1979

Jolene. Stahl v. Utah Transit Authority : Respondent's Brief

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

JOLENE STAHL, :

Plaintiff-Appellant, :

vs. : Case No. 16419

UTAH TRANSIT AUTHORITY, :

Defendant-Respondent: :

APPEAL FROM A SUMMARY JUDGMENT OF THE
DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE CHIRSTINE M. DURHAM, JUDGE

RESPONDENT'S BRIEF

REX J. HANSON
DAVID H. EPPERSON
702 Kearns Building
Salt Lake City, Utah 84111
Attorneys for Respondent

WENDELL E. BENNETT
370 East 500 South
Salt Lake City, Utah 84111
Attorney for Appellant

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RESPONDENT'S BRIEF

NATURE OF THE CASE

This is a negligence action brought by the Appellant against the Respondent for injuries sustained in a motor vehicle collision.

DISPOSITION IN THE LOWER COURT

This case was originally heard by the Honorable G. Hal Taylor on December 19, 1978, who dismissed the Appellant's complaint, for failure to comply with the notice of claim requirement of Section 11-20-56 Utah Code Annotated, (1953), as amended, which requires that a claimant file a signed and verified complaint with the Board of Directors of the Utah Transit Authority (UTA) within thirty days after the injury complained of.

Judge Taylor allowed the Appellant ten days from that dismissal to amend her complaint, and an amended complaint was filed by Appellant on December 27, 1978 alleging in substance estoppel of UTA to allege lack of notice by the Appellant, based upon alleged actions of the adjuster for UTA's insurance carrier Transit Casualty.

The depositions of the Appellant and insurance adjuster Thomas Vance were taken and filed with the Court, and UTA again brought a motion to dismiss which was heard before the Honorable Christine M. Durham on March 30, 1979. Judge Durham granted the Respondent, UTA's motion for summary judgment, holding that Appellant had failed to comply with the notice of claim requirement set out in Section 11-20-56 Utah Code Annotated (1953) as amended.

RELIEF SOUGHT ON APPEAL

Respondent seeks a ruling affirming the judgment of the District Court.

STATEMENT OF FACTS

The Appellant, Jolene Stahl, brought an action against the Respondent, Utah Transit Authority ("UTA"), alleging personal injuries as the result of a bus/automobile accident, which occurred on September 9, 1976, near 3100 South and 2700 West in Salt Lake County, State of Utah.

On the date of the accident, Thomas L. Vance, an adjuster for Brown Brothers Insurance, who represents UTA's insurer, Transit Casualty, made a routine investigation of the accident, and met with the Appellant.

Adjuster Vance took a statement from Appellant concerning the accident and obtained an authorization to release medical information. He did not indicate to Appellant that she should not file a claim with the UTA, nor did he indicate that he would be adjusting the claim or that he would be recontacting her in the future.

On December 29, 1977, the UTA board of directors received a notice of claim from Appellant, and a lawsuit was subsequently filed by Appellant on July 14, 1977.

POINT I.

THE TRIAL JUDGE DID NOT ERR IN DISMISSING APPELLANT'S COMPLAINT FOR FAILURE TO FILE A WRITTEN, SIGNED AND VERIFIED CLAIM WITH THE BOARD OF DIRECTORS OF UTA WITHIN THIRTY DAYS AFTER THE INJURY.

The Utah Public Transit District is a governmental entity which was established in 1969. Section 11-20-56 Utah Code Annotated (1953), as amended, pertains to the presentment and handling of claims against the UTA. It states:

> Claims Against District -- Requirements. -- Every claim against the District for death, injury or damage alleged to have been caused by the negligent act or omission of the district shall be presented to the board of directors in writing within thirty days after the death, injury, or damage, signed and verified by the claimant or his duly authorized agent, stating the time and place where the injury or damage occurred and a general statement of the cause and circumstances of the death, injury or damages. No action under this section shall be commenced until sixty days after presentation, or unless the board of directors shall sooner deny claim. (Emphasis added.)

In the present case the accident for which the Appellant claims compensable damages occurred on September 9, 1976. The notice of claim was not received by the Board of Directors of UTA until December 29, 1976, and a complaint was not filed until July 14, 1977.

