

1986

# Le Ann Schultz v. Weldon Conger : Brief of Appellant

Utah Supreme Court

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860181

IN THE SUPREME COURT  
FOR THE STATE OF UTAH

---

LE ANN SCHULTZ,

Plaintiff and )  
Appellant, )

v. )

WELDON CONGER,

Defendant and )  
Respondent. )

APPELLANT'S BRIEF

Supreme Court No. 860181

---

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THIS IS A CATEGORY 13(b) APPEAL

OCT 17 1986

IN THE SUPREME COURT  
FOR THE STATE OF UTAH

---

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

---

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THIS IS A CATEGORY 13(b) APPEAL

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STATEMENT OF ISSUES PRESENTED ON APPEAL

IS DRIVING A MOTOR VEHICLE AN ACTIVITY WHICH IS UNIQUELY GOVERNMENTAL IN NATURE SO AS TO BRING THE DRIVER WITHIN THE PROTECTION OF THE UTAH GOVERNMENTAL IMMUNITY ACT, UTAH CODE ANNOTATED SECTION 63-30-1, ET. SEQ. (1953, AS AMENDED)?

IS IT A DENIAL OF EQUAL PROTECTION OF THE LAW TO GRANT GOVERNMENTAL EMPLOYEES ENGAGED IN ACTIVITIES THAT ARE NOT UNIQUELY GOVERNMENTAL IN NATURE IMMUNITY NOT ENJOYED BY NON-GOVERNMENTAL EMPLOYEES ENGAGED IN THE SAME CONDUCT?

IS IT A VIOLATION OF DUE PROCESS OF THE LAW TO REQUIRE A NOTICE OF CLAIM WHEN THE INJURED PARTY IS NOT AWARE OF ANY GOVERNMENTAL ACTIVITY?

IS A MOTION TO DISMISS PROPER WHEN FACTUAL ISSUES REMAIN UNRESOLVED?

IS THE NOTICE REQUIREMENT OF UTAH CODE ANNOTATED SECTION 63-30-13 (1953, AS AMENDED) SATISFIED WHEN A THIRD PARTY PROVIDES THE NOTICE?

## FACTS

On March 9, 1984, the Plaintiff/Appellant (hereinafter "Schultz") while driving her vehicle, was struck from behind by a vehicle driven by the Defendant/Respondent (hereinafter "Conger"). The vehicle driven by Conger has subsequently been determined to be owned by Salt Lake County, although there were no markings or other indications on the vehicle or license plates to indicate such at the time of the accident [Rec. pp. 23, 66]. Conger was further dressed in civilian clothing, with no indication that he was an employee of Salt Lake County [Rec. pp. 24, 66]. Schultz was not placed on notice that Conger was a governmental employee acting within the scope of his employment [rec. pp. 23, 24].

On March 14, 1984, Schultz' automobile insurance carrier, State Farm Automobile Insurance Company (hereinafter "State Farm") filed a Proof of Claim with the Salt Lake County Board of Commissioners [Rec. pp. 34]. The County recognized this claim and paid in excess of \$6,000.00 on the claim [Rec. pp. 35].

Schultz gave no other notice [Rec. pp. 67] and filed her complaint with the Salt Lake County Clerk's office on October 23, 1985 [Rec. pps. 2 through 7]. Conger filed a Motion to Dismiss on November 6, 1985 [Rec. pgs. 8-10], claiming that since Schultz had not filed a separate Notice of Claim pursuant to Utah Code Annotated, Section 63-30-13 (1953, as amended), that the Statute of Limitations had expired. The lower Court, the Honorable Leonard H. Russon, presiding,



granted Conger's Motion by an Order dated March 17, 1986  
[Rec. pgs 66-67].

#### SUMMARY OF ARGUMENT

##### I

THE CONDUCT IN THIS CASE IS NOT UNIQUELY GOVERNMENTAL IN  
NATURE AND THUS THERE IS NO IMMUNITY

##### II

IT IS A DENIAL OF EQUAL PROTECTION OF THE LAW TO GRANT  
GOVERNMENTAL EMPLOYEES IMMUNITY NOT ENJOYED BY NON-  
GOVERNMENTAL  
EMPLOYEES ENGAGED IN THE SAME CONDUCT

##### III

THE NOTICE REQUIREMENT OF THE GOVERNMENTAL IMMUNITY ACT  
IS A VIOLATION OF DUE PROCESS UNDER THE FACTS OF THIS CASE

##### IV

FACTUAL ISSUES REMAIN UNRESOLVED WHICH PRECLUDE THE  
GRANTING OF A MOTION TO DISMISS

##### V

THE NOTICE PROVIDED BY STATE FARM INSURANCE COMPANY  
SATISFIES THE REQUIREMENTS OF UTAH CODE ANNOTATED SECTION 63-  
30-13 (1953, AS AMENDED).

## ARGUMENT

### I

#### THE CONDUCT IN THIS CASE IS NOT UNIQUELY GOVERNMENTAL IN NATURE AND THUS THERE IS NO IMMUNITY

The recent decisions of this Court make it clear that there is no immunity arising from conduct that is not uniquely governmental in its nature. This standard was set forth in Standiford v. Salt Lake City Corporation, 605 P.2d 1230 (Utah 1980) where this Court held that the operation and maintenance of a public golf course was not a uniquely governmental function and permitted the Plaintiff to proceed with her suit. Justice Stewart, writing for the Court, stated:

We therefore hold that the test for determining governmental immunity is whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental activity. Clearly, this new standard broadens governmental liability. However, the position is consistent with the plain legislative intent in Section 63-30-1 et. seq. to expand governmental liability  
. . .

