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Gibbons and Reed Company v. City of Ogden, Utah, Utah State Road Commission, Oscar A. Robin, Hardy Scales Co. : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GIBBONS AND REED COMPANY, a Utah corporation,

Plaintiff and Appellant,

vs.

CITY OF OGDEN, UTAH, a municipal corporation; UTAH STATE ROAD COMMISSION; OSCAR A. ROBIN; and HARDY SCALES CO., a corporation,

Defendants and Respondents.

CASE NO. 14030

APPELLANT'S REPLY BRIEF

Appeal From a Judgment of the District Court
of Weber County
Honorable Ronald O. Hyde, Judge

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APPELLANT'S REPLY BRIEF

ARGUMENT

POINT I

THE ARGUMENT OF RESPONDENT, OGDEN CITY, THAT APPELLANT'S CLAIM AGAINST THE CITY WAS NOT TIMELY FILED MISCONSTRUES THE LAW.

Ogden City argues that Gibbons and Reed Company's claim for damages was not timely under the Utah Governmental Immunity Act, 63-30-1 et seq. Utah Code Annotated 1953 because it was not filed within ninety days after the cause of action arose.

The city's reliance on the Utah Governmental Immunity Act is misplaced in light of Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975). In Greenhalgh the court had to determine whether the operation of a hospital by Payson City was

a "governmental function" as used in the context of 63-30-3 Utah Code Annotated 1953 to bring the hospital within the scope of our Governmental Immunity Act. Section 63-30-3 provides:

> Except as may be otherwise provided in this act, all governmental entities shall be immune from suit for any injury which may result from the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function. [Emphasis added].

The court considered the arguments that the term "governmental function" should be interpreted to mean any activity performed by a governmental entity but rejected this argument in favor of the more traditional approach:

> It is certain that prior to this enactment those terms ['governmental' and 'proprietary'] had been widely used and had come to have distinct and antithetical meanings in our law. We should assume that the legislature was aware of this and that they used their language advisedly. Therefore, if it had intended to include proprietary functions within the scope of the act, it could have easily so indicated by omitting the final phrase, "governmental function," from the just quoted Section 63-30-3.
>
> * * *
>
> It is therefore our conclusion that proprietary functions of a municipality are not within the coverage of the Utah Governmental Immunity Act." 530 P.2d at 801.

Because the 90-day provisions of 63-30-13 apply only to claims arising from the exercise of a "governmental

function" and not those arising from the exercise of a "proprietary" function, it is necessary to distinguish the two concepts. In Greenhalgh the court discussed important factors in making that distinction:

> A primary one is whether the activity is something which is done for the general public good and which is generally regarded as a public responsibility. Coupled with this, other matters considered are whether there is any special pecuniary benefit to the City; and also, whether it is of such a nature as to be in competition with free enterprise.

These same factors were cited by the Utah Supreme Court in Cobia v. Roy City, 12 Utah 2d 375, 366 P.2d 986 (1961) and Ramairez v. Ogden City, 3 Utah 2d 102, 279 P.2d 463 (1955) as tests to determine whether a function is governmental or proprietary.

On the basis of the above factors the activities of respondent Ogden City were clearly proprietary in nature and the procedural requirements of the Utah Governmental Immunity Act are inapplicable to this action.

Furthermore, the Utah Governmental Immunity Act took effect as of July 1, 1966, and applies only to claims arising after that date. Chapter 139, §37, laws of Utah 1965. The plaintiff's claim arose at the time of the city's repudiation or total breach in May, 1966. Restatement of Contracts, §318. The Governmental Immunity Act was not yet in effect.

Even if it were questionable whether the limitation period prescribed in the Utah Governmental Immunity Act or the provisions of 10-7-77 Utah Code Annotated 1953 were applicable to the case at bar, this court should adopt the statute permitting the claim to be filed. With regard to the construction of statutes requiring notice, 56 Am.Jur. 2d, Municipal Corporations, §687 states:

> Statutory and charter provisions conditioning the right to maintain an action against a municipal corporation upon the giving of certain prescribed notice within a specific time after accrual of the cause of action are in derogation of the common right of the people of a commonwealth to maintain their common-law or statutory causes of action anywhere within a state where the proper venue attaches, under the same rules of practice and procedure accorded them at any other point or place in the state. Accordingly, such provisions are to be construed strictly and not extended by implication beyond their own terms, where they are invoked by a municipality to avoid liability. * * *

