

1998

Joanna Banford and Amber Banford v. David Quinley, and Kaysville City Corporation, and Kaysville City Police Dept. : Reply Brief

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 980300-CA

JOANNA BANFORD and AMBER)
BANFORD, a minor, by and through her)
parent and natural guardian JOANNA)
BANFORD)

Plaintiffs and Appellants,)

v.)

DAVID QUINLEY, an individual, and)
KAYSVILLE CITY CORPORATION,)
a Utah political subdivision, and)
KAYSVILLE CITY POLICE DEPT.)

Defendants and Appellees.)

Case No.: 980300-CA

Priority No.:15

REPLY BRIEF OF APPELLANTS

APPEAL OF FINAL JUDGMENT OF THE SECOND JUDICIAL DISTRICT
COURT IN AND FOR DAVIS COUNTY, STATE OF UTAH
THE HONORABLE RODNEY PAGE PRESIDING

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FILED

Utah Court of Appeals

MAR 10 1999

Julia D'Alessandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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Larson v. Park City Corp.,
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B. Statutes

U.C.A. § 63-30-111,2,5

U.C.A. § 10-6-1575

U.C.A. § 10-3-1052

ARGUMENT

THE APPELLANT DID COMPLY WITH THE PROVISIONS OF THE UTAH GOVERNMENTAL IMMUNITY ACT.

A. The November 16, 1995, Letter to Dean Storey, Kaysville City Finance Director, Does Comply with § 63-30-11 (3)(a).

U.C.A. § 63-30-11 mandates the information required in a notice of claim:

- (3)(a) The notice of claim asserted shall set forth:
- (i) a brief statement of the facts
 - (ii) the nature of the claim asserted; and
 - (iii) the damages incurred by the claimant so far as they are known.

On November 16, 1995, Attorney Sondgeroth wrote and delivered to Dean Storey, the Kaysville City Finance Director, a letter which contained all the information required by Utah's Governmental Immunity Act. The letter specifically stated that appellants were involved in a motor vehicle accident with a police officer. It clearly stated that the accident was a result of gross negligence of the police officer and that the appellants' damages were in excess of \$750,000. The applies argue that merely because the appellants' November 16, 1995 letter does not contain the heading of Notice of Claim, it does not strictly comply with § 63-30-11(3)(a)(i)-(iii). The statute does not require a heading identifying it as a notice of claim. It would appear from appellee's argument, that without the heading "Notice of Claim," the defendant would be without the sufficient knowledge to carry out the intent to which the notice serves; "to afford the responsible public authorities an opportunity to pursue a proper and timely investigation of the merits of a claim and to arrive at a timely settlement, . . ." Brittain v. State By and Through Utah Dept. of Employment Sec., 882 P.2d 666, 671 (Utah App. 1994). Under

the specific facts of this case, that purpose was fulfilled. The city's insurance carrier was contacted, an investigation had been conducted and settlement negotiations had begun.

Therefore, the letter complies with § 63-30-11 (3) (a).

B. The November 16, 1995, Letter to Dean Storey, Kaysville City Finance Director, Does Comply with § 63-30-11 (3) (b).

U.C.A. § 63-30-11 (3)(b) states:

- (b) The notice of claim shall be:
 - (i) signed by the person making the claim or that person's agent, attorney, parent, or legal guardian; and
 - (ii) directed and delivered to the responsible governmental entity according to the requirements of Section 63-30-12 or 63-30-13.

The November 16, 1995 letter did contain the signature of Appellants' attorney.

The appellee argues that this letter was not in strict compliance of the § 63-30-11 because it was delivered to Dean Storey, the Kaysville City Finance Director, not the mayor or city council.

In support of the appellee's argument, it cites Larson v. Park City Corp. 955 P.2d 343, (Utah 1998). In Larson, the Utah Supreme Court identifies the Utah Municipal Code as the source used to define the controlling term "governing body" as provided in the Utah Governmental Immunity Act. Id. at 345. Pursuant to the Utah Municipal Code, the governing body of third class cities are to be a "council composed of six members one of whom shall be the mayor and the remaining five shall be councilmen." U.C.A. § 10-3-105 (1996) The appellees argue that this language alone is dispositive of the issue of strict compliance. Upon review of Utah's case law regarding the interpretation of governing body as used in the Utah Governmental Immunity Act, that is not the case.