Finally, and not the least of our concerns, the standard we adopt today to narrow governmental immunity should allow more innocent victims injured by tortious conduct on the part of public entities access to the courts for redress. Fewer such people will be mercilessly and senselessly barred from recovery for their injuries sustained at the hands of the entities designed to serve them.

605 P.2d at 1236 through 1237.

This concept, that the Governmental Immunity Act (Utah Code Annotated Section 63-30-1 et. seq. (1953, as amended))

was not applicable to non-governmental functions, was reiterated in Dalton v. Salt Lake Suburban Sanitary District, 676 P.2d 399 (Utah 1984) where the operation of a sewage plant was held to be non-governmental in nature. Justice Howe, writing for the Court stated:

Since the Governmental Immunity Act does not purport to waive immunity for injury or damages caused in the exercise of a nongovernmental function, it is obvious that this statute of limitations applies only to actions brought to recover for injury or damage arising from the operation of governmental function, but where the Act waives immunity from suit and permits the action to be maintained.

This distinction is soundly based. Immunity never existed for injuries not arising from the exercise of a governmental function and thus the Act did not purport to waive it, expressly or impliedly.

676 P.2d at 400-401.

The Court then continued at 401 through 402:

In this respect, non-governmental claims are similar to equitable claims. In El Rancho Enterprises, Inc. v. Murray City, Utah 565 P.2d 778 (1977) this Court following Auerbach v. Salt Lake County, 23 Utah 103, 63 P.907 (1901) and Wall v. Salt Lake City, 50 Utah 593, 168 P. 766 (1970) held that where the claims of the Plaintiff are for equitable relief, there was not and never had been any governmental immunity and the requirements of notice of claim imposed by the Governmental Immunity Act did not apply.

In Cox v. Utah Mortgage & Loan Corporation, 716 P.2d 783 (Utah 1986), this Court held that when the function was non-governmental (supervision of disbursement from escrowed funds) that the Utah Governmental Immunity Act did not apply, and notice, as required by Utah Code Annotated Section 63-30-13 (1953, as amended) was not required.

In Cox, the Plaintiffs were allowed to proceed on one cause of action against a municipality because the supervision of the disbursement from escrowed funds was not uniquely governmental in nature. This was so despite no notice of claim being given. However, two claims were held barred for failure to give notice, because the duty to maintain and repair streets was a uniquely governmental function.

Thus, it is clear that no notice is required where the function is not uniquely governmental in its nature. See also Johnson v. Salt Lake City Corp., 629 P.2d 432 (Utah 1981) [providing recreational opportunities is non-governmental]; Thomas v. Clearfield City, 642 P.2d 737 (Utah 1982) [collection and disposal of sewage are non-governmental]; Madsen v. Borthick, 658 P.2d 627 (Utah 1983) [supervision of financial institutions is governmental]; Richards v. Leavitt, 716 P.2d 276 (Utah 1985) [maintaining streets is governmental].

It is also the law that an employee may be immune in some capacities, but not in others. In Doe v. Arguelles, 716 P.2d 279 (Utah 1985), a state employee was absolutely immune while performing discretionary functions, but was held not to be absolutely immune while implementing policy which is a "nondiscretionary, ministerial function". Id. at 283.

In this case, it must be determined whether Conger's conduct was uniquely governmental in nature. The conduct in which he was engaged was driving a motor vehicle. Clearly,

the operation of an automobile on a public highway is not uniquely governmental in its nature. Indeed, thousands of persons drive vehicles upon the public highways in Salt Lake County.

Even assuming that Conger was within the scope of his employment serving subpoenas, the principal of Doe, supra, indicates that his function of driving does not necessarily fall under his scope of employment. While serving papers may or may not be uniquely governmental, driving a car is not, making Conger liable under the Standiford and Doe doctrines.

## II

IT IS A DENIAL OF EQUAL PROTECTION OF THE LAW  
TO GRANT GOVERNMENTAL EMPLOYEES IMMUNITY NOT  
ENJOYED BY NON-EMPLOYEES ENGAGED IN THE SAME  
CONDUCT

Traditionally, the immunity enjoyed by the government in the performance of governmental activity, did not extend to its employees. See Frank v. State, 613 P.3d 517 (Utah 1980); Connell v. Tooele City, 572 P.2d 697 (Utah 1977); Cornwall v. Larsen, 571 P.2d 925 (Utah 1977). However, in 1983, the Utah Legislature amended 63-30-13 of the Governmental Immunity Act to grant governmental immunity from suit when acting ". . . during the performance of his duties, within the scope of employment . . .".

This Amendment violates Article I, Section 2 of the Utah Constitution and the Fourteenth Amendment, Section I to the United States Constitution. Article I, Section 2 of the Utah Constitution provides that ". . .all free governments are founded on their authority for their equal protection and

benefit . . .". The Fourteenth Amendment, Section 1 to the United States Constitution provides that: "no state shall . .

deny to any person within its jurisdiction the equal protection of the laws." These provisions are violated to the extent that an injured party has no redress against a governmental employee who is engaged in the same conduct that non-governmental employees engage in, but who enjoy no immunity.

In this case, Conger was driving a vehicle, an activity engaged in by many people who are not governmental employees. In the absence of a unique governmental function, this classification has no justification and denies equal protection of the law to Schultz. To determine if the classification satisfies the equal protection clause, it must be determined that the classification has some rational relationship to legitimate governmental interests. U.S. Department of Agriculture v. Moreno, 93 S.Ct. 2821, 413 U.S. 528 (1973). The classification here is solely whether the tortfeasor is a government employee or non-employee.