Appellant clearly failed to comply with the statutory requirement, requiring filing of a written notice within thirty days of the injury as a condition precedent to the maintenance of an action against the UTA. Because this defect could not be cured, the Honorable G. Hal Taylor and the Honorable Christine M. Durham correctly dismissed Appellant's complaint.

In the Utah decision of Gallegos vs. Midvale City, 27 Utah 2d 27, 492 P.2d 1335 (1972), this court sustained a

trial court's dismissal of an action because a timely notice had not been filed. This Court stated at 29 and 30:

> The Doctrine of Soverign Immunity which would ordinarily protect the City from such a suit was part of the common law and thus part of the body of law which was assimilated into the law of this jurisdiction at statehood. The allowance of a claim against the city for injuries which may be suffered because of 'the. . . defective, unsafe, dangerous . . . condition of any street . . .' is a statutorily created exception to the Doctrine of Soverign Immunity. Inasmuch as the maintenance of such a cause of action derives from such statutory authority, a prerequisite thereto is meeting the conditions prescribed in the statute. A party seeking to obtain the benefit thereof should not be entitled to claim the favorable aspects which confer the rights, and disavow the conditions upon which the rights are predicated. (Emphasis added.)

In this case, as in Gallegos, the right to compensation is a statutory right, and all conditions precedent must be met by the Appellant. If the required conditions precedent are not met, no cause of action accrues, and no compensation can be awarded to the Appellant.

In Peterson vs. Salt Lake City, 118 Utah 231, 221 P.2d 591 (1950), where a plaintiff brought an action against the city for an allegedly defective sidewalk, this Court held that in order to maintain an action against a municipality, all conditions precedent, including notice, must be met. This Court stated at 235:

> It is the prerogative of the legislature to make such conditions precedent to the maintenance of an action against a city or town as it sees fit and the courts cannot relieve parties from the obligation of meeting those conditions. (Emphasis added.)

The notice requirements of the analogous Utah Governmental Immunity Act have been tested and upheld by the Utah Supreme Court under many differing circumstances. The recent case of Crowder vs. Salt Lake County, 552 P.2d 646 (Utah 1976) upheld the constitutionality of the notice requirements when challenged on the basis of equal protection. This Court stated at 647:

> . . .it is generally held that the legislature has a wide discretion in enacting laws which effect one group of citizens differently than other groups.

In Point I of Appellant's brief, counsel for the Appellant attempts to draw a distinction between the Governmental Immunity Act, 63-30-12 UCA, which states that a claim is barred unless notice of the claim is filed with the Attorney General or the agency concerned within one year after the cause of action arises; and Section 11-20-56 UCA which provides that claims against UTA "shall be presented to the Board of Directors in writing within thirty days" after the accident and that "No action under this section shall be commenced until sixty days after presentation, or unless the board of directors shall sooner deny claim."

Appellant's argument is without merit that the language of the Transit District Act "shall be presented" or "no action under this section shall be commenced," is different in effect from the language of the Governmental Immunity Act which uses the word "bar".

The language of Section 11-20-56 UCA is clear and unambiguous in requiring the filing of written notice within thirty days or no action shall be commenced. In order for the notice of claim to be valid it must comply with the time limitations established by the legislature.

The Utah Supreme Court has held in numerous decisions that in construing a statute the words must be given their logical and reasonable meaning. Illustrative cases are Smith vs. Lenzi, 74 Utah 362, 279 P.2d 893, (1929) in which the court said at 367; "It is the duty of courts to so construe statutes and ordinances as to give effect to every word used.", and State vs. Hendrickson, 67 Utah 15, 245 P. 375 (1926) where the court held that "in construing a statute words and phrases are construed according to the context and approved uses of language and except in the case of technical words and phrases they must be construed according to their plain and ordinary meaning."

The filing of a verified claim with the board of directors of the UTA within thirty days following the injury is a condition precedent to the accrual of a cause of action. Courts cannot relieve parties from the obligation of meeting those conditions, and without proper statutory compliance by Appellant, UTA's governmental immunity remains. Appellant's claim was not filed within thirty days in the manner required by statute and this defect cannot be cured.

