

2001

Walter F. Parrish v. Layton City Corporation : Brief of Respondent

Utah Supreme Court

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BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

IN THE SUPREME COURT
OF THE STATE OF UTAH

Case No. ~~18747~~ 14018

WALTER F. PARRISH,
Plaintiff and Appellant,
vs.

LAYTON CITY CORPORATION,
Defendant and Respondent.

RESPONDENT'S BRIEF

Appeal from the Judgment of the Second District Court
for Davis County, Honorable John F. Wahlquist

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Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	<u>Page</u>
Statement of the Case	1
Disposition in Lower Court	1
Relief Sought on Appeal	2
Statement of Facts	2
Argument	
THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUSTAIN THE TRIAL COURT'S FINDING THAT THE PLAINTIFF FAILED TO FILE A TIMELY NOTICE OF CLAIM AS REQUIRED BY THE UTAH GOVERNMENTAL IMMUNITY ACT	3
Conclusion	7

AUTHORITIES CITED

CASES

Butterfield v. Chaney, 12 Utah 2d 347, 366 P.2d 607 (1961)	6
Carlton v. Hackett, 11 Utah 2d 389, 360 P.2d 176 (1961)	3
Johnson v. Koyle, 7 Utah 2d 27, 317 P.2d 596 (1957)	4
Lawrence v. Bamburgh Railroad Company, 3 Utah 2d 247, 282 P.2d 335 (1955)	4
LePasiotes v. Dinsdale, 121 Utah 359, 242 P.2d 297 (1952)	5
Rummell v. Bailey, 7 Utah 2d 137, 320 P.2d 653 (1958)	4

STATUTES

Utah Code Annotated Section 63-30-1, <u>et seq.</u> (1968)	2
Utah Rules of Civil Procedure, Rule 75 (p)	5

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WALTER F. PARRISH,

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-vs-

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Defendant and Respondent.

RESPONDENT'S BRIEF

Appeal from the Judgment
of the Second District Court for Davis County
Honorable John F. Wahlquist

STATEMENT OF THE CASE

This is an action for damages sustained by the plaintiff-appellant Walter F. Parrish allegedly resulting from the acts of the defendant-respondent Layton City Corporation during the construction of the Kays Creek Flood Relief Project.

DISPOSITION IN LOWER COURT

The District Judge, the Honorable John F. Wahlquist, granted defendant's Motion for Summary Judgment on the

basis of res judicata and the plaintiff's continued failure to comply with the notice of claim provisions of the Utah Governmental Immunity Act, §63-30-13, U.C.A., (1968).

RELIEF SOUGHT ON APPEAL

Respondent prays that the judgments and orders of the lower court be affirmed.

STATEMENT OF FACTS

On January 29, 1973, Walter F. Parrish filed a Complaint, Civil No. 17649, in the District Court of Davis County, alleging in essence that Layton City Corporation had caused waste to plaintiff's property during construction of the Kays Creek Flood Relief Project in 1970. (R. 49-52) The defendant Layton City answered the Complaint and filed a Motion to Dismiss based on plaintiff's failure to comply with the notice of claim provisions of the Utah Governmental Immunity Act, U.C.A., §63-30-1, et seq., (1968). This Motion was granted by Judge Wahlquist on October 1, 1973. Plaintiff filed a Notice of Appeal from the District Court ruling on October 19, 1973. However, this appeal was subsequently dismissed by stipulation of the parties. The Order of Dismissal was signed by Justice Crockett on June 13, 1974.

Meanwhile, on January 23, 1974, plaintiff filed a second Complaint against Layton City Corporation. (R. 1-4) This Complaint alleged essentially the same facts and

causes of action as those on which plaintiff based his first Complaint.

Defendant Layton City Corporation moved for summary judgment in this second lawsuit on the ground that plaintiff's claim was barred under the doctrine of res judicata, and by the plaintiff's continued failure to comply with the notice of claim provisions of the Utah Governmental Immunity Act. (R. 18) Judge Wahlquist granted the defendant's Motion for Summary Judgment on January 30, 1975. (R. 43) The Order and Judgment were signed by the District Judge on February 7, 1975. (R. 44)

ARGUMENT

THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUSTAIN THE TRIAL COURT'S FINDING THAT THE PLAINTIFF FAILED TO FILE A TIMELY NOTICE OF CLAIM AS REQUIRED BY THE UTAH GOVERNMENTAL IMMUNITY ACT.

It is difficult at best to determine from appellant's brief which points and issues he intends to rely on for reversal of the trial court's judgment. It appears that the thrust of appellant's argument is that there is insufficient evidence to justify the trial court's finding that the plaintiff failed to file a timely notice of claim as required by the Utah Governmental Immunity Act. (See Points 1 and 5 of appellant's brief.)

It is well recognized that it is the burden of the appellant to rebut the presumption of correct findings by the trial court. In Carlton v. Hackett, 11 Utah 2d 389, 360 P.2d 176 (1961), the Utah Supreme Court explained the appellant's burden.

"In considering the attack on the findings and judgment of the trial court, it is our duty to follow these cardinal rules of review: To indulge them a presumption of validity and correctness; to require the appellant to sustain the burden of showing error; to review the record in the light most favorable to them; and not to disturb them if they find substantial support in the evidence." Id. at 340, 360 P.2d at 176.

