

1979

Velma Gladys Yates v. Vernal Family Health Center,
A Project of Division of Family And Community
Medicine, University of Utah; Uintah County
Hospital; Vernal Drug Company, A Utah
Corporation; And Gordon Lee Balka, M.D : Brief
of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

VELMA GLADYS YATES, :

Plaintiff-Appellant, :

vs. :

VERNAL FAMILY HEALTH CENTER, :
a project of Division of :
Family and Community Medicine, :
University of Utah; UINTAH :
COUNTY HOSPITAL; VERNAL DRUG :
COMPANY, a Utah corporation; :
and GORDON LEE BALKA, M.D., :

Case No. 16602

Defendants-Respondents. :

BRIEF OF APPELLANT

An appeal from the dismissal of plaintiff's complaint of the Fourth Judicial District Court of Uintah County, State of Utah, the Honorable Allen B. Sorensen, Judge.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Plaintiff-appellant, Velma Gladys Yates, brought this action to recover damages for personal injuries alleging the commission of medical malpractice by defendants-respondents.

DISPOSITION OF THE LOWER COURT

The Honorable Allen B. Sorensen found that appellant had failed to comply with the notice requirement of 78-14-8, Utah Code Ann., and ordered the appellant's complaint dismissed.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the lower court's order dismissing the complaint and the right to have a trial upon the merits of the case.

STATEMENT OF THE FACTS

During the period which began in December of 1975 and ended in March of 1977, appellant was a patient of and undergoing medical treatment from respondent Dr. Gordon Lee Balka and respondent Vernal Family Health Center. Dr. Balka was, during this sixteen month period, employed by the Vernal Family Health Center. In the cause of this treatment, appellant was furnished with an unwarranted amount of prescriptions and refills (approximately 217) of no less than fourteen different drugs, by Dr. Balka and other members of the staff of the Vernal Family Health Center, all of which were dispensed by respondent Vernal Drug Company.

As a direct result of the negligence in providing appellant with this enormous quantity of drugs, appellant became disoriented and incoherent, which disorientation necessitated her hospitalization in respondent Uintah County Hospital on March 12, 1977. After approximately three days of hospitalization, due to negligent treatment and supervision of respondent Uintah County Hospital, appellant began to suffer continual convulsive seizures which required her transfer and admission

to Holy Cross Hospital on March 17, 1977. These seizures were eventually controlled and on April 6, 1977 appellant was returned to Uintah County Hospital where she remained until her discharge on April 12, 1977.

Subsequently, upon the stabilization of appellant's condition and the administration of tests in March of 1978 it was discovered that as a result of the aforementioned abuse of drugs and convulsive seizures appellant had suffered permanent mental disability. This deterioration of mental capability has caused appellant to function at a very marginal level in need of continual close supervision to provide for her basic needs.

On April 7, 1978, pursuant to 78-14-8, Utah Code Ann., appellant's husband and attorney executed a notice of intent to commence a malpractice action which was in the form of a letter and which was served on respondents Vernal Family Health Center, Dr. Balka, Vernal Drug Company and Uintah County Hospital on April 12, 1978.

On July 19, 1978, appellant filed the Complaint which initiated this action.

ARGUMENT

POINT I

APPELLANT DID IN FACT COMPLY WITH THE NOTICE REQUIREMENT OF SECTION B OF THE UTAH HEALTH CARE MALPRACTICE ACT BY SERVING A LETTER ON EACH RESPONDENT MORE THAN NINETY DAYS PRIOR TO THE INITIATION OF THIS ACTION.

The Utah Health Care Malpractice Act was originally

enacted in 1976 and is found at 78-14-1 et seq., Utah Code Ann. This Act was amended in several aspects by the Utah Legislature in 1979. Although appellant's cause of action accrued prior to the enactment of these amendments, it is clear that her cause of action is to be governed by the Act in its amended form, since these amendments dealt only with procedural matters. Foil v. Ballinger, No. 16071, filed September 19, 1979. Section 8 of the Act now reads as follows:

"No malpractice action against a health care provider may be initiated unless and until the plaintiff gives the prospective defendant or his executor or successor, at least ninety days prior notice of intent to commence an action. Such notice shall include a general statement of the nature of the claim, the persons involved, the date, time and place of occurrence, the circumstances thereof, specific allegations of misconduct on the part of the prospective defendant, the nature of the alleged injuries and other damages sustained. Notice may be in letter or affidavit form executed by the plaintiff or his attorney..."

Since the Utah Health Care Malpractice Act is of recent vintage, there is very little case law in existence to aid in the interpretation of its notice requirement. In fact, no case has been found in which this Court has addressed the question of what constitutes sufficient compliance with the requirements of 78-14-8. For this reason, it is helpful to look to analogous situations in which notices of claim are required to be filed prior to the initiation of an action.