POINT II.

THE CONDUCT OF ADJUSTER THOMAS VANCE OF BROWN BROTHERS COMPANY, DOES NOT ESTOP UTA FROM ASSERTING THE NOTICE OF CLAIM DEFICIENCY AS A BAR TO THIS ACTION.

When the Honorable G. Hal Taylor, Judge dismissed the Appellant's complaint on December 19, 1978, he allowed the Appellant ten days to amend her complaint. An amended complaint was filed by Appellant on December 27, 1978 alleging in substance estoppel of UTA to allege lack of notice by the Appellant, based upon alleged actions of the adjuster for UTA's insurance carrier, Transit Casualty. Paragraph 6 of the amended complaint states:

> 6. That on the date of the accident, namely, September 9, 1976 the defendant Utah Transit Authority's authorized agent, Thomas L. Vance, an insurance adjuster for Brown Brothers, who had been designated by the Utah Transit Authority's Board of

> Directors to act as its agent to handle claims against the Utah Transit Authority for death, injury or damage caused by negligence obtained from the plaintiff a writing as contemplated by Title 11-20-56, Utah Code Annotated, and also instructed the plaintiff that if she desired to present a claim against the Utah Transit Authority that she should present the claim through his office, namely, the insurance adjuster's office, whose company was the liability insurance carrier for the Utah Transit Authority, rather than presenting any claim to the Utah Transit Authority, referred to him as the "bus company." . . .

After the filing of the amended complaint, the pertinent portion of which is cited above, depositions of Appellant Jolene Stahl and insurance adjuster Thomas L. Vance were taken. Neither deposition supports Appellant's theory of waiver or estoppel against UTA. The depositions also fail to support Appellant's allegation that Thomas Vance was authorized to act as agent for UTA in receiving required notice under the Act.

Vance did represent Transit Casualty Insurance Company which carried the liability insurance coverage for UTA, (R.87, Vance depo. p.4, L.7-9) and acted on behalf of UTA and their indemnitor to investigate bodily injury claims. (R.87, Vance depo. p.6, L.12-15)

When the investigation is completed a report is made to Transit Casualty Insurance Company, not to the UTA, nor is

UTA furnished a copy of the investigative report. (R.87, Vance depo. p.7, L.10-25)

Vance took a written report from the plaintiff, containing her version of the accident. (R. 87, Vance depo. p.8, L.4-15) After taking her statement, Vance did not indicate to the plaintiff that he would be recontacting her for the purpose of possibly adjusting the claim (R. 87, Vance depo. p.10, L.12-15) nor did he indicate to her that if she had any questions about a possible claim that she should contact him or someone at Brown Brothers. (R. 87, Vance depo. p.10, L.20 to p.11,L.3)

Vance did not tell her that she should present her claim to UTA. (R. 87, Vance depo. p.12,L.7 to p.13,L.15)

On September 9, 1976, the date of the accident, Vance did obtain a medical authorization to contact the plaintiff's physician, Dr. A. F. Martin, to obtain a medical report for the purpose of the investigation. (R. 87, Vance depo. p.15,L.19 to p.16,L.25)

It should be pointed our that counsel for Appellant at page 8 of the brief has erroneously characterized Vance's testimony. Nowhere in the record is it supported that "assuming Appellant had asked Mr. Vance whether she should contact the respondent, Mr. Vance would have told her that she did not have to because he handled all the respondent's claims. (R. 87, depo. of Vance, at 12)." Vance testified as follows:

Q. (By Mr. Bennett:) Did you tell her that she should present any kind of a claim right to the Utah Transit Authority rather than through your company?

A. I definitely did not.

Q. Is there any reason why you did not tell her that?

A. Yes. All claims, claims against the bus company, are handled directly by our office and specifically by myself. I never refer anyone to the bus company. In fact, if -- well, I just don't, in any case.

Q. You would prefer that they handle all possible claims, then, through you and your company rather than going directly --

MR. HANSON: Well I'm going to object to that. That isn't what he said. You're assuming a fact he hasn't testified to.

THE WITNESS: No, I do not prefer that. It's just a fact that all claims against the bus company come through our office.

