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GALE, HAVES AND LEMA; DAVID B. HAVAS; ATTORNEY FOR DEFENDANT.
SNOW, CHRISTENSEN AND MARTINEAU; MERLIN B. LYBBERT; KIM R. WILSON.

Recommended Citation
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IN THE SUPREME COURT OF THE

STATE OF UTAH

NATRONE WARD SEARS,

Plaintiff,

vs.

DWAIN THOMAS SOUTHWORTH,

Defendant and Third-Party Plaintiff-Appellant,

vs.

THE STATE OF UTAH DEPARTMENT OF HIGHWAYS,

Third-Party Defendant-Respondent.

Case No. 14669

BRIEF OF RESPONDENT THE STATE OF UTAH DEPARTMENT OF HIGHWAYS

Appeal from the Judgment of the Second Judicial District Court in and for Weber County, State of Utah, the Honorable Ronald O. Hyde, Judge

GALE, HAVAS & LEMA
DAVID B. HAVAS
2568 Washington Boulevard
Ogden, Utah 84401
Attorneys for Defendant and Third-Party Plaintiff-Appellant

SNOW, CHRISTENSEN & MARTINEAU
MERLIN B. LYBBERT
KIM R. WILSON
700 Continental Bank Building
Salt Lake City, Utah 84101
Attorneys for Third-Party Defendant-Respondent

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DAVID B. HAVAS
2568 Washington Boulevard
Ogden, Utah 84401
Attorneys for Defendant and Third-Party Plaintiff-Appellant

SNOW, CHRISTENSEN & MARTINEAU
MERLIN B. LYBBERT
KIM R. WILSON
700 Continental Bank Building
Salt Lake City, Utah 84101
Attorneys for Third-Party Defendant-Respondent

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Party Plaintiff-Appellant,

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vs.

THE STATE OF UTAH
DEPARTMENT OF HIGHWAYS,

Third-Party
Defendant-Respondent.

BRIEF OF RESPONDENT
THE STATE OF UTAH DEPARTMENT OF HIGHWAYS

STATEMENT OF THE KIND OF CASE

This is a third-party action to recover for personal injuries by Dwain Thomas Southworth (hereinafter called Southworth) against The State of Utah Department of Highways (hereinafter called State) arising out of an automobile accident.

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DISPOSITION IN LOWER COURT

The lower court granted summary judgment in favor of the State dismissing the Third-Party Complaint.

RELIEF SOUGHT ON APPEAL

The State seeks affirmance of the judgment of the lower court.

STATEMENT OF FACTS

Respondent agrees with the Statement of Facts set forth in Appellant's Brief.

ARGUMENT

POINT I:

THE MAINTENANCE OF A HIGHWAY IS A GOVERNMENTAL FUNCTION AND THE DOCTRINE OF SOVEREIGN IMMUNITY AND THE UTAH GOVERNMENTAL IMMUNITY ACT ARE APPLICABLE TO ACTIONS ARISING OUT OF SUCH MAINTENANCE.

Section 63-30-3, Utah Code Annotated, 1953, as amended, 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.

If this action arises out of the exercise or discharge of a governmental function, Appellant must comply with the

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notice provisions of the Utah Governmental Immunity Act in order to maintain his action against the State. Appellant, in his Third-Party Complaint, alleges that at the time of the accident, the State of Utah Department of Highways was "engaged in road repairs or maintenance" and in so doing breached a legal duty to Appellant causing his injuries. (R. 120-123)

This Court has consistently held that the repair and maintenance of roads and highways is a governmental function.

In Niblock v. Salt Lake City, 100 Utah 573, 111 P.2d 800, 802 (1941), this Court stated:

> This Court is committed to the doctrine that the duty to repair or construct streets within its corporate limits is a governmental one and that in the absence of a statute no liability devolves on a municipality for the defective condition of its streets.

The later case of Cobia v. Roy City, 12 Utah 2d 375, 366 P.2d 986 (1961) characterizes "repairing streets" as a governmental function and further outlines the test for classifying governmental or public (proprietary) functions as follows:

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> The most general test of governmental function relates to the nature of the activity. It must be something done or furnished for the general public good, that is, of a 'public or governmental character', such as the maintenance and operation of public schools, hospitals, public charities, public parks or recreational facilities. In addition to the above mentioned general test the supplemental ones are also applied: (a) whether there is special pecuniary benefit or profit to the city and (b) whether the activity is of such a nature as to be in real competition with free enterprise.