One such situation is found in Hatch v. Weber County,

459 P.2d 436 (Utah 1969). In that case, plaintiff had served a notice of claim for attorneys' fees on the county in the form of a letter to the County Commission, County Clerk, and County Attorney and defendant contended that no proper claim had been filed pursuant to 17-15-10, Utah Code Ann. This Court rejected the contention that strict compliance with 17-15-10 was necessary and stated that it was sufficient if the statute was substantially complied with when such substantial compliance fulfilled the purposes for which the notice requirement was designed.

Similarly, with regard to various other statutes that provide for the giving of notice, this Court has also embraced the doctrine of substantial compliance. Thus, in State v. District Court of Salt Lake County, 115 P.2d 913 (Utah 1941), which case involved an action against the State of Utah for the disgorgement of an unlawful tax, it was stated that "There must be substantial compliance with the designated statutory procedure." Further, in Tooele Meat & Storage Co. v. Morse, 136 P. 965 (Utah 1913), Mr. Justice Frick adopted the doctrine of substantial compliance citing 29 Cyc. 1117:

"The general rule in respect to notices is that mere informalities do not vitiate them so long as they do not mislead, and give the necessary information to the proper parties."

That strict compliance is not essential to satisfy the notice requirement of 78-14-8 is further shown by analyzing those situations in which strict compliance with statutory

procedure has been typically required by the Utah courts. Those cases requiring a strict and literal compliance with the statutory procedure have generally involved a statutorily created right, such as the right to sue a governmental entity. For example, see Scarborough v. Granite School District, 531 P.2d 480 (Utah 1975). The rationale of requiring strict compliance in such a situation is that a party who is seeking the benefit of a statutorily derived right should not be allowed to claim only the favorable aspects of the statute which confers the right and to ignore the conditions upon which that right is predicated. It should be noted, however, that ample authority exists for the proposition that substantial compliance will suffice even where the notice of claim requirement arises from a statutorily created right. Nelson v. Dunkin, 419 P.2d 984 (Wash. 1966); Jorstad v. City of Lewiston, 456 P.2d 766 (Idaho 1969).

Regardless of the split of authority as to whether strict compliance is required when attempting to enforce a statutorily created right, it is clear that the instant case is not of the type of cases in which the Utah courts have required strict compliance with the procedural requirements. That is, the right to sue for malpractice does not arise as the result of a statutory enactment waiving immunity subject to stated conditions, but rather, it is a long standing common law right. Further, it is a well settled principle that the Utah statutes are to be liberally construed to effect their

objectives and to promote justice. 68-3-2, Utah Code Anno. Such a policy of liberality requires that a plaintiff need only manifest substantial compliance with the notice requirement of 78-14-8.

An examination of the notice of intent provided in the instant case shows that appellant did substantially comply with 78-14-8. This notice was in letter form, dated April 7, 1978, and executed by appellant's attorney. Said notice was timely served within the statute of limitations provided for by 78-14-4 on respondents Vernal Family Health Center, Dr. Lee Balka, Vernal Drug Company, and Uintah County Hospital on April 12, 1978. Appellant's complaint was not filed until July 19, 1978--a period of ninety-eight days subsequent to the service of the notice of intent on each defendant.

The notice served on respondents contained the following language:

Pursuant to 78-14-8, UCA, notice is herewith given that Marzine Yates, husband of Velma Gladys Yates, potentially is asserting and claiming and may commence a civil action for damages arising out of possible negligent prescribing, negligent dispensing of drugs or other forms of prescribed medicine, and negligent hospitalization and treatment of his wife. In compliance with the aforesaid section of the Utah Code, it is believed and will be alleged in the event a civil action is commenced that from approximately March 1976 until March 1978, plaintiff's wife received prescriptions from the Vernal Drug Company believed to have been prescribed by Dr. Lee Balka in his official capacity as a partner or responsible agent of the Vernal Family Health Center, which prescriptions, in combination of use or separate, were dispensed

in an excessive amount which has resulted in permanent mental damage to claimant's wife. It is further believed that as a result of the prolonged excess abuse of the prescription medication, the seizure and subsequent coma which claimant's wife suffered approximately one year ago were possibly the result of negligence. (emphasis added)

Section 8 of the Health Care Malpractice Act states that the following information be contained in the notice of intent:

- 1) a general statement of the nature of the claim,
- 2) the persons involved,
- 3) the date, time and place of occurrence,
- 4) the circumstances thereof,
- 5) specific allegations of misconduct, and
- 6) the nature of the alleged injuries.