A helpful analysis of this issue is found in Brown v. Wichita State University, 217 Kan., 279, 540 P.2d 66 (1975); modified on rehearing, 219 Kan., 2 547 P.2d 1015 (1976) [hereinafter referred to as Brown 1 and Brown 2]. In a nutshell, the Court, in Brown 1 held inter alia that the Governmental Immunity Act was unconstitutional, as it violated equal protection and due process. This was apparently the first challenge to legislatively imposed

immunity in Kansas, the earlier law on Governmental Immunity having been judicially imposed. On rehearing, the Court, in Brown 2, over three vigorous dissents, ruled that the legislature could reimpose immunity without violating constitutional protections. The Court held "absent violation of constitutional rights, the legislature may control governmental immunity." 547 P.2d at 1021. This Court has concurred in the reasoning and result of Brown 2 in Madsen v. Borthick, 658 P.2d 627, 629 (Utah 1983).

In the present case, only a portion of the Act is under attack. That portion must meet constitutional scrutiny under the Brown 2 test. The reasoning of Brown 1 concerning that portion of the Act is thus helpful. The Court stated:

. . .It is difficult for the majority of the Court to see why one governmental agency performing precisely the same acts . . . should be liable for negligence and others should be not [quoting from Carroll v. Kittle, 203 Kan. 841 457 P.2d 21, 27] . . .

A person's right to redress by due course of law does not become less worthy of protection because he or she was injured by a particular governmental unit. Nor does such a person's right to compensation become any the less worthy because of the type of governmental unit involved. Under present Kansas law, no regard is given to the injury or the facts and circumstances surrounding the events which caused the injury - it is the type of governmental agency and the activity which it is engaged that determines whether the aggrieved party will find the doors of the court open or closed. Such a classification is forced and unreal and greater burdens are imposed on some than others of the same desert. We find the classification contained in KSA 46-901, 902 [Kansas Governmental Immunity Act] are not only "baffling" but arbitrary, discriminatory and unreasonable.  
540 P.2d at 81.

In the present case, a person injured by a non-governmental employee has certain rights and redress which a person injured by a government employee does not have, solely based upon that distinction, although the injury and facts of the case are otherwise identical. Such a classification between governmental employees and non-employees engaged in the same conduct is artificial and discriminatory. The Brown <sup>1</sup> Court said this concerning that type of distinction:

The operative effect of such arbitrary distinctions are incompatible with the constitutional safeguards established by both the federal and Kansas Constitutions. Id. at 82.

The 1983 Amendment to the Utah Code Annotated, Section 63-30-13 violates the equal protection clause of the state and federal constitutions in that it gives preferential treatment for the same type of conduct to governmental employees and must therefore be stricken.

In addition, that Amendment violates the equal protection clauses of the state and federal constitutions in another respect. Utah Code Annotated Section, 31-41-4 (1953, as amended) in effect in 1984, when this accident took place, required every motor vehicle to have security in effect. Utah Code Annotated, Section 31-41-5 (1953, as amended) provided that the security could be in the form of insurance or other method approved by the Utah Insurance Department which afforded equivalent security to that offered by insurance. Thus, a person injured by the negligence of



another driver has four years within which to file a claim pursuant to Utah Code Annotated Section, 78-12-25(2) (1953, as amended). However, if the driver is a government employee, the time is reduced to one year pursuant to the Utah Governmental Immunity Act, even though both drivers are required by Section 31-41-4 to have insurance in effect. This denies the injured party equal protection of the law in that it unreasonably discriminates in favor of the governmental employee for the same wrong. The wrong is further amplified by the Utah Code Annotated, Section 63-30-29.5 (1953, as amended) which mandates that the insurance provided to cover government owned vehicles ". . . is deemed to provide the driver with the insurance coverage required by Chapter 41 Title 31 . . ." even though the employee at the time of the accident was not driving the vehicle ". . . within the course and scope of the driver's employment . . . ." This is so despite the fact that the 1983 Amendment to the Utah Code Annotated Section 63-30-13 only provides immunity to an employee acting " . . . during the performance of his duties, within the scope of employment . . . ." Thus, an injured party has a four-year statute of limitations against a government employee not within the scope of employment when driving a vehicle, but only a one-year statute of limitation if the same employee, driving the same vehicle, negligently causes the accident while within the scope of employment,. This is so despite the fact that identical insurance coverage, as required by law, is in

effect. Such classification has no rational basis to a legitimate governmental interest and is "arbitrary, discriminatory and unreasonable" and must be held unconstitutional.

### III

#### THE NOTICE REQUIREMENT OF THE UTAH GOVERNMENTAL IMMUNITY ACT IS A VIOLATION OF DUE PROCESS UNDER THE FACTS OF THIS CASE

Article I, Section 7 of the Utah Constitution states: "No person shall be deprived of life, liberty or property without due process of law." The Fifth Amendment to the United States Constitution reads: "No person shall be . . . deprived of life, liberty or property without due process of law." The Fourteenth Amendment, Section 1 to the United States Constitution states: "Nor shall any state deprive any person of life, liberty or property without due process of law . . . ."

These Constitutional guarantees require notice and a hearing before the Government can deprive a person of a property right. In Buttrey v. Guaranteed Securities Company, 78 Utah 39, 300 P. 1040 (1931), this Court held that a cause of action is a property right protected by the Constitution. In that case, a cause of action arose under the Blue Sky laws in effect at that time. However, prior to bringing suit, the law was changed, destroying that cause of action. The Court held:

. . .her right of action was nevertheless within the protection of the Constitution and could not be destroyed by legislation. . . It is a vested right, in the nature of a property right, and ought to be regarded

as property in the sense that tangible things are property and equally protected by the Constitution against arbitrary interference by the Legislature.