Over the past five years, the Utah Court of Appeals and The Utah Supreme Court have had the opportunity to decide cases dealing with the Utah's Governmental Immunity Act and the issue of service upon the governing body. As a result, a general rule of strict compliance has been created but with exceptions. . In Bellonio v. Salt Lake City Corp., 911 P.2d 1294, 1297 (Utah App. 1996), the court recognized and stated that "Utah courts have typically required strict compliance with the notice requirements *except* in certain limited circumstances." (emphasis added).

In Bischel v. Merritt, 907 P.2d 275 (Utah App. 1995), the Court of Appeals addressed the situation where the notice of claim was delivered to the county attorney. In it's decision, the court held that although the notice was delivered to the county attorney, it was deemed sufficient to comply with the Act. In Bischel, the plaintiff was instructed by the Salt Lake County Commission and the county attorney to send her notice of claim to the county attorney, of which, she complied. Upon review, the court of appeals discussed thoroughly, the purpose and intent of the Governmental Immunity Act. It held that because the county attorney and the Commission had verified the apparent authority of the county attorney to receive the notice, the plaintiff's notice of claim was in compliance with the Act. Id. at 278.

The following year, the Court of Appeals again was presented with the issue of service upon the governing body in Bellonio. In this case, the plaintiff served notice on the Utah Attorney General, the Salt Lake City Attorney, the Airport Director and the Airport's Attorney. In reaching it's decision, the court stated that since multiple notices were sent, the plaintiff indicated an understanding that service upon the counsel for the

airport would not be sufficient. Id. at 1298. Additionally, the court stated that the counsel for the airport was never the agent, apparently or in fact, of the mayor or the city council. Id.

A few months later, the Court of Appeals decided Busch v. Salt Lake International Airport, 921 P.2d 470 (Utah App. 1996). In Busch, the plaintiff filed his notice of claim with the city recorder and the city attorney. In its decision, the court held that service upon these individuals, whose functions are very different from those of a governing body, was not compliant with the Governmental Immunity Act.

Finally, in 1998, the Supreme Court of Utah decided Larson. Again the issue before the court was service of notice upon the governing body. In Larson, the plaintiff served her notice upon the city recorder of Park City. Although the court states that proper service requires that notice be filed with the mayor or city council, pursuant to the Utah Municipal Code, the city recorder because of his significant relationship with the city council, is the proper person to which a notice of claim can be served. Id. at 346.

Based upon prior case law, the issue surrounding service of notice upon a governing body pursuant to the Governmental Immunity Act, is confusion at best. What has not been misleading is the intent and purpose behind the Act. As discussed in all the above mentioned cases, the courts have consistently held,

[t]he primary purpose of a notice of claim requirement is to afford the responsible public authorities an opportunity to pursue a proper and timely investigation of the merits of a claim and to arrive at a timely settlement, if appropriate, thereby avoiding the expenditure of public revenue for costly and unnecessary litigation.

Bischel, at 278.

The case at hand is comparable to the facts of Bischel and Larson. Upon receiving the letter of July 12, 1995, Dean Storey, the City Finance Director responded with a communication to appellants' attorney in which he held himself out as having the apparent authority as the city's representative. Upon review of the Utah Municipal Code, Section 10-6-157 the city finance director can be created by the governing body of third class cities, "to perform the financial duties and responsibilities of the city recorder." Thus, the city finance director's functions are so inextricably intertwined with the city council that it is reasonable to conclude that the apparent agency existed.


Although the general rule under the Utah Governmental Immunity Act is one of strict compliance, both the Utah Court of Appeals and The Utah Supreme Court have recognized exceptions to strict compliance. Under this case law, courts have been reluctant to bar a plaintiff's claim when the purpose behind the Governmental Immunity Act has been effectuated and but for inadequacies in the service of a notice of claim, the statute has otherwise been complied with. The November 16, 1995 letter fully complied with U.C.A. § 63-30-11 (3)(a). The letter also complies with U.C.A. § 63-30-11 (3)(b), in that it was signed by appellants' attorney and was served upon the Kaysville City Finance Director, a position created to serve similar functions as that of the city recorder.

CONCLUSION

For the reasons set forth above, this court should overrule defendant's/appellee's Motion to Dismiss for lack of jurisdiction.

DATED this 4 day March, 1999.

