1953

Alton H. Davis v. Provo City Corporation, Brigham Young University et al : Reply Brief

Utah Supreme Court

Jackson B. Howard; Attorney for Appellant;

7905

In the Supreme Court of the State of Utah

ALTON H. DAVIS, by and through his Guardian, GEORGE A. DAVIS,
Appellant,

vs.

PROVO CITY CORPORATION, BRIGHAM YOUNG UNIVERSITY, a corporation, and ROBERT S. CLARK,
Respondents.

CIVIL NO. 7905

REPLY BRIEF

JACKSON B. HOWARD,
Attorney for Appellant

NEW CENTURY PRINTING CO., PROVO, UTAH

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The appellant does not dispute the statement by the respondent, Provo City Corporation, that presentation of a claim within the time fixed by law is a condition precedent to bringing an action against a town or city. The appellant would merely point out to the Court that Utah Code Annotated, 1943, Title 15-7-76, states that, every claim against a city "for damages or injuries alleged to have been caused by the defective, unsafe, dangerous or obstructed condition of any street, alley, crosswalk, sidewalk, culvert or bridge of such city or town or from the negligence of the city or

town authorities in respect to any such street, alley, crosswalk, sidewalk, culvert or bridge shall, within thirty days after the happening of such injury or damage, be presented to the board of commissioners or city council of such city * * * *. Every claim other than claims above mentioned against any city or town must be presented * * * within one year * * * ."

It is to be noted that no objection is made to the form or sufficiency of the claim, but only to the matter of timely presentation. The appellant argues that the claim herein, which is the basis of this suit, is not a suit which comes within the thirty days limitation clause, but one which comes within the yearly limitation clause. A statute which is in derogation of the common law is to be strictly construed.

Where a statute specifically enumerates certain conditions under which a short statute of limitations will apply, the rule of **Inclusio Unius Est Exclusio Alterius** applies. In other words, the legislature, by specifying certain conditions, excludes all others. Therefore, if the negligence complained of is negligence as against the plaintiff directly and negligence in respect to a street, etc., the city cannot invoke the short statute of limitations. Appellant in this case does not contend or allege that the negligence of the city was in respect to any street, etc., or that the city's relationship to these things had anything to do with the injury, but rather that the city's negligent construction and maintenance of the coasting course was the proximate cause of the injury. The statute seems clear in its meaning, and is not capable of the interpretation that the respondent, Provo City Corporation, would put upon it.

In 38 A. J. 385, Sec. 676, the rule is stated as follows:

> "A provision in a statute or a municipal charter requiring notice or the presentment of claim as a condition precedent to the maintenance of an action thereon, being against common right, will be strictly construed. Thus, where, as is the case in many states, notice of an injury arising from a defective highway is required to be filed within a comparatively brief period after the injury, it has been held that such a requirement has no application to an action for an injury arisnig from the negligent management of other public works and not resulting from the obstruction of the highway as a place for travel, even if the injury actually occurred within the limits of the way. Nor does such requirement apply to injuries arising from conditions outside the streets or highways of the municipality, or even to objects or substances in the streets or highways which, while resulting in injuries to adjacent property, do not render the street or highway defective as such."

In light of the above rule, it is obvious that the principal case is not one of those which comes within the thirty days period provided in the statute. A rather isolated case, but somewhat in point is a Canadian case which says:

> "Notice is not necessary of an injury to a child, playing in the street from being splashed with boiling pitch used in repairing a wood block pavement, since the injury was caused not be any defect in the condition of the streetitself , or the nonrepair thereof, but resulted in consequence of negligence in the doing of repairs." Waller vs. Sarnia (1913) 4 Ont. Wee., Notes 890, 24 Ont. Week. Rep. 204, 9 D. L. Rep. 834. 10 A. L. R. 254.

In Dahl vs. Salt Lake City, 45 Utah Reports 544, 147 Pac. 622, the court said:

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

In conclusion, the appellant alleges that the contention of Provo City Corporation that the claim of the appellant was not filed timely is unfounded.

Respectfully submitted,

JACKSON B. HOWARD,
Attorney for Appellant