300 P. 1045

In this case, Schultz became vested with a cause of action against Conger when he negligently caused his vehicle to collide with her vehicle. He was driving an unmarked car that had no indication on it, nor on the license plates, that it was owned by the government. Conger was not in any type of uniform or clothing that would indicate he was a government employee. Absent notice of government involvement, Schultz had a four-year statute of limitations within which to bring her suit, pursuant to Utah Code Annotated Section 78-12-25 (2) (1953, as amended). The legislature cannot alter that right via the Governmental Immunity Act when Schultz had no indication whatsoever that Conger was a governmental employee. In Brown 1, supra, the Court stated:

To say that the governmental immunity statutes in question subvert the concept of due process, is but to state the obvious for that doctrine blocks access to our courts to those seeking redress for injuries occasioned by the negligent act of a governmental entity.

540 P.2d at 82.

The Governmental Immunity Act, as applied to the facts of this case where no notice is available and a tort-feasor is a governmental employee, is a violation of due process. Schultz is, therefore, entitled to her day in Court.

#### IV

FACTUAL ISSUES REMAIN UNRESOLVED WHICH PRECLUDE THE GRANTING OF A MOTION TO DISMISS

Conger brought his Motion to Dismiss pursuant to the Utah Governmental Immunity Act and Rule 12(b)(1) of the Utah Rules of Civil Procedure, claiming the Court had no subject matter jurisdiction over the controversy. The subject matter of jurisdiction was not argued to the lower Court, Conger instead relying on the Notice provisions of Utah Code Annotated, Section 63-30-13 (1983 amendment). In order to qualify for immunity under that Section, Conger must be within the scope of his employment. See Foster v. Salt Lake County, 712 P.2d 224, 227 (Utah 1985). Whether or not he is within that scope are factual issues which Schultz is entitled to discover before having her claim dismissed.

The closest thing this Court has to come to determining that issue is a review of cases interpreting Rule 12(b)(6), which motion to dismiss has been treated as a Motion for summary judgment, as the Rule permits. In Holbrook Company v. Adams, 542 P.2d 191 (Utah 1975) this Court held that a motion to dismiss cannot be granted when factual issues remain. The Court stated:

Conversely, if there is any dispute as to any issue material to the settlement of the controversy, the Summary Judgment should not be granted.

542 P.2d at 193.

In this case, as in Holbrook, Conger has presented affidavits outside the scope of the pleadings themselves (Complaint and Motion to Dismiss) which extraneous documents appear to deal with Rule 12(b)(6) matters rather than 12(b)(1) matters. Because factual issues are unresolved,

Conger is not entitled to a dismissal. See also Harvey v. Sanders, 534 P.2d 905 (Utah 1975) and Lind v. Lynch, 665 P.2d 1276 (Utah 1983).

V

THE NOTICE PROVIDED BY STATE FARM INSURANCE  
COMPANY SATISFIES THE REQUIREMENTS OF UTAH  
CODE ANNOTATED SECTION 63-30-13 (1953,  
AS AMENDED)

This Court has had the opportunity to review the purpose of the Notice requirement of Utah Code Annotated Sections 63-30-13 (1953, as amended) in Sears v. Southworth, 563 P.2d 192 (Utah 1977). In Sears, this Court indicated that the purpose of the Notice requirement is to give the affected governmental entity the opportunity to promptly investigate the claim and to minimize any changes that may occur in an administration.

These purposes have been met in the instant case when State Farm, Schultz's insurance carrier, provided notice to Salt Lake County. The County had the opportunity to investigate the claim and apparently felt it was valid, as it paid Six Thousand Sixteen Dollars and 69/100 (\$6,016.69) as a claim arising from this accident. Since the purpose of the Notice requirement was met, there was no need for Schultz to file a duplicate notice. Having received a written notice and made payments thereon, the County and Conger are in no position to argue lack of notice.


CONCLUSION

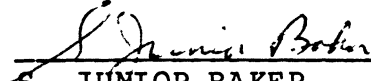
The Trial Court was in error in several respects in granting Conger's Motion to Dismiss. Conger was not involved

in a governmental activity that was uniquely governmental in its nature so as to grant him immunity. The equal protection and due process clauses of the United States and Utah State Constitutions have been violated as the Utah Governmental Immunity Act has been applied to the facts of this case. There are factual issues which preclude a dismissal in this case. The purpose of the Notice requirement has been met so that Schultz was not required to file a duplicate notice.

For these reasons, the decision of the lower Court must be reversed and the case remanded for trial on the merits.

Respectfully submitted this 15<sup>th</sup> day of October, 1986.