As to proprietary activities, 10-7-77 Utah Code Annotated 1953 sets forth the requirements for making claims against cities and towns. Greenhalgh v. Payson City, supra. The first sentence of that section deals with defective, unsafe, dangerous or obstructive conditions of streets, alleys, etc.. The second sentence of that section, which governs plaintiff's claim, states:

> Every claim, other than claims above-mentioned, against any city or town, must be presented, properly itemized or described

> and verified as to correctness by the claimant or his agent, to the governing body within one year after the last item of such account or claim accrued, and if such account or claim is not properly or sufficiently itemized or described or verified, the governing body may require the same to be made more specific as to itemization or description, or to be corrected as to the verification thereof. [Emphasis added].

Ogden City contends that even under 10-7-77 Utah Code Annotated 1953, the action was not timely filed on September 3, 1968, because Gibbons and Reed relies upon repudiation of the option in May, 1966, and the last day in which a claim could be filed would be in May, 1967. But no actionable claim arose until damages were sustained. The precise sum in which Gibbons and Reed Company would be damaged, if at all, could not be determined until completion of the stripping, hauling, and placing of material from the alternative sites and the rehabilitation of those sites.

In Boulder City v. Miles, 85 Nev. 46, 449 P.2d 1003 (1969), a city subdivided a tract of land, grading and compacting the soil. Approximately two years after completion of the city's work, the plaintiffs' house began to crack due to faulty compaction of the soil. The city argued that the time for filing a notice of claim began to run from the last date it worked on the lots, while the plaintiff urged that it commenced when the actual damages occurred. Re-

jecting the city's position, the court said:

> It is true that in most cases damages caused by the wrongful act of another occur contemporaneously with the wrongful act. But it is also true that no one has a claim against another without having incurred damages. And the reason for the rule is quite clear. Though an act may endanger the person or property of another, no actionable wrong is committed if the danger is averted. It is only the injury to a person or the damage to property arising from a wrongful or negligent act which constitutes an invasion of a personal right protected by law and, therefore, an actionable wrong. A cause of action accrues only when the forces wrongfully put in motion produce an injury. Otherwise, in certain cases, as in this case, a purported cause of action might be barred before liability arose. [Emphasis added and citations omitted].

In the instant case, damages could not be determined until completion of the project, and plaintiff's filing is therefore timely whether computed from the date of its last work in the alternate pits (October, 1967) or rehabilitation of the pits (March, 1968).

The language of 10-7-77 clearly contemplates the filing of notice and the running of the time for doing so after the amount of damages is determined. The statute provides that claims must be presented within "one year after the last item of such account or claim accrued." That the ascertainment of such damages cannot be properly made and presented until the last item of damages accrues is indicated by the

requirement of "sufficient" and "specific" itemization. See Moran v. Salt Lake City, 53 Utah 407, 173 Pac. 702 (1918).

The provisions of 10-7-77 Utah Code Annotated 1953 are substantially the same as Section 312, Compiled Laws of Utah 1907, construed by the Utah Supreme Court in Dahl v. Salt Lake City, 45 Utah 544, 147 Pac. 622 (1915). With respect to the notice of claim provisions, the court said:

> * * * It will be noticed that the statute is comprehensive and sweeping in its terms respecting the claims that must be presented to the city council before an action can be brought and successfully maintained thereon. These claims are divided into two classes: one class consists of claims "for damages or injury alleged to have been caused by the defective, unsafe, dangerous or obstructed condition of any street, alley, crosswalk, sidewalk, culvert or bridge," which must be presented "within thirty days after the happening of such injury or damage." The other class consists of "every claim, other than the claims above mentioned," must be presented, properly itemized or described, etc., within one year after the last item of such "account or claim" accrued.

The court held that injuries to crops alleged to have been caused by seepage water from the defendant's canal came within the second class of cases, and that the claim had to be filed within one year after the last item of damage accrued. This position is consistent with the general limitations rule applying to breach by anticipatory repudiation. Restatement of Contracts, §322.

POINT II

PLAINTIFF'S ACTION IS NOT BARRED BY THE STATUTE OF FRAUDS.

Respondents Ogden City and Robin and Hardy Scales Company argue that the option agreement is unenforceable because it does not comply with the Statute of Frauds. It is contended that the Statute of Frauds require the writing to contain all elements of the contract and the option does not define the amount of fill to be removed.