12 Utah 2d 375, 366 P.2d 986 at 988.

The construction and maintenance of a highway is certainly for the public good. It neither inures to the special pecuniary benefit or profit of the State nor places the State in competition with free enterprise. The Utah position is clearly that the construction and maintenance of a highway is a governmental function. To classify it as proprietary would be to deny the long standing judicial pronouncements of this Court and is not supported by facts or sound reasoning.

This case arose out of the exercise of a governmental function and the Appellant is required to comply with the notice requirements of the Utah Governmental Immunity Act as a condition to bringing his action. (Section 63-30-12, U.C.A. 1953, as amended) This he has failed to do and has so admitted in the Statement of Facts in Appellant's Brief.

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POINT II:

APPELLANT FAILED TO GIVE TIMELY NOTICE OF HIS CLAIM TO THE STATE OF UTAH AND HIS CLAIM FOR RELIEF IS THEREBY BARRED BY SECTION 63-30-12, UTAH CODE ANNOTATED 1953, AS AMENDED.

Section 63-30-12, Utah Code Annotated 1953, as amended, provides:

> A claim against the state or any agency thereof as defined herein shall be forever barred unless notice thereof is filed with the attorney general of the state of Utah and the agency concerned within one year after the cause of action arises. (emphasis added)

The cause of action for Appellant's claimed injuries and loss arose on the date of the accident, May 10, 1973. His notice of claim was filed nearly two years later on April 5, 1975.

This Court has consistently held that actions will be barred if a notice of claim is not filed strictly within the time limit prescribed by the Utah Governmental Immunity Act.

In *Varoz v. Sevy*, 29 Utah 2d 158, 506 P.2d 435 (1973), an automobile failed to negotiate a turn and the occupants were killed. A suit was brought against Salt Lake County, alleging that the warning signs and the guard rail on the

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curve were inadequate. The plaintiff failed to file his notice of claim with Salt Lake County until after the ninety (90) day notice period had run as provided in a companion statute, Section 63-30-13. The plaintiff contended that since the county had actual knowledge of the circumstances surrounding the accident, notice of claim was unnecessary. In affirming the trial court's dismissal, this Court said:

> From the language of the statute it is quite clear that the legislature intended to make the filing of a timely notice of claim prerequisite to maintaining an action...
>
> Actual knowledge of the circumstances which resulted in the death of the plaintiff's mother by officials of the county does not dispense with the necessity of filing a timely claim.

29 Utah 2d 158, 506 P.2d 435 at 436.

Appellant contends that even though a formal notice of claim was not filed within the one year period, a written investigating officer's report of the traffic accident was filed with an agency of the state government within one year of the accident. He contends that the notice of claim requirement under the Governmental Immunity Act was satisfied by the filing of the accident report.

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In Scarborough v. Granite School District, __ Utah 2d, _______, 531 P.2d 480 (1975), the plaintiff failed to timely file a formal notice of claim. In an opinion affirming a dismissal of the action, this Court set forth the essential requirements of a notice of claim as follows:

> We have consistently held that where a cause of action is based upon a statute, full compliance with its requirements is a condition precedent to the right to maintain a suit. In order to so meet the requirements of the statute quoted above and fulfill its intended purpose, the "filing" of a claim should include these essentials: that it be in writing; that it contain a brief statement of the facts and the nature of the claim asserted; that it be subscribed by the party required to give it and who intends to rely on it; that it be directed to and delivered to some one authorized to or responsible for receiving it; and that this be done within the prescribed time.

531 P.2d 480 at 482.

The investigating officer's report routinely filed with intra-governmental agencies does not satisfy the statutory notice requirements. Most importantly, it is not a notice of claim and is not in a form calculated to give notice of plaintiff's intention, if any, to claim against the entity. To be effective the claim must contain the essential elements noted above and be filed and served upon the governmental agencies mentioned in the statute by or on behalf of the claimant.

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As the California Supreme Court said in Fidelity and Deposit Company v. Claude Fisher Company, 161 Cal. App. 2d, 431, 327 P.2d 78, 81 (1958):

> Statutes of limitations and the like, prescribing definite periods of time within which actions may be brought or certain steps taken are, of necessity, adamant rather than flexible in nature. Such statutes are upheld and enforced regardless of personal hardship, and they are favored by the courts.