  
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#### CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) copies of the foregoing Appellant's Brief, postage prepaid, this 16<sup>th</sup> day of October, 1986, to:

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## ADDENDUM



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MAR 17 1986

*L. E. Midgley*

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IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

LE ANN R. SCHULTZ,	)	
Plaintiff,	)	ORDER OF DISMISSAL
vs.	)	
WELDON CONGER,	)	Civil No. C-85-7163
Defendant.	)	Leonard H. Russon, Judge

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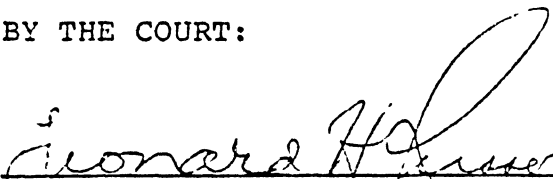
Defendants' Motion to Dismiss having come on regularly for hearing on the 24th day of February, 1986, before the undersigned, and L. E. Midgley, Esq., appearing in behalf of defendants and John Spencer Snow, Esq., appearing in behalf of the plaintiff, and arguments of counsel having been heard and the memoranda submitted by the parties having heretofore been reviewed by the Court, and the Court having found that the defendant Conger at the time of the accident in question which occurred on March 9, 1984, was employed as a deputy sheriff without uniform for the Salt Lake County Sheriff's Office and was driving an unmarked vehicle registered to Salt Lake County;

that the plaintiff failed to file a Notice of Claim as provided under the provisions of 63-30-11(2)(3) U.C.A. within the time prescribed by said statute; that the notice filed by the plaintiff's insurance company was insufficient; and that the Complaint filed herein was filed after the statute of limitations had expired under the provisions of the Governmental Immunity Act; and the Court having found that the defendants' Motion to Dismiss should be granted.

NOW, THEREFORE, it is ordered, adjudged and decreed that plaintiff's Complaint be and the same is herewith dismissed with prejudice.


DATED this 17<sup>th</sup> day of March, 1986.

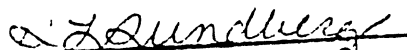
BY THE COURT:

  
LEONARD H. RUSSON, District Judge

ATTEST  
H. DIXON HINDLEY  
Clerk

APPROVED AS TO FORM:

  
JOHN SPENCER SNOW  
Attorney for Plaintiffs

By   
Deputy Clerk

CONSTITUTION OF THE UNITED STATES AMEND. XIV, § 5

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is *denied to any of the male inhabitants of such State, being twenty-one years* of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall *not be questioned*. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

**Sec. 2. [All political power inherent in the people.]**

All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.

**Comparable Provision.**

Montana Const., Art. III, § 2.

**Motorcycle helmet law.**

Statute which requires any person riding a motorcycle on a public highway to wear a crash helmet is not violative of equal protection. *State v. Acker*, — U. (2d) —, 485 P. 2d 1038.

**Qualifications of signers of petition.**

Provisions of the Water Conservancy Act precluding owners of property whose assessed valuation is less than \$300 from acting on petitions either for or against a proposed conservancy district do not violate this section. *Patterick v. Carbon Water Conservancy Dist.*, 106 U. 55, 145 P. 2d 503.

**Residence requirements for voting.**

Former provision, denying the franchise to residents of Indian reservations, was not in conflict with this clause. *Alan v. Merrell*, 6 U. (2d) 32, 305 P. 2d 490.

**Unemployment benefits.**

Statute denying unemployment benefits to student attending established school but granting them to those attending night school was not constitutionally discriminatory. *Norton v. Department of Employment Security*, 22 U. (2d) 24, 447 P. 2d 907.

**Wage payment law.**

Law imposing penalties on employers for failure to pay wages due separated employees within 24 hours from demand therefor is unconstitutional because the classification excluding banks and mercantile houses from the penalty provision is arbitrary and has no reasonable justification in fact. *Justice v. Standard Gilsonite Co.*, 12 U. (2d) 357, 366 P. 2d 974.

**Collateral References.**

Constitutional Law 91; Elections 1.  
16 C.J.S. Constitutional Law §§ 3, 214;  
29 C.J.S. Elections § 1.  
16 Am. Jur. 2d 180, Constitutional Law § 2.

Accountant, equal protection of the laws in regulation of, 70 A. L. R. 2d 437.

Air pollution: discriminatory legislation; equal protection of laws; special or class legislation as violated by regula-

tion of smoke or other air pollution, 78 A. L. R. 2d 1324.

Aliens, restricting right to bear weapons, 34 A. L. R. 63.

Aliens, statute precluding from acting as guardians, 39 A. L. R. 943.

Arbitration: violation of equal protection of the laws by arbitration statutes, 55 A. L. R. 2d 445.

Beauty shops: equal protection of the law as denied by statute or ordinance regulating beauty shops or beauty culture schools, 56 A. L. R. 2d 886.

Blue sky laws, constitutionality, 87 A. L. R. 42, subdiv. VIII superseded 163 A. L. R. 1050.

Burial: equal protection of the laws as violated by statute regulating pre-need contracts for the sale or furnishing of burial services and merchandise, 68 A. L. R. 2d 1251.

Burial: equal protection under statute, ordinance, or other regulation in relation to funeral directors and embalmers, 89 A. L. R. 2d 1351.

Cemeteries: public prohibition or regulation of location of cemetery as violation of equal protection of the laws, 50 A. L. R. 2d 918, 921.

Censorship laws, validity, 64 A. L. R. 505.

Charitable trust property, violation of equal protection of law by legislation authorizing sale of, 40 A. L. R. 2d 573.

Contributory negligence, statute abolishing or modifying rule in certain class of cases or situations, as denial of equal protection of the laws, 142 A. L. R. 631.

Corrupt practices acts, constitutionality, 69 A. L. R. 377.

Debt adjusting, equal protection of the laws as violated by legislation regulating or forbidding business of, 95 A. L. R. 2d 1355.

Dogs, equal protection of law as violated by statute or ordinance providing for destruction of, 56 A. L. R. 2d 1044.

Fair trade law: equal protection of the laws under state "fair trade" law as applied to nonsigning reseller, 19 A. L. R. 2d 1139.

Fair trade law: validity, under equal protection of the laws guaranty of state constitution, of nonsigner provision of, 60 A. L. R. 2d 444.