A reading of the letter served by appellant indicates that appellant did provide respondents with the above information and substantially complied with 78-14-8 in all aspects. That is, the claim was identified as one involving negligent prescribing and dispensing of drugs and negligent hospitalization, the appellant and respondents were identified, the time of occurrence was set during the period from March 1976 to March 1978 and specific misconduct was alleged in the excessive supplying of appellant with prescriptions resulting in seizures and injuries consisting of permanent mental damage. This information sufficiently apprised respondents of appellant's claim and substan-

tially complied with the provisions of 78-14-8.

POINT II

RESPONDENTS RECEIVED ACTUAL NOTICE OF APPELLANT'S INTENT TO COMMENCE A MALPRACTICE ACTION SUFFICIENT TO FULLY SATISFY THE PURPOSES COMTEMPLATED BY THE LEGISLATURE IN ENACTING SECTION 8 OF THE UTAH HEALTH CARE MALPRACTICE ACT.

Not only did appellant comply with the provisions of 78-14-8, but her notice further satisfied the intent underlying the enactment of that section. In order to correctly interpret the notice requirement of 78-14-8, the legislative intent underlying the Health Care Malpractice Act must be ascertained, since these provisions must be construed so as to accomplish the purposes of the Act. Section 2 of this Act states the purposes of the Act as follows:

...to provide a reasonable time in which actions may be commenced against health care providers while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated; and to provide other procedural changes to expedite early evaluation and settlement of claims.

It is apparent that 78-14-8 was adopted merely as a procedural device to insure that potential defendants receive actual notice of a claim against them, and have an opportunity to resolve that claim prior to the filing of a complaint. This is conclusively shown by reference to the "Report of the Activity and Recommendations of the Social Services Study Committee" of December 17, 1975 which is found in Medical

Malpractice Insurance Problems, Report to the 41st Legislative, Research Report No. 2, January 1976, Office of Legislative Research State of Utah Recommendation 9 of that report established the notice requirement now found at 78-14-8 and states:

The Committee feels that the requirement that the plaintiff give notice of action prior to suit will enhance the possibility of a settlement of the claim before suit.

Thus, the Legislature intended the notice requirement of 78-14-8 to provide potential medical malpractice defendants the opportunity to evaluate claims and to engage in settlement negotiations prior to the filing of a suit. The intent was not to create a technical stumbling block for unwary plaintiffs, but only to provide a time period of ninety days within which settlement negotiations could be pursued.

In the instant case, it is not disputed that each respondent received actual notice of the claim and had ample opportunities to investigate the claim and engage in settlement proceedings prior to the initiation of litigation. In fact, appellant's notice was served with dispatch after the discovery in March of 1978 of appellant's mental disabilities, which promptness enabled respondents to make an early investigation and evaluation of the claim while the matter was of recent memory and while witnesses were still readily available. That is, appellant has accorded respondents with every right that the legislature intended she should.

To adopt a construction of 78-14-8 requiring strict and technical compliance, in the fact of actual knowledge by respondents of the type of information designed to be provided by 78-14-8, would be an obvious injustice. Further, such a reading would thwart the purpose of the Act by erecting a mere technical requirement serving to increase uncertainty, which is inimical to the facilitation of reasonable and accurate calculation of premiums. Form should not be held in violate at the cost of substance, especially where respondents had actual notice of the claim, which actual notice provided respondents with the information and settlement period which 78-14-8 was intended to provide.

POINT III

IN ADDITION TO COMPLIANCE WITH 78-14-8,
APPELLANT SATISFIED THE REQUIREMENTS OF
ALL OTHER APPLICABLE STATUTE'S PROVIDING
FOR THE FILING OF A NOTICE OF CLAIM.

As a preliminary matter, it should be noted that the only other such applicable statute providing for the filing of a notice of claim is found in the Utah Governmental Immunity Act 63-30-1 et seq., Utah Code Ann., at Section 11. On its fact, 17-15-10, Utah Code Ann., which requires the filing of claims against the county with the County Auditor, appears to be applicable. A closer examination, however, reveals that such a contention cannot stand.

17-15-10 was first enacted in the Revised Statutes,

1898, while the Utah Governmental Immunity Act was enacted in 1965. Prior to this statutory abrogation of immunity for actions sounding in negligence by governmental entities in 1965, a cause of action founded in this abrogation of immunity is to be governed solely by the procedure enunciated in the statute which waives the immunity. Such a conclusion is consistent with the role that when two statutes relate to the same general statute to govern those situations within the scope of its coverage. Rammell v. Smith, 560 P.2d 1108 (Utah 1977).

The requirement of a filing of a notice pursuant to the Utah Governmental Immunity Act is found at 63-30-11 as follows:

Any person having a claim for injury to person or property against a governmental entity or its employee shall, before maintaining an action under this act, file a written notice of claim with such entity for appropriate relief including money damages. The notice of claim shall set forth a brief statement of the facts and the nature of the claim asserted, shall be signed by the person making the claim or such person's agent, attorney, parent or legal guardian, and shall be directed and delivered to the responsible governmental entity within the time prescribed in Section 63-30-12 or 63-30-13, as applicable.