Cited with approval in Roosendall Construction and Mining Corp. v. Holman, 28 Utah 2d, 396, 503 P.2d 446 at 448 (1972). In the latter case this Court held a complaint "fatally defective" because compliance with the statutory notice requirements was not alleged.

Appellant contends that the one year period within which notice is to be given does not begin to run until discovery of negligence on the part of the State. Section 63-30-12, Utah Code Annotated, expressly provides that a claim must be filed "within one year after the cause of action arises." Appellant's cause of action arose on May 10, 1973, at the instant the accident occurred, and the one year period began to run at that time.

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In Varoz v. Sevy, supra, plaintiff mistakenly filed a notice of claim with the State of Utah when Salt Lake County was the entity responsible for the construction and maintenance of the roadway where the accident occurred. When the plaintiff finally discovered that his claim should have been against Salt Lake County, the time for filing notice had expired. Even so, this Supreme Court upheld a dismissal of the action for failure to file proper notice. The time period in Varoz ran from the date of the injury and not from the date of discovery of the claimed wrongdoing by the governmental entity. The one year period within which Appellant in this action was to have filed his notice of claim began to run on May 10, 1973, the date of the accident.

POINT III:

THE NOTICE PROVISIONS OF THE UTAH GOVERNMENTAL IMMUNITY ACT ARE NOT VIOLATIVE OF THE EQUAL PROTECTION GUARANTIES OF THE CONSTITUTIONS OF THE STATE OF UTAH AND THE UNITED STATES.

The recent case of Crowder v. Salt Lake County, ___ Utah 2d ____, 552 P.2d 646 (1976), is dispositive of this issue. This Supreme Court was presented with the question of whether different time periods within which notices of claim must be filed with city, county and state governments

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were violative of equal protection guaranties. In upholding the constitutionality of such notice provisions, this Court said:

> While no precise formula has been enunciated, it is generally held that the legislature has a wide discretion in enacting laws which affect one group of citizens differently than other groups. The constitutional safeguard of equal protection is offended only if the classification rests upon a ground not relative to the State's objective. The legislature is presumed to have acted within their constitutional authority even though inequality results.

552 P.2d 646 at 647.

This Court has passed upon the question of the rationale of notice provisions and has found them to be relative to the state's legislative objectives. As such they do not offend equal protection guaranties of the federal or state constitutions.

In the earlier case of Gallegos v. Midvale, 27 Utah 2d 27, 492 P.2d 1335 (1972), this Court also considered the question of whether notice provisions of the Utah Governmental Immunity Act violated equal protection guaranties of a minor claimant. There, as in the case at bar, the claimant had failed to file a timely notice of claim.

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This Supreme Court held that the notice provisions of the Act did not deprive the claimant of equal protection rights and affirmed a dismissal of the suit.

These decisions of this Supreme Court are well reasoned and well founded in law. Both this Court and the United States Supreme Court have consistently held that legislation may discriminate between classes of individuals if the classification is reasonable and has some rational relation to a legitimate legislative objective. e.g., San Antonio Independent School v. Rodriguez, 411 U.S. 1, 40 (1973); State v. Warwick, 11 Utah 2d 116, 355 P.2d 703 (1960); Wein v. Crockett, 115 Utah 301, 195 P.2d 222 (1948).

In recent years the courts have applied a two-tiered approach to analysis of equal protection claims. If the classification is based on a "suspect criterion", or affects a "fundamental interest", the statute will be scrutinized closely and will not be upheld unless necessary for a "compelling state interest". Such areas of suspect criteria and fundamental rights are very limited.

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Suspect criteria include race, Loving v. Virginia, 388 U.S. 1, 9 (1967); alienage, Graham v. Richardson, 403 U.S. 365, 371-72 (1971); and national origin, Korematsu v. United States, 323 U.S. 214, 216 (1944).

Fundamental rights include the right to vote, Kramer v. Union Free School District No. 15, 395 U.S. 621, 626-27 (1969), the right to travel, Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969), the right to procreate, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and the right to marry, Boddie v. Connecticut, 401 U.S. 371 (1971).

Conversely, if the classification is not "suspect" and the right affected is not "fundamental", all doubts will be resolved in favor of the legislation and it will be upheld unless the classification is wholly irrelevant to the purpose of the statute. As the United States Supreme Court held in McCowan v. Maryland, 366 U.S. 420, 425-26 (1961):

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement

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> of the State's objective. <u>State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.</u> (emphasis added)

The Court should, therefore, look to the purposes of the notice statute. If there exist purposes which would justify a notice requirement for claims against governmental entities, the statute should be upheld.