Financial responsibility act as violative of equal protection of the laws, 35 A. L. R. 2d 1013.

## ART. I, § 7

## CONSTITUTION OF UTAH

Gun control laws, validity and construction of, 28 A. L. R. 3d 845.

### Law Reviews.

The Constitutional Right to Keep and

Bear Arms, Lucilius A. Emery, 28 Harv. L. Rev. 473.

Restrictions on the Right To Bear Arms—State and Federal Firearms Legislation, 98 U. Pa. L. Rev. 905.

### Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

#### Comparable Provision.

Montana Const., Art. III, § 27.

#### Cross-Reference.

Eminent domain generally, 78-34-1 et seq.

#### In general.

"Due process of law" comes to us from the Great Charter and is synonymous with "law of the land." It means that a party shall have his day in court—trial. *Jensen v. Union Pac. Ry. Co.*, 6 U. 253, 21 P. 994, 4 L. R. A. 724.

Due process of law is not necessarily judicial process. *People v. Hasbrouck*, 11 U. 291, 39 P. 918.

Judgment against defendant, not served with process and not appearing either in person or by attorney, would not be due process of law. *Blyth & Fargo Co. v. Swenson*, 15 U. 345, 49 P. 1027.

It is elementary that there can be no judicial action affecting vested rights that is not based upon some process or notice whereby the interested parties are brought within the jurisdiction of the judicial tribunal about to render judgment. *Parry v. Bonneville Irr. Dist.*, 71 U. 202, 263 P. 751.

"Due process of law" requires that, before one can be bound by a judgment affecting his property rights, some process must be served upon him which in some degree at least is calculated to give him notice. *Naisbitt v. Herriek*, 76 U. 575, 290 P. 950.

Due process of law requires that notice be given to the persons whose rights are to be affected. It hears before it condemns, proceeds upon inquiry, and renders judgment only after trial. *Riggins v. District Court of Salt Lake County*, 89 U. 183, 51 P. 2d 645.

The phrase "due process of law" apparently originated with Lord Coke, who defined the terms. Many attempts have been made to further define due process of law, but all of them resolve into the thought that a party shall have his day in court. *Christiansen v. Harris*, 109 U. 1, 163 P. 2d 314.

In depriving a person of life or liberty, the essentials of due process are: (a) the existence of a competent person,

body, or agency authorized by law to determine the questions; (b) an inquiry into the merits of the question by such person, body or agency; (c) notice to the person of the inauguration and purpose of the inquiry and the time at which such person should appear if he wishes to be heard; (d) right to appear in person or by counsel; (e) fair opportunity to submit evidence, examine and cross-examine witnesses; (f) judgment to be rendered upon the record thus made. In the absence of statute laying down other or more specific requirements, the above conditions meet the demands of due process. In the absence of specific provisions to the contrary, due process does not require that any or all of these requirements must be in writing or in any particular form. In the interests of orderly procedure and certainty as to its proceedings and action taken, any legally constituted body or agency should as far as practical have written records of all proceedings before it, except where otherwise provided by law. *Christiansen v. Harris*, 109 U. 1, 163 P. 2d 314.

In the trial of criminal cases the statutes prescribe certain rules of procedure, which must be substantially complied with to keep the proceedings within the due processes of the law. A somewhat different set of rules is prescribed in civil cases and in special proceedings. Some rules, affecting all types, are not found in the statutes, but in that great basic body of the law commonly known as the decisions or rules of the courts. But all these methods and means provided for the protection and enforcement of human rights have the same basic requirements—that no party can be affected by such action, until his legal rights have been the subject of an inquiry by a person or body authorized by law to determine such rights, of which inquiry the party has due notice, and at which he had an opportunity to be heard and to give evidence as to his rights or defenses. *Christiansen v. Harris*, 109 U. 1, 163 P. 2d 314.

While normally we think of "due process of law" as requiring judicial action, yet "due process" is not necessarily judicial action. *Christiansen v. Harris*, 109 U. 1, 163 P. 2d 314.

**31-41-4. Requirement for maintenance of security by residents, non-residents, state of Utah and political subdivisions, United States, and other states or political subdivisions.**—(1) Every resident owner of a motor vehicle shall maintain the security provided for in section 31-41-5 in effect continuously throughout the registration period of the motor vehicle.

(2) Every nonresident owner of a motor vehicle which has been physically present in this state for more than ninety days during the preceding 365 days shall thereafter maintain the security provided for in section 31-41-5 in effect continuously throughout the period the motor vehicle remains within this state.

(3) The state of Utah and all of its political subdivisions and their respective departments, institutions, or agencies shall maintain in effect continuously in respect to their motor vehicles the security provided for in section 31-41-5.

(4) The United States and any other state, or any political subdivisions of same, or any of their agencies, may maintain in effect in respect to their motor vehicles the security provided for in section 31-41-5.

**History:** L. 1973, ch. 55, § 4.

7 Am. Jur. 2d 297, Automobile Insurance § 4.

**Cross-Reference.**

Safety Responsibility Act, security required, 41-12-5.

Validity and construction of "no-fault" automobile insurance plans, 42 A. L. R. 3d 229.

**Collateral References.**

Automobiles 144.1(4).

60 C.J.S. Motor Vehicles § 110.

Validity of Motor Vehicle Financial Responsibility Act, 35 A. L. R. 2d 1011.