* * * *

Q. (By Mr. Bennett:) Did you so instruct Mrs. Stahl that you wanted her to present her claims through your company rather than through the bus company?

A. No, I didn't.

Q. Did you tell her to present them to the bus company?

A. No, I didn't.

Q. Did you indicate that you would be getting back in touch with her?

A. No, I didn't.

None of Vance's testimony supports the allegations that he or Brown Brothers in making the investigation were acting as agents of UTA or that Vance made any representations to the plaintiff to the effect that her claim would be settled, from which she could reasonably contend was the cause of her not filing a notice of claim as required under Section 11-20-56 UCA, (1953).

Vance made the investigation solely as an employee of Brown Brothers who represented UTA's insurance carrier, Transit Casualty.

In Vadner vs. Rozzelle, 88 Utah 162, 45 P.2d 561, (1935) the Court stated:

> An insurance adjuster is ordinarily a special agent for the company for whom he acts, and his authority is prima facia coexistent with the business entrusted to him which usually is limited to ascertainment and adjustment of the loss.

The deposition of Appellant Jolene Stahl also clearly indicates that she was not promised that her case would be settled, and neither was she instructed to not file a claim with the UTA, or otherwise "lulled" into a failure of filing her notice.

In her deposition taken on July 12, 1978, she states:

Q. Let me ask you, I understand after the accident you were contacted by Mr. Vance, Insurance Adjuster?

A. Yes.

Q. How long after the accident did he see you?

A. The day of the accident.

Q. Where did he see you, at your home?

A. No. At my work.

Q. At your work. Do you remember, did you have a conversation with him?

A. Oh, he called me earlier that day and asked if he could come out to get a statement. That is the reason I stayed at work, you know, as long as I did.

Q. I see. Did he come out and take a statement?

A. Yes, he did.

Q. And in that statement you told him --

A. What happened.

Q. What happened. Was there anything else said or did you have any conversation with him when you took the statement?

A. Yes. He was there for quite a while.

Q. Tell em what he--other than what is in the statement, I assume you saw the statement before you came up here, didn't you?

A. I have a copy of it.

Q. Other than what is in the statement, did he tell you anything else or did you have any other conversation?

A. No.

Q. Was there anything said to you about filing any kind of a claim or anything of that nature?

A. No.

Q. Did you see him again after that?

A. No.

Q. That is the only time you saw him?

A. Yes. That is the only time I saw him.

* * *

MR. BENNETT: Just for clarification, you mean was there any conversation in addition to the statement?

MR. HANSON: Yes. That is what I mean.

MR. BENNETT: Okay. Do you understand that, Jolene?

THE WITNESS: There was just conversation about the accident.

Q. (By Mr. Hanson) Nothing said about filing claims or contacting anybody or anything of that nature?

A. No.

Q. By that you mean there wasn't?

A. No, there wasn't.

Q. In other words, he just talked to you about the accident and took a statement and you read it and signed it, is that right?

A. Yes.

Q. Did you have any subsequent contact with Mr. Vance--I think I asked you that question, but I am not sure. Did you see him again?

A. No.

Q. Have any telephone conversation with him?

A. I believe I did. I believe I--I don't, I can't remember.

Q. Do you know what the conversation was about, if there was a subsequent one?

A. It seems like I had, it was something to do with the insurance. When the insurance people called about the settlement on the car.

Q. Oh, I see. Do you remember that conversation, the date it happened?

A. No, I don't.

Q. Did you have any other contacts with Mr. Vance other than these two instances you have told us about?

A. No.

Deposition of Jolene Stahl at pp. 25,26,27 and 28.

* * *

Q. . . .Did Mr. Vance give you any kind of a card or any identification?

A. Yes he gave me his card.

Q. What did he say when he gave you his card?

A. He said that he would be the adjuster for, you know that he was the adjuster, and that

that was why he was there to take the statement. If I had any questions or whatever to call him.

Q. Is that all he said about his card? Is that everything he said about the card?

A. As far as I can remember.

Deposition of Jolene Stahl at p. 30.

