a motor vehicle. However, where there is no immunity because the conduct is not uniquely governmental in nature, there is no need to provide notice of claim to the governmental entity. See Cox v. Utah Mortgage & Loan Corporation, 716 P.2d 783 (Utah 1986). Thus, where the negligent operation of a motor vehicle is not uniquely governmental in its nature, as conceded in this case, there is no immunity and no need to provide notice.

II.  
IMMUNITY EXTENDS TO AN EMPLOYEE IN THE  
SCOPE AND COURSE OF EMPLOYMENT ONLY IF THE ACTIVITY IS  
UNIQUELY GOVERNMENTAL IN ITS  
NATURE.

Conger argues that he was within the course and scope of his employment, serving subpoenas, and he is, therefore, immune from suit unless proper notice has been given to his employer, Salt Lake County. Although there was no opportunity for discovery to determine if Conger was within the course and scope of his employment, assuming that to be the case, Schultz is still entitled to prevail unless the activity is uniquely governmental in its nature. Undoubtedly, each of the government employees in Standiford, supra, Cox, supra, Dalton v. Salt Lake Suburban Sanitary District, 676 P.2d 399 (Utah 1984); Johnson v. Salt Lake City Corp., 629 P.2d 432 (Utah 1981); Thomas v. Clearfield City, 642 P.2d 737 (Utah 1982); and Doe v. Arguelles, 716 P.2d, 279 (Utah 1985) were acting within the course and scope of their employment when some act was done which led to litigation. In each instance, there was held to be no immunity because the conduct was not uniquely governmental in nature. In addition, it is not known if driving a vehicle is necessary to the service of subpoenas. There are alternate means of transportation available throughout Salt Lake County.

Conger further argues that he must enjoy immunity, since the sheriff can be compelled to serve papers. While Conger may be immune for negligence incurred during the actual

service of subpoenas, he is not necessarily immune from negligent conduct while driving to serve subpoenas. Doe, supra, held that an employee may be immune while performing certain functions, but not immune while performing others. In addition, Conger correctly points out that Rule 4 of the Utah Rules of Civil Procedure allows any disinterested party over the age of twenty-one (21) to serve subpoenas. This appears to be a clear message that service of subpoenas is not a uniquely governmental function.

### III.

#### A. WHERE THERE IS NO IMMUNITY, THERE IS NO NEED TO GIVE NOTICE

Conger maintains that the notice requirement of Utah Code Annotated Section 63-30-11 (1953, as amended) is mandatory and dictates that Schultz' suit should be barred. Notice is only mandatory when there is immunity which has been waived. The result in Cox, supra, clearly shows that a suit may be maintained against a governmental entity without providing notice, when there is no immunity. In Cox, a claim was permitted to proceed on one cause of action despite the lack of notice because the supervision of escrowed funds was held non-governmental in nature. Two other causes were dismissed for failure to give the notice, because those causes related to conduct which was uniquely governmental in its nature.

In this case, the conduct of Conger (driving a vehicle) is not uniquely governmental in nature, thus there is no immunity and no need to give notice.

B. THE NOTICE GIVEN BY STATE FARM SATISFIES  
THE MANDATES OF THE GOVERNMENTAL IMMUNITY ACT

In the event Conger enjoys immunity, it must be determined whether the notice given Salt Lake County by Schultz' insurance carrier, State Farm, satisfies the requirement of Utah Code Annotated Section 63-30-11 (1953, as amended). There is no question that the County received notice of this accident and attendant injuries. This case is thus distinguishable from Scarborough v. Granite School District, 531 P.2d 480 (Utah 1975) and Madsen v. Borthick, 658 P.2d 627 (Utah 1983), where no notice was given. The question is whether the notice was sufficient.

Conger claims that under Allstate Insurance Company v. Ivie, 606 P.2d 1197 (Utah 1980) that the insurance company has its own claim and that separate notices are required; however, Ivie merely held that an insurance company cannot sue its own insured for subrogation claims. However, the insured can be liable for those claims if the settlement anticipates the same. See Jaramillo v. Farmers Insurance Group, 669 P.2d 1231 (Utah 1983).

In the present case, the purposes of the notice requirement, as set forth in Sears v. Southworth, 563 P.2d 192 (Utah 1977) [see point V of Appellant's Brief for analysis] have been met. Therefore, the notice provided the County is sufficient for Shultz to maintain this cause of action.

C. DUE PROCESS REQUIRES NOTICE PRIOR  
TO THE TAKING AWAY OF VESTED RIGHTS

The analysis of Buttrey v. Guaranteed Securities Corp., 78 Utah 39, 300 P. 1040 (1931), indicates that Schultz had a vested right against Conger as soon as Conger's negligence caused this accident. This would remain vested for four years, the applicable statute of limitations, absent some notice that Conger was a government employee, performing his duties as such. If such notice is present, due process is satisfied by reducing the cause of action to a one-year statute of limitations pursuant to the Governmental Immunity Act.