**31-41-5. Insurance or other security authorized—Insurance coverages greater than required minimum allowed.**—(1) The security required by this act shall be provided in one of the following methods:

(a) Security by insurance may be provided with respect to each motor vehicle by an insurance policy that qualifies under chapter 12 of Title 41 (the Safety Responsibility Act), except as modified to provide the benefits and exemptions provided for in this act, and has been approved by the department; or

(b) Security may be provided with respect to any motor vehicle by any other method approved by the department as affording security equivalent to that offered by a policy of insurance provided such security is continuously maintained throughout the motor vehicle's registration period. The person providing this type of security shall have all of the obligations and rights of an insurer under this act.

(2) Nothing contained in this act shall be construed to prohibit the issuance of policies of insurance providing coverages greater than the minimum coverages required under this act nor to require the segregation of such minimum coverages from other coverages in the same policy.

**History:** L. 1973, ch. 55, § 5.

Validity and construction of "no-fault" automobile insurance plans, 42 A. L. R. 3d 229.

**Collateral References.**

Automobiles 43.

60 C.J.S. Motor Vehicles § 113.

7 Am. Jur. 2d 297, Automobile Insurance § 5.

Validity of Motor Vehicle Financial Responsibility Act, 35 A. L. R. 2d 1011.

The 1983 amendment inserted "or 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)."

**Action based on exercise of governmental function.**

Action against state which was predicated on governmental supervision of financial institutions involved the exercise of a governmental function and was barred where there was no compliance with the notice of claim provisions of 63-30-11 and 63-30-12. *Madsen v. Borthick* (1983) 658 P 2d 627.

**Compliance with section.**

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* (1980) 621 P 2d 1234.

**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* (1977) 572 P 2d 1374.

**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.

**Compiler's Notes.**

The 1978 amendment rewrote this section. For prior version, see parent volume.

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)."

**Claims barred.**

Trial court properly dismissed complaint against county where notice of the claim was not filed with the county commission during the year following plaintiff's discovery of her injuries. *Yates v. Vernal Family Health Center* (1980) 617 P 2d 352.

**Claims by minors.**

Failure of a minor to give notice within the time provided in this section does not bar the minor's claim as the time for notice is tolled during minority by 78-12-36. *Scott v. School Board of Granite School Dist.* (1977) 568 P 2d 746.

**63-30-15. Denial of claim for injury — Authority and time for filing action against governmental entity.** If the claim is denied, a claimant may institute an action in the district court against the governmental entity [in those circumstances in which immunity from suit has been waived in this chapter] or an employee of the entity. The action must be commenced within one year after denial or the denial period as specified in this chapter.

**History:** L. 1965, ch. 139, § 15; 1983, ch. 129, § 6; 1985, ch. 82, § 2.

**Compiler's Notes.**

The 1983 amendment substituted "in this chapter" for "as in this act provided" in the first sentence and for "herein" in the second

sentence; and made minor changes in phraseology.

**Amended complaint.**

Plaintiffs complied with this section where, within a year after the cause of action arose, they filed notice of claim with the

said trust fund shall be subject to investment pursuant to Chapter 7, Title 51, the State Money Management Act of 1974, ~~[51-7-1 to 51-7-2]~~ and shall be subject to audit by the state auditor. Notwithstanding any law to the contrary, the trust agreement between the governmental entity and the trustee may authorize the trustee to employ counsel to defend actions against the entity and its employees and to protect and safeguard the assets of the trust, to provide for claims investigation and adjustment services, to employ expert witnesses and consultants, and to provide such other services and functions necessary and proper to carry out the purposes of the trust.

**History:** L. 1965, ch. 139, § 28; 1978, ch. 27, § 9; 1979, ch. 94, § 1; 1983, ch. 130, § 1; 1985, ch. 21, § 32.

**Compiler's Notes.**

The 1978 amendment substituted "or self-insure against any risk created by this act" for "against any risk which may arise as a result of the application of this act" in the first paragraph, and made a minor change in phraseology.

The 1979 amendment inserted "commercial" in the first paragraph; added "or by sections 63-48-1 through 63-48-7" to the first paragraph; and added the second paragraph.

The 1983 amendment rewrote the first paragraph which read: "Any governmental entity within the state may purchase commercial insurance or self-insure against any risk created by this act or by sections 63-48-1 through 63-48-7"; inserted "In addition to any other reasonable means of self-insurance" at the beginning of the second paragraph; deleted "supported in whole or in part from federal sources" after "a governmental entity" in the first sentence of the second paragraph; deleted "in accordance with applicable federal regulations" before "by

establishing" in the first sentence of the second paragraph; and inserted the citation after "State Money Management Act" in the second sentence of the second paragraph.

**Repealing Clause.**

Section 12 of Laws 1978, ch. 27 provided: "Sections 63-30-21 and 63-30-30, Utah Code Annotated 1953, as enacted by chapter 139, Laws of Utah 1965, section 10-7-77, Utah Code Annotated 1953, as amended by chapter 10, Laws of Utah 1973, and section 10-7-78, Utah Code Annotated 1953, are repealed."

**Right to hire legal counsel.**

This section provides University of Utah Hospital with authority to hire independent legal counsel; this section does not violate attorney general's authority under Art. VII, § 16 of the state constitution and provides an exception to the general authority of the attorney general to perform legal services for any agency of state government. *Hansen v. Utah State Retirement Bd.* (1982) 652 P 2d 1332.

**Law Reviews.**

Utah Legislative Survey — 1979, 1980 Utah L. Rev. 155.

**63-30-29. Repealed.**

**Repeal.**

Section 63-30-29 (L. 1965, ch. 139, § 29; 1978, ch. 27, § 10), relating to provisions of

liability insurance policies, was repealed by Laws 1983, ch. 130, § 5.