In response to this argument Gibbons and Reed Company contends that the option is not covered by the statute of frauds, the option is sufficiently certain and the city is estopped to assert the statute of frauds.

The September 30, 1965 "Option For Purchase Of Road Building Material" makes it clear that the contract was not a sale of an estate in land or even a mining interest, but merely a right to remove certain materials from the property. The option specifies that it is for sale of "road-building material <u>from</u> the property of the owner" and that the Road Commission does not have a "right to <u>all</u> materials on the above described property."

The material referred to consists of sand and gravel and, in the context of this case, do not fall within the

statute of frauds. In 37 C.J.S., Statute of Frauds, §83(b) it is stated:

> A mineral, while it remains in the soil is part of the real estate so that a contract for its sale in such state is within the statute of frauds; but a contract for the sale of a mineral as such, severed from the soil, is not one for the sale of land within the statute of frauds.

It is immaterial who severs the mineral from the soil. The fact remains that the only interest to be acquired by Gibbons and Reed Company would be a right to the minerals from the property.

Even if the option agreement were to fall within the statute of frauds the contract would be enforceable. The purpose of the statute is to prevent fraud or, in other words, to prevent a party from being held responsible by oral, and perhaps false, testimony for a contract he claims he never made. 73 Am.Jur.2d, Statute of Frauds, §510. With this purpose in mind recent decisions from this court have enforced contracts despite the fact the entire contract was not reduced to writing.

In Peterson v. Hendricks, 524 P.2d 321 (Utah 1974), the plaintiff, an experienced miner and mining operator, alleged that he entered into a joint venture contract with the defendant, owner of certain mining claims in Piute

County, to discover and produce ore. The alleged contract was based in part on conversations between the parties when they were alone, conversation in the presence of third parties and certain writings in the form of letters. The letters did not precisely set forth the terms of the agreement nor did they describe the claims. In fact, no writing made mention of the mining claims or indicated that plaintiff was to have an interest in the land. All that was clear was that if a company was formed to operate the claims the parties were to share equally in that company. No company was formed and defendant eventually sold the mining claims. Plaintiff then brought this action to recover the value of his alleged interest in the mining claims by virtue of the purported joint venture agreement. Despite the absence of a clear and unambiguous writing the court held plaintiff was entitled to share equally with defendant in the proceeds of the sale.

In Guinand v. Walton, 22 Utah 2d 196, 450 P.2d 469 (1959), the defendant partnership promised plaintiff in writing a 10% interest in the company if plaintiff would continue working for the partnership. Plaintiff worked for the company an additional three years and defendant refused to distribute a 10% interest to plaintiff. The partnership

defended on the ground the assets of the partnership consisted of leaseholds and interests in lands which had not been conveyed in a writing sufficient to satisfy the statute of frauds. The court refuted the statute of frauds defense and made these cogent observations:

> From careful attention to the wording of that section it will be seen that there is no requirement either that the instrument in writing demonstrate a valid consideration, or that it be a complete contract in any other particular. All that is required is that the interest be granted or declared by a writing subscribed by the party to be charged. For the purpose of establishing that there was such a grant by the partnership it is not essential that its assets be described with particularity. The purpose of the statute is that certain matters of great importance such as the conveyance of real estate should be protected against frauds and perjuries. As between the contesting parties here, that requirement is satisfied by the letter in question; and the granting of the 10% of the interest in the partnership includes the grant of its assets.

If the option agreement in the case at bar is affected by the statute of frauds it is sufficient in form to satisfy its requirements. As noted above, the purpose of the statute is to protect against fraud and perjuries neither of which is present in the instant case. The option agreement is complete in every respect other than the exact amount of fill which could be removed and this term is easily implied.

Even if the statute of frauds did apply to this case and the option agreement was not sufficient to satisfy its requirements, the city is estopped to assert it. The function of equitable estoppel is stated at 28 Am.Jur.2d, Estoppel and Waiver, §28, and it is submitted that its policy is applicable in the case at bar:

> The doctrine of estoppel is based upon the grounds of public policy, fair dealing, good faith, and justice, and its purpose is to forbid one to speak against his own act, representations, or commitments to the injury of one to whom they were directed and who reasonably relied thereon. The doctrine of estoppel springs from equitable principles and the equities in the case. It is designed to aid the law in the administration of justice where without its aid injustice might result.