Conger argues that adequate notice has been provided, since two accident reports indicate the vehicle is owned by Salt Lake County. However, an accident report has been held insufficient to give notice. In Varoz v. Sevey, 29 Utah 2d 158, 508 P.2d 435 (1973), the Plaintiff's claim against Salt Lake County was dismissed where notice had not been given within ninety (90) days as required by the applicable statute. The Plaintiff claimed that the county had notice, since the county sheriff had investigated and reported the accident. This was held insufficient notice. If it is insufficient to give a government entity notice, it is also insufficient to give a claimant notice of government involvement.

Conger also argues that notice must be given, even if the claimant is misinformed as to which governmental entity is at fault. He cites Varoz, supra, in support of this

argument. However, in Varoz, the claimant was misinformed about which governmental agency was at fault. In the present case, there is no notice that any governmental agency is at fault. Here, where Conger is in civilian clothing and driving a completely unmarked vehicle, it appears as though only a private citizen and not a government agency is at fault.

Due process requires more notice than was present in the instant case to reduce vested rights. The Governmental Immunity Act, as applied to the specific facts of this case, violates the due process clause of the state and federal constitutions.

#### IV

#### THE GOVERNMENTAL IMMUNITY ACT VIOLATES EQUAL PROTECTION OF THE LAW AS APPLIED TO THE FACTS OF THIS CASE

Schultz claims that the Governmental Immunity Act violates the equal protection clauses of the state and federal constitutions as applied to the facts of this case. Conger counters by setting forth the fact that the constitutionality of the Act has been upheld on previous occasions and is, therefore, not subject to a review in this proceeding. Schultz does not contest the fact that the Act is constitutional on its face [see appellant's Brief, pp. 12]. However, Conger apparently fails to recognize that a statute may be constitutional on its face yet unconstitutional as applied to specific fact situations. See Ellis v. Social Services Department of the Church of Jesus Christ of

Latter Day Saints, 615 P.2d, 1250 (Utah 1980), where the Court upheld the constitutionality of Utah Code Annotated Section 78-30-4 (1953, as amended) but stated: "However, a statute fair upon its face may be shown to be void and unenforceable as applied." Id. at 1256.

In addition, Schultz is not attacking the entire Act, but only the 1983 amendment to Utah Code Annotated, Section 63-30-13. This section granted immunity to government employees where they had enjoyed no such immunity before. To the extent that government employees are granted immunity for doing the same thing as a non-governmental employee, with no immunity (such as driving a vehicle), the amendment violates the equal protection clauses of the state and federal constitutions.

Furthermore, every vehicle driven upon the roads of this state is required to be insured. Utah Code Annotated, Section 63-30-29.5 (1953, as amended) extends the coverage to an employee who is not even within the course and scope of his employment. Thus, a person injured by a government employee not in the course and scope of employment has a four year statute of limitations. On the other hand, the same person injured by a government employee within the scope and course of employment has only a one-year statute of limitations, yet identical insurance coverage is required by law. This distinction has no rational basis to a legitimate governmental interest and violates equal protection of the law.

V  
CONCLUSION

Notice of claim is only required when there is immunity which has been waived. If there is no immunity, there is no need to provide notice of claim. There is no immunity in the present case, where the conduct is concededly not uniquely governmental in its nature. By the same token, an employee can only claim immunity if he is within the scope and course of his employment and that employment is uniquely governmental in its nature.

Notice of claim has been given to the proper governmental entity in this case, which satisfies the purposes of the notice statute.


An injured party is entitled to notice of government involvement in the cause of an accident before vested rights are reduced. To the extent the Governmental Immunity Act mandates otherwise, it violates the due process requirements of the state and federal constitutions.

Utah Code Annotated, Section 63-30-13 (1953, as amended), granting government employees immunity from suit, violates the equal protection clauses of the state and federal constitutions under the facts of this case, where the employees and non-employees performing the same acts, receive different treatment under the law. Where both government employees and non-employees drive vehicles and are involved in accidents, equal protection of the law will not permit different treatment.



For these reasons, the lower court erred in dismissing the complaint in this case. This case should be remanded for trial on the issues of negligence and damages.

Respectfully submitted this 12<sup>th</sup> day of January, 1987.

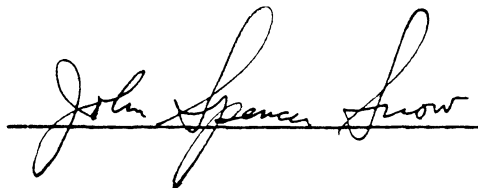
  
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#### CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) true and accurate copies of the foregoing Appellant's Reply Brief, postage pre-paid, this 13<sup>th</sup> day of January, 1987, to:

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