It is equally well recognized by this court that findings of fact will not be disturbed on appeal unless they are clearly erroneous. Lawrence v. Bamburgh Railroad Company, 3 Utah 2d 247, 282 P. 2d 335 (1955); Rummell v. Bailey, 7 Utah 2d 137, 320 P.2d 653 (1958).

The trial court in this case found that the plaintiff failed to file timely notice of claim as required by the Utah Governmental Immunity Act. That finding must be sustained unless the appellant can demonstrate that it is clearly erroneous. In other words, it is the appellant's burden to demonstrate with convincing evidence that a timely notice of claim was filed.

The appellant has failed anywhere in his brief to demonstrate where the evidence may be found in the record to support his contention that a proper notice of claim was filed. This court on numerous occasions has held that such failure, in itself, constitutes grounds for dismissal of appellant's appeal. In Johnson v. Koyle, 7 Utah 2d 27, 317 P.2d 596 (1957), the appellant filed a brief citing as error the adequacy of trial court's

findings. Speaking for an unanimous court, and relying on Rule 75 (p) of the Utah Rules of Civil Procedure*, Justice McDonough wrote:

"Appellant Page on his brief from the judgment below has filed a brief citing as error the trial court's finding and conclusions of law made pursuant to this court's mandate. In his brief, he fails to point out in the record, as required by Rule 75 (p), Utah Rules of Civil Procedure, where evidence may be found to support his contentions. Consequently, we might properly disregard the assignment which deals with the lack of support in the record for the trial court's findings." Id. at 27-28, 317 P.2d at 596-97. (Emphasis added)

In LePasiotes v. Dinsdale, 121 Utah 359, 242 P.2d 297 (1952), the appellant alleged, without designating any specific error or making any reference to the record, that the trial court erred in ruling on certain evidentiary

*Rule 75 (p) provides in pertinent part:

"The appellant's brief shall contain in order: (1) a table of contents including a concise statement of the points upon which appellant intends to rely for a reversal of judgment or order of the court below, without redundancy or duplicity and in the same order in which such points are argued in the brief, and including an alphabetical index of the cases and authorities cited; (2) (a) a short one-sentence statement of the nature of the case; (b) the disposition made of the case in the lower court; (c) the exact nature of the relief sought on appeal, and (d) a concise statement of the material facts of the case citing the pages of the record supporting such statement."

questions. In rejecting the appellant's argument, this court ruled:

" . . . none of the many rulings on admission of evidence was assigned specifically on appeal as constituting prejudicial error, so that any decision thereon would require discussion of all objections, no one of which plaintiff has had an opportunity to meet in her brief because of such non-designation. Therefore, we feel constrained not to review those matters which plaintiffs cannot defend against because not called to the attention by her opponents." Id. at 360, 242 P.2d at 297.

Similarly, in Butterfield v. Chaney, 12 Utah 2d 347, 366 P.2d 607, the appellant failed to designate evidence in the record to support his argument. The court in an unanimous opinion noted:

"No where in defendant's brief is found any reference to any page in the voluminous 238 page record to support the gratuitous conclusion that 'It is the contention of the appellant that the determination should be from all the circumstances involved in the entire transaction.' However, though we could decide this case based on such failure to point out to the record for sustaining evidence, we have gone over it and find ample substantial competent and credible evidence to support the trial court." Id. at 348, 366 P.2d at 608. (Emphasis added)

The appellant in this case has failed to refer the court or respondent to a single reference in the record to support his contention that a claim was properly filed. This court can therefore, under the authority of 75 (p) and the previous decisions of the Utah Supreme Court, properly disregard appellant's assignment of error.

Even if the record is examined, however, it indicates that the only claim filed was on July 26, 1973.

(R. 36-38) Indeed, in his Memorandum in Opposition to Defendant's Motion for Summary Judgment, the appellant acknowledges that no claim was filed until that date:

"FACTS

"(1) January 29, 1973. Plaintiff files Complaint, Civil No. 17649, in the District Court of Davis County against the above-referred-to defendant and also the State Road Commission. Plaintiff, realizing no verified claim had been filed in accordance with U.C.A. 63-30-1, et seq. (1953), brought his action based upon taking or damaging property without just compensation, a constitutional principal.

"(2) July 26, 1973. Six months after filing the Complaint, plaintiff filed with the defendant, Layton City, a verified claim."
(R. 32) (Emphasis added)

Appellant has thus conceded in the trial court that no claim was filed until July 26, 1973, and cannot now urge on appeal the contrary proposition.

CONCLUSION

The appellant in this case has failed to demonstrate that the court improperly dismissed his Complaint. Appellant's only tenable argument appears to be that there is insufficient evidence to support the trial court's findings. However, appellant's brief is totally devoid of any reference in the record to support that contention.

Previous decisions of this court indicate that this defect, in itself, provides sufficient grounds to dismiss the appeal.

However, even if the record is referred to, it provides substantial support for the trial court's finding that appellant did not file timely notice of claim as required by the Utah Governmental Immunity Act. That defect has not and could not be corrected, and the trial court therefore correctly ruled that the plaintiff was barred from recovery.

Respondent urges that the judgment of the trial court be affirmed.

DATED this 16 day of June, 1975.

Respectfully submitted,

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