There are numerous purposes for notice statutes. Among them are the following:

> 1. A requirement of notice provides the governmental entity with the opportunity to settle meritorious claims before suit is instituted, thus avoiding needless litigation and legal expense.
>
> 2. A requirement of notice provides the governmental entity with an opportunity to investigate claims while the evidence is still fresh and thereby to avoid stale and fraudulent claims.
>
> 3. A requirement of notice allows the governmental entity to make prompt repairs of dangerous defects or adjustment of dangerous practices thereby avoiding other injuries and resultant suits.
>
> 4. A requirement of notice facilitates budgeting and tax planning.
>
> 5. Notice requirements generally facilitate the orderly and expeditious administration of public business.

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Some of these purposes were discussed by this Court in Gallegos v. Midvale City, supra, where this Court pointed out the problems in not requiring notice:

> The unsatisfactory aspects of such a situation: Deprivation of the city of an opportunity to make a prompt investigation of the particular case, and if any defect is found to exist to remedy it; the possibility that changes may have occurred in the material circumstances; and the carry-over to subsequent city administrations of responsibility for accidents that may have previously occurred, are sufficiently obvious not to require further elaboration.

Many of the purposes of the notice provisions are set forth in the dissent in Scarborough v. Granite School District, supra, as follows:

> The purposes of statutes requiring the presentation of claims to political subdivisions, prior to filing a suit, is in furtherance of public policy to prevent unnecessary litigation. The purpose of notice provisions is to afford the political subdivision an opportunity to investigate the claim while the matter is of recent memory, witnesses are yet available, conditions have not materially changed and to determine if there is liability, and if there is, the extent of it. These salutary provisions do serve to prevent needless litigation.

The Appellant cites cases from three state courts which have overturned notice statutes. The cases of these courts, share a common error. Each assumes that the purpose

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of their respective legislative schemes is to put governments on an equal footing with private tort-feasors. For example in Hunter v. North Mason High School, 539 P.2d 845, 850 (1975) the Washington Court said:

> The state's waiver of tort immunity is unbridled by procedural conditions pertaining to the consent to be sued.

And in Turner v. Stagg, 510 P.2d 879, 882 (1973) the Nevada Court said:

> The stated object of NRS 41.031 is to waive the immunity of governmental units and agencies from liability for injuries caused by their negligent conduct, thus putting them on an equal footing with private tort-feasors.

In Reich v. State Highway Dept., 194 N.W. 2d 700, 702, the Michigan Court said:

> [C]ontrary to the legislature's intention to place victims of negligent conduct on an equal footing, the notice requirement...bars the actions of victims of governmental negligence after only 60 days.

The error of this analysis is obvious. If the legislature had intended to place governmental tort-feasors and private tort-feasors on an exactly equal basis, it would not have adopted the notice requirement in the first place.

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The Idaho Supreme Court recently considered the question of whether notice statutes violated equal protection guaranties. The Court commented on the cases cited by Appellant herein as follows:

> We find the opinion in Reich to be highly conclusory without any consideration of the rationale for such notice statute, nor any real analysis of the equal protection problem. We are not persuaded by that authority.
>
> We find Turner v. Stagg, 510 P.2d 879 (Nev. 1973) to be equally unpersuasive...
>
> We believe the opinions of the Michigan and Nevada courts are contrary to the weight of authority. Most states have consistently rejected similar consitutional attacks.

Newlan v. State, 535 P.2d 1348, 1352 (Ida. 1975).

Other cases upholding notice requirements are Artukovich v. Astendorf, 131 P.2d 813 (Cal. 1942); and Lunday v. Vogelmann, 213 N.W. 2d 904 (Iowa 1973).

The notice provisions of the Governmental Immunity Act are reasonable and have a rational relation to legitimate legislative objectives. This Court has held that as such they are not violative of equal protection guaranties of the Constitutions of the State of Utah and the United States.

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POINT IV:

TO HOLD THAT NOTICE PROVISIONS OF THE UTAH GOVERNMENTAL IMMUNITY ACT ARE VIOLATIVE OF EQUAL PROTECTION GUARANTIES WOULD BE TO INVALIDATE THE ENTIRE ACT.