**63-30-29.5. Liability insurance — Government vehicles operated by employees outside scope of employment.** A governmental entity that owns vehicles driven by employees of the governmental entity with the express or implied consent of the entity, but which, at the time liability is incurred as a result of an automobile accident, is not being driven and used within the course and scope of the driver's employment is deemed to provide the driver with the insurance coverage required by Chapter 41, Title 31, and is deemed to provide liability coverage by the governmental entity in accordance with the requirements of the Safety Responsibility Act (section 41-12-1 et seq.). In no event, however, shall the limits of the liability coverage provided under this subsection be deemed to exceed the minimum bodily injury and property limits specified in section 41-12-5.

**History:** C. 1953, 63-30-29.5, enacted by L. 1983, ch. 128, § 1.

**Compiler's Notes.**

Chapter 41, Title 31, referred to in this section, was repealed by Laws 1985, ch. 242, § 58, effective July 1, 1986.



## LIMITATION OF ACTIONS

78-12-25

What constitutes a promise in writing to pay money within statutes of limitation, 111 A. L. R. 984.

When does limitation commence to run against action, defense, or counterclaim based on usury, 108 A. L. R. 622.

When does limitation or laches commence to run against suit to reform an instrument, 106 A. L. R. 1338.

When statute begins to run against action to recover interest, 36 A. L. R. 1085.

When statute begins to run against note payable on demand, 71 A. L. R. 2d 284.

When statute begins to run in favor of drawer of check, 4 A. L. R. 881.

When statute commences to run against action for breach of covenant, 99 A. L. R. 1050.

When statute of limitations begins to run against action on a contract which contemplates an actual demand, 159 A. L. R. 1021.

When statute of limitations commences to run against action based on fraud in construction, repair, or equipment of building, 150 A. L. R. 778.

## DECISIONS UNDER FORMER LAW

### War risk insurance.

Action to recover automatic insurance benefits on war risk insurance which accrued in 1917 was barred by this statute, where claim was not presented to bureau

until 1931, and suit was not brought until 1932, more than six years after accrual of action. *United States v. Preece*, 85 F. 2d 952.

**78-12-24. Public officers—Within six years.**—An action by the state or any agency or public corporation thereof against any public officer for malfeasance, misfeasance, or nonfeasance in office or against any surety upon his official bond may be brought within six years after such officer ceases to hold his office, but not thereafter.

**History:** L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-24.

53 C.J.S. Limitations of Actions § 82 et seq.

### Compiler's Notes.

This section is identical to former section 104-2-48 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Running of limitation as to action by public body against officer or employee as deferred until defendant ceases to be officer or employee, or until the end of his term of office or employment, 137 A. L. R. 674.

### Cross-Reference.

Governmental Immunity Act, 63-30-1 et seq.

Running of statute of limitations as affected by uncertainty as to existence of a cause of action because of delay in settling or determining a matter of general or governmental concern upon which it depends, 135 A. L. R. 1339.

### Collateral References.

Limitation of Actions—58(2).

### 78-12-25. Within four years.—Within four years:

(1) An action upon a contract, obligation or liability not founded upon an instrument in writing; also on an open account for goods, wares and merchandise, and for any article charged in a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received.

(2) An action for relief not otherwise provided for by law.

**History:** L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-25.

cal to former section 104-2-23 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3. Subdivision (2) is similar to former section 104-2-30 (Code 1943) which also was repealed by Laws 1951, ch. 58, § 3.

### Compiler's Notes.

Subdivision (1) of this section is identi-

## PLEADINGS, MOTIONS, AND ORDERS

## Rule 12(b)

Agency, manner and sufficiency of pleading in contract action, 45 A. L. R. 2d 583.

Last clear chance doctrine, raising issue of, in reply, 25 A. L. R. 2d 277.

Propriety of entering summary judgment for plaintiff before defendant files or serves answer to complaint or petition, 85 A. L. R. 2d 825.

(b) **How Presented.** Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

### Compiler's Notes.

This Rule is identical to Fed. Rule 12(b) as it existed prior to 1966, except for the addition of the phrase "or by further pleading after the denial of such motion or objection" at the end of the third sentence.

### Failure to state a claim upon which relief can be granted.

A motion to dismiss should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. *Liquor Control Comm. v. Athas*, 121 U. 457, 243 P. 2d 441.

Complaint alleging false, deceptive or misleading advertising and misrepresentation of guarantee was improperly dismissed, under this section, since under circumstances trial court could not conclude "with certainty" that plaintiff would be entitled to no relief under any state of facts which could be proved in support of such claim. *Christensen v. Lelis Automatic Transmission Service, Inc.*, 24 U. (2d) 165, 467 P. 2d 605.

Complaint alleging that defendants con-

spired to harass, annoy, threaten and intimidate plaintiff until it was necessary for it to discontinue business failed to state claim on which relief could be granted, as required under Rule 8(a), so that defendants' motion to dismiss should have been granted. *Utah Steel & Iron Co. v. Bosch*, 25 U. (2d) 85, 475 P. 2d 1019.

Action against city for breach of implied contract was properly dismissed for failure to state claim upon which relief could be granted, since the contract to review bids on an equal basis was too nebulous to be enforceable, and the city is immune to tort action for deceit. *Rapp v. Salt Lake City*, 527 P. 2d 651.

It only takes one sworn statement to dispute averments on other side of controversy and create issue of fact, precluding summary judgment. *Holbrook Co. v. Adams*, 542 P. 2d 191.

### General and special appearances.

The language in this Rule stating that "[n]o defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after