

1986

Audrey Forsman v. George Forsman and Ronald
Flinders; Utah Department of Public Safety,
Narcotic and Liquor Law Enforcement Division v.
George Leland Forsman : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

860430

IN THE SUPREME COURT OF THE STATE OF UTAH

AUDREY FORSMAN, :

Plaintiff/Appellant, :

-v- :

GEORGE FORSMAN, :

RONALD FLINDERS and :

DOES I through X, :

Defendants/Respondents, :

UTAH DEPARTMENT OF PUBLIC :

SAFETY, NARCOTIC & LIQUOR :

LAW ENFORCEMENT DIVISION, :

Plaintiff, :

Case No. 860430

-v- :

GEORGE LELAND FORSMAN, :

Defendant/Cross-Claimant. :

RESPONDENT'S BRIEF

APPEAL FROM AN ORDER GRANTING SUMMARY JUDGMENT
TO RESPONDENT RONALD FLINDERS IN THE THIRD
JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH, THE HONORABLE DEAN E.
CONDER, PRESIDING.

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JAN 12 1987

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-v- :

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DOES I through X, :
Defendants/Respondents, :

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STATEMENT OF THE ISSUE

1. Whether the lower court properly granted summary judgment in favor of the State on grounds of governmental immunity where plaintiff failed to file the statutory notice of claim without allowing the issue of estoppel to go before a trier of fact.

IN THE SUPREME COURT OF THE STATE OF UTAH

AUDREY FORSMAN, :
Plaintiff/Appellant, :

-v- :

GEORGE FORSMAN, :
RONALD FLINDERS and :
DOES I through X, :
Defendants/Respondents, :

UTAH DEPARTMENT OF PUBLIC :
SAFETY, NARCOTIC & LIQUOR :
LAW ENFORCEMENT DIVISION, :
Plaintiff, :

Case No. 860430

-v- :

GEORGE LELAND FORSMAN, :
Defendant/Cross-Claimant. :

STATEMENT OF THE CASE

Plaintiff was injured in an automobile accident and brought this action against defendants for negligence. The case was thereafter consolidated with an action filed by the Department of Public Safety against plaintiff's husband for damages to the Department's vehicle occurring in the same accident. Defendant Flinders was employed by and drove the vehicle owned by the Department. Defendant Forsman drove the vehicle in which plaintiff was a passenger.

On October 31, 1985, the trial court granted a summary judgment in favor of defendant Flinders because plaintiff failed to file the statutory notice of claim without which her claim was

barred by governmental immunity. The final order was entered on June 26, 1986. An order granting Express Determination and Express Direction was entered on July 23, 1986 and plaintiff filed a notice of appeal on July 25, 1986.

SUMMARY OF ARGUMENT

Plaintiff's claim is barred by her failure to file a timely and proper notice of claim within the statutory time period. Defendant is not estopped from claiming protection of the statute under the circumstances of this case where he made no false representations and no attempt was made by the State to lull plaintiff into a false sense of security or otherwise avoid liability.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO DEFENDANT FLINDERS, A STATE EMPLOYEE, UNDER THE GOVERNMENTAL IMMUNITY ACT.

Plaintiff argues that the State should not have been granted a summary judgment on the basis of the Governmental Immunity Act but that plaintiff should have been allowed to present evidence of estoppel at trial. Under the circumstances of this case, plaintiff's claim is meritless.

This court recently stated that

Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c); Gadd v. Olson, Utah, 685 P.2d 1041 (1984). Under the pertinent

standard of review, we view the evidence in a light most favorable to the losing party. Draper Bank and Trust Co. v. Lawson, Utah, 675 P.2d 1174 (1983), and cases there cited.

Cox v. Utah Mortg. and Loan Corp., 716 P.2d 783, 785 (Utah 1986).

Even viewing the evidence in the light most favorable to plaintiff, the trial court's action was proper.

There was uncontroverted evidence that plaintiff's investigator asked the State Division of Personnel Management whether Mr. Flinders was a state employee and that someone at the Division told the investigator that Mr. Flinders was not an employee (R. 208). There was also uncontroverted evidence that Mr. Flinders was at all pertinent times a state employee and that he was employed by the Department of Public Safety at 4501 S. 2700 W. in Salt lake City (R. 208). Mr. Flinders provided this address on the accident report form (R. 208). He also listed the State of Utah as being located at that address and as the insurance carrier (R. 39). In spite of these facts, plaintiff did not file a notice of claim with any representative of the State.