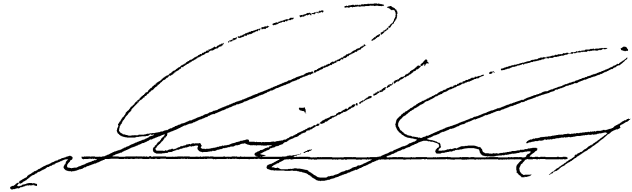
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By: 
Damian E. Davenport

CERTIFICATE OF MAILING

I hereby certify that APPELLANT'S REPLY BRIEF was mailed, first class, postage prepaid on the 9 day of March, 1999, to the following counsel of record:

Harry Souval
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant/Appellee
Newhouse Building
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145

A handwritten signature in black ink, appearing to be "Harry Souval", written over a horizontal line.

ADDENDUM

false imprisonment, false arrest, intentional trespass, abuse of process, interference with contract, mental anguish, or violation of civil

ial, suspension, or revocation of or l to issue, deny, suspend, or revoke rtificate, approval, order, or similar

ke an inspection or by making an nt inspection; or prosecution of any judicial or ding, even if malicious or without

tion by an employee whether or not ntional; assemblies, public demonstrations, il disturbances; f and assessment of taxes; f the Utah National Guard; ion of any person in any state prison, - other place of legal confinement; condition on publicly owned or con- dition existing in connection with an - mining operation, or any activity school and Institutional Trust Lands ie Division of Forestry, Fire and State

mplementation of cloud management learing of fog; ment of flood waters, earthquakes, or

ction, repair, or operation of flood or

n of an emergency vehicle, while being ice with the requirements of Section

agerous or latent defective condition of d, street, alley, crosswalk, sidewalk, idge, viaduct, or other structure located

ngerous or latent defective condition of ag, structure, dam, reservoir, or other nt; ies of: ng emergency medical assistance; ; fire; ing, mitigating, or handling hazardous hazardous wastes; ncy evacuations; or - ning during dam emergencies; or se or performance or the failure to exer- ny function pursuant to Title 73, Chapter hapter 10 which immunity is in addition nities granted by law. 1996

r of immunity for taking private without compensation.

y Article I, Section 22 of the Utah Consti- om suit of all governmental entities is ery of compensation from the governmen- governmental entity has taken or dam- ty for public uses without just compensa-

1 and damages shall be assessed according ; of Title 78, Chapter 34, Eminent Domain.

1991

neys' fees for records requests.

om suit of all governmental entities is y of attorneys' fees under Sections 63-2-405

Notwithstanding Section 63-30-11:

(a) a notice of claim for attorneys' fees under Subsec- tion (1) may be filed contemporaneously with a petition for review under Section 63-2-404; and

(b) Sections 63-30-14 and 63-30-19 shall not apply.

(2) Any other claim under this chapter that is related to a claim for attorneys' fees under Subsection (1) may be brought contemporaneously with the claim for attorneys' fees or in a subsequent action. 1992

63-30-11. Claim for injury — Notice — Contents — Service — Legal disability.

(1) A claim arises when the statute of limitations that would apply if the claim were against a private person begins to run.

(2) Any person having a claim for injury against a govern- mental entity, or against its employee for an act or omission occurring during the performance of the employee's duties, within the scope of employment, or under color of authority shall file a written notice of claim with the entity before maintaining an action, regardless of whether or not the function giving rise to the claim is characterized as govern- mental.

(3) (a) The notice of claim shall set forth:

- (i) a brief statement of the facts;
- (ii) the nature of the claim asserted; and
- (iii) the damages incurred by the claimant so far as they are known.

(b) The notice of claim shall be:

- (i) signed by the person making the claim or that person's agent, attorney, parent, or legal guardian; and
- (ii) directed and delivered to:
 - (A) the city or town recorder, when the claim is against an incorporated city or town;
 - (B) the county clerk, when the claim is against a county;
 - (C) the superintendent or business adminis- trator of the board, when the claim is against a school district or board of education;
 - (D) the president or secretary of the board, when the claim is against a special district;
 - (E) the attorney general, when the claim is against the State of Utah; or
 - (F) a member of the governing board, the executive director, or executive secretary, when the claim is against any other public board, commission, or body.

(4) (a) If the claimant is under the age of majority, or mentally incompetent and without a legal guardian at the time the claim arises, the claimant may apply to the court to extend the time for service of notice of claim.

(b) (i) After hearing and notice to the governmental entity, the court may extend the time for service of notice of claim.

(ii) The court may not grant an extension that exceeds the applicable statute of limitations.

(c) In determining whether or not to grant an exten- sion, the court shall consider whether the delay in serving the notice of claim will substantially prejudice the gov- ernmental entity in maintaining its defense on the merits. 1998

63-30-12. Claim against state or its employee — Time for filing notice.