The doctrine of sovereign immunity predates the founding of the State of Utah, and the founding of the United States. See e.g., Black v. Rempublicam, 1 Yeates 140 (Pa. 1792).

This doctrine is part of the common law and has been consistently followed by the Utah Supreme Court. Holt v. Utah State Road Commission, 30 Utah 2d 4, 511 P.2d 1286 (1973); Hampton v. State, 21 Utah 2d 342, 445 P.2d 708 (1968); Springville Banking Co. v. Burton, 10 Utah 2d 100, 349 P.2d 157 (1960); Jopes v. Salt Lake County, 9 Utah 2d 297, 343 P.2d 728 (1959); State v. Tedesco, 4 Utah 2d 21, 286 P.2d 785 (1955); Hojorth v. Whittenburg, 121 Utah 324, 241 P.2d 907 (1952); Bingham v. Board of Education, 118 Utah 582, 223 P.2d 432 (1950); Campbell Building Co. v. State Road Commission, 95 Utah 242, 70 P.2d 857 (1937); State Road Commission v. Fourth District Court, 94 Utah 384, 78 P.2d 502 (1937); Wilkinson v. State, 42 Utah 483, 134 P. 626 (1913).

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Although frequently called upon to do so, the Utah Supreme Court has declined to alter this doctrine because to do so was a legislative matter. As this Court held in Hojorth v. Whittenburg, 121 Utah 324, 241 P.2d 907, 909 (1952):

> This phase of our law is well established and of long standing. If it is to be changed, that must come through the sovereign power of this commonwealth, the people, speaking through the Legislature.

In 1965 the legislature responded by enacting the Utah Governmental Immunity Act, Utah Code Ann. §63-30-1, *et seq*. (1967).

The Act waived governmental immunity subject to certain conditions or restrictions. Among them are limitations in amount of recovery, §63-30-34; limitations to certain types of actions, §63-30-5 through 10; the requirements of filing an undertaking, §63-30-19; and the requirement of filing a notice of claim §63-30-11 through 15.

Not only the notice provisions but also all of the other provisions set forth above place different restrictions on persons wronged by governmental tort-feasors as opposed to those wronged by private tort-feasors. It should be noted

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that if the analysis of the Reich, Hunter and Turner cases cited by Appellant is adopted, then any discrimination between governmental and private tort-feasors is impermissible and the entire Utah Governmental Immunity Act would be invalid. This Court would have to overrule a long line of cases upholding governmental immunity.

In Wilcox v. Salt Lake City, 26 Utah 2d 78, 484 P.2d 1200 (1971), this Court said:

> [P]laintiffs...seem to say that...we should judicially abolish the doctrine altogether as being archaic and doing so judicially to legislate our Governmental Immunity Act out of existence. This last contention we are not inclined to espouse, in spite of a claimed trend in that direction, noted by plaintiffs' adversions to scholarly papers written by eminent educators, and the judicial pronouncements of some sister states. (emphasis added)

Respondent submits that if this Court strikes down the notice provisions on constitutional grounds, it will have effectively legislated the Utah Governmental Immunity Act out of existence by judicial decree. To do so is contrary to the numerous decisions of this Court.

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CONCLUSION

The maintenance of a highway is a governmental function and the Utah Governmental Immunity Act is applicable to actions arising out of such maintenance. As a condition to bringing his suit, Appellant must have filed a timely notice of claim with the State. This he has failed to do and he may not now maintain an action against the State of Utah. Appellant is pleased to accept the right to sue under the Governmental Immunity Act, but seeks to excuse himself from complying with other provisions of the Act.

The notice provisions of the Utah Governmental Immunity Act are reasonable and have a rational relation to legitimate legislative objectives. As such they are not violative of equal protection guaranties of the Federal or State Constitutions. To so hold would be to invalidate the entire Utah Governmental Immunity Act.

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DATED this 11th day of November, 1976.

Respectfully submitted,

SNOW, CHRISTENSEN & MARTINEAU

By /s/
Merlin R. Lybbert

By /s/
Kim R. Wilson
700 Continental Bank Building
Salt Lake City, Utah 84101
Telephone: 521-9000

Attorneys for Third-Party
Defendant-Respondent

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CERTIFICATE OF MAILING

Mailed a true and correct copy of the foregoing Brief of Respondent to attorney David B. Havas, 2568 Washington Boulevard, Ogden, Utah 84401, postage prepaid, on this 11th day of November, 1976.

/s/
Marita O. Boam, Secretary

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