Utah Code Ann. § 63-30-12 (Rep. Vol. 1986), bars claims against the State unless a notice of claim is filed with the state agency concerned and the attorney general within one year. This language is an unequivocal bar to further action absent compliance with its provisions. c.f. Stahl v. Utah Transit Authority, 618 P.2d 480, 482 (Utah 1980). Moreover, the right to maintain an action against the State or its employee is a purely statutory right. See Utah Code Ann. § 63-30-7 (Rep. Vol. 1986).
*Where a right is purely statutory and is granted upon

conditions, one who seeks to enforce the right must by allegation and proof bring himself within the conditions." Cornwall v. Larsen, 571 P.2d 925, 926 (Utah 1977), quoting Hamilton v. Salt Lake City, 99 Utah 362, 106 P.2d 1028 (1940). See also Scarborough v. Granite School Dist., 531 P.2d 480 (Utah 1975).

Plaintiff does not contend that she in any form complied with the statutory notice requirement. She argues only that the State should be estopped from asserting the protection of the statute of limitations because an unrelated state employee told her that Flinders was not a state employee. The circumstances of this case are distinguishable from the cases cited by plaintiff in support of her position. In this case, there was no timely written notice given to any state agency as had been done in Rice v. Granite School District, 23 Utah 2d 22, 456 P.2d 159 (1969). See Scarborough, 531 P.2d at 482. Nor did anyone representing the State assure plaintiff that her case would be settled and thereby lull her into a sense of false security as in Rice. Moreover, plaintiff was represented by counsel who presumably knew the consequences of failing to file a proper notice of claim should Mr. Flinders turn out to be a state employee as he had represented. See Cornwall, 571 P.2d at 927. Nothing prevented plaintiff from protecting her right to maintain an action by filing a timely and proper notice of claim with the State alleging that Mr. Flinders was a state employee as he represented. It would then have fallen to the State to admit or deny such a claim. If Mr. Flinders was not an employee, no harm could have resulted from filing a notice of claim based upon the

accident report form and yet, plaintiff's claim would have been protected in the event Flinders told the truth about his employment.

Certainly, this case is not similar to Myers v. McDonald, 635 P.2d 84 (Utah 1981) where the plaintiff did not even know a wrongful death cause of action existed against anyone because they did not even know about the death of their ward. In that case, the defendant sought to prevent inquiry into the ward's death to avoid discovery of the decedent's identity and actually made false statements about the victim's identity. Here, there is no evidence that the State instructed its unidentified employee to mislead anyone about the identity of persons who work for the State to avoid liability in this case. In fact, there was unrefuted evidence of the State's policy to respond truthfully to inquiries about whether an individual is a state employee (R. 150, 208). Although, they would not disclose that the person worked as a narcotics agent. Nor was there evidence that the unidentified State employee acted to conceal the truth from plaintiff purposely to avoid any liability of the State for plaintiff's injuries.

In this case, unlike Vincent v. Salt Lake County, 583 P.2d 105 (Utah 1978), plaintiff could not have reasonably relied upon the unknown state employee's information that Flinders did not work for the State when Flinders himself reported that he did and when the steps necessary to perfect a possible claim were so easily accomplished and failure to perfect resulted in a permanent bar to her claim. Moreover, when plaintiff discovered

her error, she did not attempt to correct the error by giving notice of her claim within one year from the alleged discovery of the State's misrepresentation as did the plaintiff in Vincent.

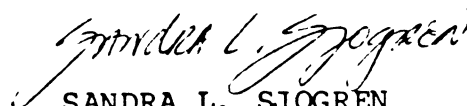
Because plaintiff in this case does not fit the mold of plaintiffs who have successfully claimed estoppel in governmental immunity cases, and is more like those who have not, the lower court properly granted summary judgment. There was no genuine issue of material fact on the estoppel issue that warranted a trial on the merits. This Court should, therefore, affirm the trial court's decision.

CONCLUSION

For the reasons stated above, defendant Flinders requests this Court to affirm the lower court's decision to grant him summary judgment.

DATED this 12th day of January, 1987.

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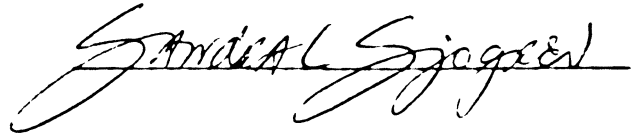
CERTIFICATE OF SERVICE

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed to the following:

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this 12th day of January, 1987.

A handwritten signature in cursive script, reading "Gerald Sjogren", written over a horizontal line.