Estoppel may be used to preclude a party from asserting the statute of frauds:

> It is universally conceded that the doctrine of equitable estoppel may be invoked to preclude a party to a contract from asserting the unenforceability of a contract by reason of the fact that it is not in writing as required by the statute of frauds. 73 Am.Jur. 2d, Statute of Frauds, §565.

In Mohler v. Park County School District, 32 Col.App. 388, 515 P.2d 112 (1973) the plaintiff was employed as superintendent of schools. At a meeting of the school board a resolution was passed to offer plaintiff a contract for the upcoming year. Plaintiff was present at the meeting and

thanked the board for their action, intending his thanks to operate as an acceptance. Plaintiff returned to school believing he was employed for the next school year. In the prior year he had accepted a verbal offer and his written contract was not executed until after the school year began. At a subsequent meeting the school board rescinded the resolution to reemploy plaintiff and plaintiff instituted this action for breach of his alleged employment contract. The court held there was sufficient evidence to support findings that there had been detrimental reliance on the promise and held for plaintiff.

In Lloyd Crystal Post No. 20 v. Jefferson County, 72 Ida. 158, 237 P.2d 348 (1951) the city and Legion Post entered into an agreement whereby the Legion Post was to convey the property to the city and the city would obtain federal financial assistance to repair and remodel the building thereon. The city would then reconvey the property back to the Legion Post when certain mortgages were paid. The agreement was performed and the city quit claimed the property back to the Legion Post pursuant to resolution of the city council. However, respondents alleged that the reconveyance was invalid because it was not done in compliance with an Idaho law requiring enactment of an ordinance

and the holding of an election after notice in which a majority of the electors voted in favor of the reconveyance. The court distinguished between contracts absolutely prohibited by statute and contracts which are within the corporate power but which, in the making thereof, some irregularity occurs. The court classified the case as within the latter category and held the post received good title and the city was estopped from denying the validity of the reconveyance.

In Studer Construction Company v. Rural Special Improvement District No. 208, 148 Mont. 200, 418 P.2d 865 (1966) plaintiff was awarded a contract for construction of a sewer. On completion the work was okehed by the board of commissioners but the city of Billings contended the sewer was inadequate. The controversy between the board and city was resolved by an agreement whereby the commissioners agreed to pay for additional work on portions of the sewer. When the work was done the district refused to pay for the entire cost on the basis the cost of improvement including extras was over the approximate estimate and the contractor brought an action for breach of contract. The court ruled the commissioners were estopped from asserting the cost of improvement including the extras was over the approximate cost and held for the contractor.

In McDowell v. Cagle, 205 Okla. 554, 240 P.2d 783 (1952), a lessor and lessees had an agreement whereby they were to share the harvest of alfalfa on the premises. When the lessees began harvesting, the lessor pursuaded them to postpone doing so until after the expiration of the lease since the alfalfa would later be more valuable as a seed crop than as hay.

The lessor argued that for various reasons the oral extension of the lease did not constitute a contract. The court, estopping the lessor to rely on defects in the oral agreement, found that the lessees had relied on the oral agreement and changed their position to their detriment.

This court in Grover v. Garn, 23 Utah 2d 441, 464 P.2d 598 (1970), announced adherence to the following definition of estoppel set forth in Blacks Law Dictionary:

> "An estoppel by the conduct or admin-
> isions of a party * * * it is, and always
> was, a familiar principle in the law of con-
> tracts. It lies at the foundation of morals
> and is a cardinal point in the exposition
> of promises, that one shall be bound by the
> state of facts which he has induced another
> to act upon."

The case at bar is brought within the doctrine of equitable estoppel by reason of the city's unconscionable act of inducing Gibbons and Reed Company to believe it had an option

for materials and to prepare its bid and enter into a contract with the commission on the basis of that belief. The city knew Gibbons and Reed Company was relying on the option agreement in computing its bid. The discussions between Mike Gibbons and the Assistant City Engineer were reported to the City Engineer; and regardless of whether the Assistant City Engineer could contract for the city, the notice and knowledge given to him is imputed to the city. See 3 Am.Jur.2d, Agency, §273 et seq..

POINT III

RESPONDENTS ROBIN AND HARDY SCALES COMPANY HAVE SUBMITTED THEMSELVES TO THE JURISDICTION OF UTAH COURTS.