A claim against the state, or against its employee for an act or omission occurring during the performance of the employ- ee's duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the attorney general within one year after the claim arises, or

Section

- 10-3-1225 Manager — Removal from office.
 10-3-1226 Manager — Powers and duties
 10-3-1227 Municipal administrative code in council-manager form
 10-3-1228 Manager — Working time and compensation

Part 13**Municipal Officers' and Employees' Ethics Act**

- 10-3-1301 Short title
 10-3-1302 Purpose
 10-3-1303 Definitions
 10-3-1304 Use of office for personal benefit prohibited
 10-3-1305 Compensation for assistance in transaction involving municipality — Public disclosure and filing required
 10-3-1306 Interest in business entity regulated by municipality — Disclosure statement required
 10-3-1307 Interest in business entity doing business with municipality — Disclosure
 10-3-1308 Investment creating conflict of interest with duties — Disclosure
 10-3-1309 Inducing officer or employee to violate part prohibited
 10-3-1310 Penalties for violation — Dismissal from employment or removal from office
 10-3-1311 Complaints charging violations — Procedure
 10-3-1312 Violation of disclosure requirements — Penalties — Rescission of prohibited transaction

PART 1**GOVERNING BODY****10-3-101. Governing body — Legislative and executive powers.**

Each municipality shall have a governing body which shall exercise the legislative and executive powers of the municipality unless the municipality is organized with separate executive and legislative branches of municipal government

1977

10-3-102. Governing body — Other functions.

The governing body may perform such other functions as may be specifically provided or necessarily implied by law

1977

10-3-103. Governing body in cities of the first class.

The governing body of cities of the first class shall be a commission of five members of which one shall be the mayor and the remaining four shall be commissioners

1977

10-3-104. Governing body in cities of the second class.

The governing body of cities of the second class shall be a commission of three members of which one shall be the mayor and the remaining two shall be commissioners

1977

10-3-105. Governing body in cities of the third class.

The governing body of cities of the third class shall be a council composed of six members, one of whom shall be the mayor and the remaining five shall be council members

1997

10-3-106. Governing body in towns.

The governing body of a town shall be a council of five persons one of whom shall be the mayor and the remaining four shall be councilmen

1977

PART 2**ELECTION OF GOVERNING BODY**

10-3-201. Municipal election — Terms of office

municipalities to fill all elective offices vacated by 12 o'clock noon on the first Monday in the January following the election. The officers elected shall continue in the office to which they were elected for four years except in case of death, resignation, removal or disqualification from office.

(2) The officers so elected shall begin their term of office at 12 o'clock noon on the first Monday in January following their election

1977

10-3-202. Terms of elected municipal officers.

Each elected officer of a municipality shall hold office for the term for which he is elected and until his successor is chosen and qualified, unless the office becomes vacant under Section 10-3-301

1990

10-3-203. Election of officers in cities of the first class.

In cities of the first class, the election and terms of office of the officers shall be as follows

(1) The offices of mayor and two commissioners shall be filled in municipal elections held in 1979. The terms shall be for four years. The offices shall be filled every four years thereafter in municipal elections.

(2) The offices of the other two commissioners and the city auditor shall be filled at a municipal election held in 1977. The terms shall be for four years. These offices shall be filled every four years thereafter in municipal elections

1997

10-3-204. Election of officers in cities of the second class.

In cities of the second class the election and terms of office of the officers shall be as follows

(1) The offices of mayor and one commissioner shall be filled in a municipal election held in 1977. The terms shall be for four years. The offices shall be filled every four years thereafter in municipal elections.

(2) The offices of the other commissioner and the city auditor shall be filled in municipal elections held in 1979. The terms shall be for four years. These offices shall be filled in municipal elections held every four years

1997

10-3-205. Election of officers in cities of the third class.

In cities of the third class, the election and terms of office shall be as follows

(1) The offices of mayor and two council members shall be filled in municipal elections held in 1977. The terms shall be for four years. These offices shall be filled every four years in municipal elections.

(2) The offices of the other three council members shall be filled in a municipal election held in 1979. The terms shall be for four years. These offices shall be filled every four years in municipal elections

1997

10-3-205.5. At-large election of officers of first, second, and third class — Election of commissioners or council members.