In Appellant's brief, she cites the Utah decision of Rice vs. Granite School District, 23 Utah 2d 22, 456 P.2d 159, (1969) for the proposition that the notice of claims provision in the Utah Governmental Act can be waived by a political subdivision or its insurance adjuster. The facts of that case are clearly distinguishable from the facts in this case. In Rice, the plaintiff did file a notice of claim within the thirty-day statutory period, but thereafter failed to file a suit within the statutory limitation period of one year because of reliance on an adjuster's representations that the claim would be settled and that suit was unnecessary.

In Rice, the court rightly held that the adjuster's actions in "lulling" the plaintiff into assuming that her claim would be settled, operated as an estoppel eliminating the requirement that suit be filed within one year.

The testimony in the depositions of Appellant and Vance, cited above, clearly establish that Vance made no

representations to the plaintiff that the claim would be settled and that suit was not necessary as was done in Rice. In Rice, the claimant's cause of action came into existence when she complied with the statutory condition precedent of filing notice of her claim within the ninety-day period. To the contrary, in this case the Appellant did not obtain a viable cause of action because of her failure to file the statutorily required notice of claim within the thirty-day period. Without this condition precedent being met, the Appellant cannot now claim that the alleged estoppel or waiver of the defendant established her claim which never came into being because of failure to comply with the thirty-day notice requirement.

POINT III.

THE TELEPHONE CONVERSATION SUMMARY PREPARED BY INSURANCE ADJUSTER TOM VANCE, AFTER SPEAKING WITH APPELLANT, DOES NOT CONSTITUTE NOTICE AS REQUIRED BY SECTION 11-20-56 OF UTAH'S PUBLIC TRANSIT DISTRICT ACT.

On the date of the accident, September 9, 1976, Tom Vance, an adjuster for Utah Transit Authority's insurance carrier, spoke by telephone with the Appellant concerning the accident. At page 8 of the deposition of Tom Vance it states:

Q. I show you what has been marked as Deposition Exhibit P-1 and ask if this is a copy of statement that you wrote?

A. Yes, it is two pages.

Q. Did you take notes independent of that statement?

A. No.

Q. You just talked with her, made up that statement, and had her sign it?

A. Yes, I wrote it as I spoke with her.

As noted in Point I of this brief Section 11-20-56 of the UCA requires that:

> Every claim against the district for . . . injury. . . shall be presented to the board of directors in writing within thirty days after the . . . injury . . . signed and verified by the claimant. . . stating the time and place where the injury or damage occurred and a general statement of the cause and circumstances of the . . . injury.

Appellant alleges in Point III of her brief that adjuster Tom Vance's actual knowledge of the accident constituted sufficient notice as contemplated by Section 11-20-56 UCA, UCA, cited above. However, a summary prepared by an insurance investigator in the routine course of his investigation does not constitute verified written notice as required by the Act.

Plaintiff's have often alleged that conversations, such as the telephone conversation between Mr. Vance and the

Appellant, should comply with the notice provisions of various governmental immunity acts.

The Utah Supreme Court has repeatedly held that when a written notice is required, constructive notice will not suffice. In Varoz vs. Sevey, 29 Utah 2d 158, 506 P.2d 435, (1953), this Court held that a county official's actual knowledge of an accident that resulted in the death of a minor child's mother did not dispose with the necessity of filing a timely notice for compensation. This Court stated at 160:

> 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.

This court has carried this reasoning even further by requiring that compliance with the notice requirement be pleaded in the complaint. In Roosendaal Construction and Mining Corporation vs. Holman, 28 Utah 2d 396, 503 P.2d 446, (1972), this Court stated:

> It appears that the plaintiff's complaint is fatally defective in that it does not allege compliance with that section. (That section being 63-30-12 Utah Code Annotated (1953), notice requirements.)

Similarly, in Scarborough vs. Granite School District, 531 P.2d 480 (Utah, 1975), this Court held that even though

a school principal had examined and talked to an injured boy, such examination did not constitute notice under the statute. At page 482 this Court stated:

> 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. . .It should require no exposition to demonstrate that the oral conversation with the school principal and the fact that he turned in a report to the School District, do not satisfy the foregoing requirements. (Emphasis added.)