In 1969, the Utah State Legislature enacted 78-27-22 et seq. Utah Code Annotated 1953, hereinafter called the "Long-arm Statute", which provides for the exercise by Utah courts of in personam jurisdiction over non-resident defendants. The legislative purpose in enacting this statute is set forth in 78-27-22 as follows:

> It is declared, as a matter of legislative determination, that the public interest demands the state provide its citizens with an effective means of redress against non-resident persons, who through certain significant minimal contact with this state, incur obligations to citizens entitled to the state's protection. This legislative action is deemed necessary because of technological progress which has substantially increased the flow of commerce between the

several states resulting in increased interaction between persons of this state and persons of other states.

The provisions of this act, to insure maximum protection to citizens of this state, should be applied so as to assert jurisdiction over non-resident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment of the United States Constitution. [Emphasis added].

The acts whereby a non-resident submits himself to the jurisdiction of the Utah courts are outlined in 78-27-24 Utah Code Annotated 1953:

"Any person, notwithstanding section 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising:

"(1) The transaction of any business within this state;

"(2) . . .

"(3) The causing of any injury within this state, whether tortious or by breach of warranty;

"(4) The ownership, use or possession of any real estate situated in this state;

* * *"

Respondents Robin and Hardy Scales have submitted themselves to the jurisdiction of the Utah courts under each of the above cited subsections.

The initial basis whereby respondents Robin and Hardy Scales have submitted themselves to the jurisdiction of Utah courts is the "transaction of business within this state." This term is defined in 78-27-23 as follows:

> "As used in this act:
>
> * * *
>
> "(2) The words 'transaction of business within this state' mean activities of a non-resident person, his agent, or representatives in this state which affect persons or businesses within the State of Utah."

The language of 78-27-24(1) together with the definition given "transaction of business within this state" in 78-27-23(2) would, without more, indicate jurisdiction could be exercised over non-residents when such non-residents performed virtually any act within this state. While this broad reading of the statutory language is limited by the due process requirements of the Fourteenth Amendment as announced by the United States Supreme Court in opinions such as International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154 (1945), McGee v. International Life Insurance Co., 355 U.S. 220, 78 S.Ct. 199 (1959) and Hansen v. Denkla, 357 U.S. 235, 78 S.Ct. 1228 (1958), the requirements of these cases are satisfied in the case at bar.

In Hill v. Zale Corporation, 25 Utah 2d 357, 482 P.2d

332 (1971), plaintiff, a Utah citizen, brought an action against Zale, a Texas corporation, to recover wages, an incentive award, vacation pay and moving expenses allegedly owed him for services rendered to defendant in Alaska. Service of process was made upon one Hankin, an assistant vice-president and regional manager of the defendant corporation. Zale moved to dismiss the action on the ground that there had been no proper service of summons upon the defendant. The district court granted the motion and plaintiff appealed.

Remanding the case, the Utah Supreme Court commented upon the definition given the term "transaction of business" by 78-27-23(2) as follows:

> "It is appreciated that the language just quoted is necessarily a broad-sounding generality; and it must be so interpreted and applied as to confirm with basic concepts of fairness and due process of law. This mandates that a foreign corporation should not be subjected to undue difficulties from lawsuits merely because its products are distributed in this state or may be purchased and sold by others therein. On the other hand, when a foreign corporation is permitted to enjoy the advantages of having activities carried on within a state to further its business interests under the protection of its laws, it is only fair and reasonable that its citizens have some practical means of redress if grievances arise." 482 P.2d 332 at 333, 334. [Emphasis added].

In Rudd v. Crown International, 26 Utah 2d 263, 488

P.2d 298 (1971), this court upheld jurisdiction over a Nevada corporation and indicated that the courts might have jurisdiction on the basis of minimal contracts even without the Long-Arm Statute.

It is evident from the decisions of the Utah Supreme Court in Hill v. Zale Corporation and Rudd v. Crown International, supra., that when a non-resident corporation purposely carries on economic activities within the State of Utah and avails itself of the protection of the laws of Utah, then the non-resident corporation has submitted itself to the jurisdiction of Utah courts. In the instant case, Hardy Scales was conducting its business in Utah, and Robin and Hardy Scales negotiated for and entered into a contract for the sale of real property located in Utah with representatives of a municipal corporation located in Utah, and have engaged in activities in Utah having a pronounced effect on the business of a corporation domiciled and doing business in Utah. Except for the testimony of Robin and of the representatives of Hardy Scales, all evidence and witnesses relating to this matter are located in Utah. In view of the decisions of the United States Supreme Court and the Supreme Court of Utah, it is clear that Utah courts have jurisdiction over respondents Robin and Hardy Scales and should exercise that jurisdiction.