(1) Except as provided in Subsection (2) the officers of each first, second, and third class city shall be elected in an at-large election held at the time and in the manner provided for electing municipal officers

(2) (a) Notwithstanding Subsection (1) the governing body of a first, second or third class city may by ordinance provide for the election of some or all commissioners or council members, as the case may be, by district equal in number to the number of commissioners or council members elected by district

(b) (i) Each district shall be of substantially equal population as the other districts

(ii) Within six months after the Legislature com-

appointed official shall terminate upon ceasing to be an elected official or an employee of the city for which such person worked when appointed

(b) Notwithstanding the requirements of Subsection (a) the auditor shall at the time of appointment or reappointment adjust the length of terms to ensure that the terms of committee members are staggered so that approximately half of the committee is appointed every two years

(3) Any vacancy shall be filled by the state auditor from the same class as the original appointment as described in Subsection (1) Members may be reappointed

(4) The advisory committee shall assist, advise, and make recommendations to the state auditor in the preparation of uniform accounting and reporting procedures and program and performance accounting budgeting and reporting for cities

(5) (a) Members shall receive no compensation or benefits for their services but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107

(b) Members may decline to receive per diem and expenses for their service

(c) Local government members who do not receive salary per diem or expenses from the entity that they represent for their service may receive per diem and expenses incurred in the performance of their official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107

(d) Local government members may decline to receive per diem and expenses for their service

1996

10-6-154. Duties of state auditor and committee — Adoption and expansion of uniform system.

(1) The state auditor with the assistance, advice, and recommendations of the municipal government fiscal committee shall

(a) prescribe uniform accounting and reporting procedures for cities in conformity with generally accepted accounting principles,

(b) conduct a continuing review and modification of such procedures to improve them

(c) prepare and supply each city with suitable budget and reporting forms, and

(d) prepare instructional materials, conduct training programs, and render other services deemed necessary to assist cities in implementing the uniform accounting, budgeting and reporting procedures

(2) The Uniform Accounting Manual for Utah Cities shall prescribe reasonable exceptions and modifications for smaller third class cities to the uniform system of accounting, budgeting, and reporting

(3) The advisory committee shall establish and conduct a continuing review of suggested measurements and procedures for program and performance budgeting and reporting which may be evaluated on a statewide basis

(4) Cities may expand the uniform accounting and reporting procedures to better serve their needs, however, no deviations from or alterations to the basic prescribed classification systems for the identity of funds and accounts shall be made

1993

10-6-155. Repealed.

1985

10-6-156. State auditor to evaluate fiscal practices.

The state auditor shall continually analyze and evaluate the accounting, budgeting and reporting practices and experi-

10-6-157. Director of finance in certain cities.

The governing body of third class cities may, and the cities under an optional form of city government shall, by resolution or ordinance, create a director of finance position to perform the financial duties and responsibilities of the city recorder in third class cities or the city auditor in first and second class cities, as established by this chapter. The director of finance shall be a qualified person appointed and removed with the advice and consent of the governing body, and may not assume the duties of the city treasurer. The governing body may also adopt the financial administrative duties of the director of finance prescribed in the Uniform Accounting Manual for Utah Cities

1985

10-6-158. Financial administration ordinance — Adoption — Purpose.

The governing body under the council-mayor optional form of government shall, and the governing body of any other city may, adopt a financial administration ordinance, which would, with appropriate budgetary controls, authorize the mayor, director of finance, or other official approved by the council, to act as the financial officer for the purpose of approving

(1) payroll checks, if the checks are prepared in accordance with a salary schedule established in a personnel ordinance or resolution, or

(2) routine expenditures, such as utility bills, payroll-related expenses, supplies, materials, and payments on city-approved contracts and capital expenditures which were referenced in the budget document and approved by an appropriation resolution adopted for the current fiscal year

1985

10-6-159. Financial administration ordinance — Provisions.

The financial administration ordinances adopted pursuant to Section 10-6-158 shall provide for the following

(1) a maximum sum over which all purchases may not be made without the approval of the mayor in the council-mayor optional form of government or the governing body in other cities, however, this section shall not prevent the mayor in the council-mayor optional form of government or the governing body in other cities from approving all or part of a list of verified claims, including a specific claim in an amount in excess of the stated maximum, where certified by the appropriate financial officer or officers of the city,

(2) that the financial officer be bonded for a reasonable amount, and

(3) such other provisions as the governing body may deem advisable

1993

CHAPTER 7

MISCELLANEOUS POWERS OF CITIES AND TOWNS

Article 1

General Powers and Mode of Exercise [Repealed]

Section

10-7-1, 10-7-2 Repealed

Article 2

Local Boards of Health

10-7-3

Joining with county to create and maintain