In the recent decision Sears vs. Southworth, 563 P.2d 192 (Utah 1977) this Court held that even though state law enforcement officers had investigated an accident and filed the report with the State, this report did not constitute notice under the Governmental Immunity Act. This court stated:

> Third, Southworth argues that, although no formal notice of claim was filed within the year as required, State did receive adequate notice of the accident and was aware, or should have been aware of the negligence involved. . . .This point is not a matter of first impression with this court.

In an excellant summary of the existing Utah law on notice requirements the court went on to cite and reaffirm the portions of Varoz vs. Sevey , supra. and Scarborough vs. Granite School District, cited, supra.

The facts of the present case fall squarely under the rule of Sevey, Scarborough, and Sears which hold that actual knowledge or investigative reports do not comply with the notice requirements of the Governmental Immunity Act. The two page summary prepared by adjuster Tom Vance for Transit Casualty Company, the insurer for UTA, was not sufficient notice as required by Section 11-20-56 UCA. Appellant's complaint was rightly dismissed by the trial court for Appellant's failure to give timely statutory notice as a condition precedent to the filing of her action.

POINT IV.

THE PROCUREMENT OF LIABILITY INSURANCE BY A GOVERNMENTAL AGENCY HAS NO EFFECT UPON ITS IMMUNITY FROM TORT LIABILITY.

In footnote 1 on page 9 of Appellant's brief, Appellant contends that a governmental entity waives immunity by taking out liability insurance.

This contention is against the clear weight of authority in the United States as noted in 68 ALR 2d, titled "Liability or Indemnity Insurance Carried by a Governmental Unit as Affecting Immunity from Tort Liability". In that annotation, the majority rule is stated as follows:

> In a majority of jurisdictions, it is held that the procurement of liability or indemnity insurance by a governmental unit has no effect upon its immunity from tort liability.

As noted above, the general rule would not provide waiver of immunity to a governmental entity merely because that entity has obtained liability insurance.

Whether or not a party has liability coverage, has long been excluded under Rule 54 of the Utah Rules of Evidence, as being not relevant to the issue of liability or negligence. Similarly, in the present case, it would not be equitable to punish either a governmental entity for obtaining liability insurance, or to punish its insurer for extending coverage to a governmental entity.

The presence of liability insurance should not serve to waive sovereign immunity, especially in this case, where statutory requirements for filing suit have not been complied with.

CONCLUSION

The UTA is a governmental entity, and the legislature has the prerogative to make such conditions precedent to waiver of that governmental immunity as it sees fit. The courts cannot relieve parties from the obligation of meeting those conditions.

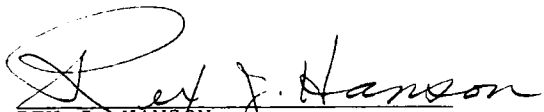
The filing of a verified claim with the board of directors of the UTA within thirty days following the injury is a condition precedent to an injured party's accrual of a cause of action. In this case, the accident for which Appellant claims damages, occurred on September 9, 1976. The notice of claim was not filed by Appellant with the board of directors of the UTA until December 29, 1976, nearly four months subsequent to the accident.

Appellant clearly failed to comply with the notice of claim requirement of Section 11-20-56 UCA, and inasmuch as this defect could not be cured, both the Honorable G. Hal Taylor and the Honorable Christine M. Durham correctly dismissed Appellant's complaint.

The depositions of both Appellant and adjuster Vance fail to point out a single question of fact on the issue of waiver or estoppel. The facts of this case are clearly distinguishable from those of Rice where a timely notice of claim was filed, but where there were substantial issues of fact as to representations, assurances, and promises on the part of the adjuster who "lulled" and "gulled" and otherwise induced the plaintiff into not filing her complaint until

the one year statute of limitations had run.

RESPECTFULLY submitted this 16th day of August, 1979.



REX J. HANSON
DAVID H. EPPERSON
Attorneys for Respondent

PERSONALLY DELIVERED ten copies of the foregoing Brief of Respondent to the clerk of the Supreme Court of the State of Utah and two copies to Appellant's attorney, Wendell E. Bennett, 370 East 500 South, #100, Salt Lake City, Utah this 16th day of August, 1979.