As a second ground for jurisdiction under the Utah Long-Arm Statute the respondents Robin and Hardy Scales committed a tortious injury within this state by intentionally interfering with the contract between appellant and the Utah State Road Commission. As a result of the tortious conduct of respondents Robin and Hardy Scales, Gibbons and Reed Company was unable to remove roadbuilding materials from property located in Ogden City and was, thereby, injured. Appellant's injury arises directly from the tortious conduct of Robin and Hardy Scales which falls clearly within the language of 78-27-24(3) Utah Code Annotated 1953.

The final ground of jurisdiction arises directly from the ownership and use by respondents Robin and Hardy Scales of real property located in Utah and falls within the provisions of 78-27-24(4). The real property located in Ogden, Utah, purchased by respondents Robin and Hardy Scales, was subject to the right of appellant to enter upon said property and remove therefrom roadbuilding materials. Respondents Robin and Hardy Scales have refused, and continue to refuse, to allow appellant to enter upon this real property and remove roadbuilding materials.

Respondents Robin and Hardy Scales argue that Gibbons and Reed Company has failed to plead facts enumerated in the Utah Long-Arm Statute which would vest the Utah court

with jurisdiction. Because of this failure it is asserted appellant never obtained jurisdiction over respondents Robin and Hardy Scales.

A district court complaint served under the Long-Arm Statute need not allege jurisdictional acts. It is provided in 78-3-3 Utah Code Annotated 1953:

> The district court shall have original jurisdiction in all matters civil and criminal, not excepted in the constitution and not prohibited by law; * * *

Rule 8(a), Utah Rules of Civil Procedure, provides:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim or third party shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) the demand for judgment for relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

As district courts in Utah are courts of general jurisdiction, claims for relief in actions in such courts do not require jurisdictional allegations.

This question was recently considered by the Nevada Supreme Court in Certain-Teed Products Corporation v. Second Judicial District, 87 Nev. 18, 479 P.2d 781 (1971). Nevada has adopted a long-arm statute virtually identical to that adopted in Utah and, like Utah, Nevada has adopted, with some modification, the Federal Rules of Civil Procedure.

In Certain-Teed, the petitioner moved to quash service of process for want of jurisdiction and because service was not made upon an authorized person. Petitioner was a foreign corporation not qualified to do business in Nevada but had supplied building materials for construction of a warehouse. The court held that, as plaintiff had failed to submit competent proof of the capacity of petitioner's chief legal counsellor to receive service of process, the service should have been quashed. The court then stated:

> "The petitioner next contends that neither the amended complaint nor the affidavit which was filed in support of the order authorizing service of process outside the State of Nevada contains a sufficient statement of facts to warrant service of process or to confer jurisdiction on the trial court. However, neither NRS 14.065 [the Nevada long-arm statute] nor NRCP 4(d)(1) requires an affidavit or order as a prerequisite to serve a process. The amended complaint does state a claim for relief against the petitioner within the framework of NRS 14.065 when tested by the rules generally applicable to pleadings. NRCP 8(a). A more detailed statement of facts is not required and a failure to allege that the contract was made in Nevada is not essential. The pleading is adequate to place a claim for relief within NRS 14.065(2)(a).

CONCLUSION

The activities of Ogden City complained of by appellant arose from the exercise of a proprietary function. In addition, the first item of appellant's claim accrued prior to

July 1, 1966, the effective date of the Utah Governmental Immunity Act. For both of these reasons, appellant's claims are not governed by the provisions of that act. Under the applicable statute, 10-7-77 Utah Code Annotated 1953, appellant's claim was timely made as it was filed within one year after the last item of the account accrued.

Appellant's claim is not barred by the statute of frauds, since the option agreement is not covered by the statute of frauds. Even if it were, the option is sufficiently certain and the city is estopped to assert this defense.

Respondents Robin and Hardy Scales have purposely engaged in economic activities within this state and have availed themselves of the benefit and protection of Utah law. They are subject to the jurisdiction of Utah's court.

Respectfully submitted,

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