An examination of the notice served on respondents on April 12, 1978, (see text of this notice on page 7) shows compliance with the above quoted section. That is, said notice was in writing, was served prior to the filing of this action, contained a brief statement of the facts and the nature of the claim,

was signed by appellant's attorney and husband, and, as will be discussed below, was timely filed. Further, the notice furnished by appellant fully satisfied the purposes for which the notice of claim statute was enacted. These purposes were identified by Mr. Justice Maughn in his dissenting opinion in Scarborough v. Granite School District, 531 P.2d 480 (1975):

The purpose of statutes requiring the presentation of claims to political subdivisions, prior to filing a suit, is in furtherance of public policy to present 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.

Mr. Justice Maughn also rejected the contention that strict compliance with the notice of claim statute was required when defendant was provided with all of the opportunities that the statute was intended to provide.

With regard to the question whether appellant's notice of claim was timely filed, Section 63-30-13 provides that claims against a political subdivision are barred unless filed within one year after the cause of action arises. Thus, it is crucial to make the determination as to when appellant's cause of action arose. This Court recently held in Foil v. Ballinger, No. 16071, filed September 19, 1979, that in a medical malpractice action, the statute of limitations does not begin to run "until the injured person knew or should have

known that he had sustained an injury and that the injury was caused by negligent action." Similarly, in the context of a notice of claim filed against a county pursuant to 63-30-13, Utah Code Ann., this Court held that no cause of action arose until plaintiff actually discovered the cause of the damage to his property. Vincent v. Salt Lake County, 583 P.2d 105 (1978). Both of these decisions relied on Christiansen v. Rees, 436 P.2d 435 (Utah 1968), wherein this Court stated:

It seems somewhat incongruous that an injured person must commence a malpractice action prior to the time he knew, or reasonably should have known, of his injury and right of action.

Thus, appellant's cause of action could not have arisen until appellant had discovered the injury and that such injury was caused by negligent conduct. The earliest possible date that this discovery could have occurred would have been on April 12, 1977, the date of appellant's release from Uintah County Hospital. It is much more likely, however, that the cause of action did not arise until March of 1978, after appellant's condition had stabilized and examination revealed permanent mental disability. In any event, since the notice of claim was served on April 12, 1978, such complaint was timely--that is, the earliest date on which the one year period provided by 63-30-13 could have run was April 13, 1978.

Regardless of whether appellant's claim was filed within one year of the accrual of her cause of action, appellant's mental disability tolled the running of the one year filing

period. Section 78-12-36 states:

If a person entitled to bring an action, other than for the recovery of a real property, is at the time the cause of action accrued, either:

- (1) Under the age of majority; or,
- (2) Mentally incompetent and without a legal guardian, or,
- (3) Imprisoned on a criminal charge...

The time such disability is not a part of the time limited for the commencement of the action.

This provision was before the court in the context of the notice provision of the Utah Governmental Immunity Act in Scott v. School Board of Granite School District, 568 P.2d 746 (1977).

In that case, Mr. Justice Hall stated:

Notwithstanding the prior pronouncements of this court, a minor claimant is justly entitled to the protection afforded by said Section 78-12-36(1), UCA, 1953, in all cases, including notice requirements of the type contained in the Utah Governmental Immunity Act. To hold otherwise is a denial of due process and equal protection.

Additionally, Section 63-30-11 provides that if the claimant is a minor or mentally incompetent, or imprisoned at the time that the cause of action accrued, then the court may extend the time for service of the notice of claim.

Thus, even though it appears that appellant's notice was filed within one year of the accrual of her cause of action, had it not been so timely filed, the tolling provisions of 78-12-36, Utah Code Ann. and 63-30-11, Utah Code Ann., would have prevented the running of the one year notice period due to appellant's mental disability.

POINT IV

THE NOTICE OF CLAIM REQUIRED BY SECTION 63-30-11, UTAH CODE ANN. IS UNCONSTITUTIONAL AS A RESULT OF ITS DENIAL OF EQUAL PROTECTION.

The notice provisions of the Utah Governmental Immunity Act have the effect of dividing all tort-feasors into classes of tort-feasors:

- 1) private tort-feasors to whom no notice of claim is required, and
- 2) governmental tort-feasors to whom such notice is required.

The principle of equal protection, guaranteed by both the Utah and United States constitutions, does not require equal treatment in law of things factually different, but it does, however, require that those similarly situated be similarly treated.

Thus, in State v. Mason, 78 P.2d 920 (1938) this Court stated:

It is only where some persons or transactions excluded from the operation of the law are as to the subject matter of the law in no differentiable class from those included in its operation that the law is discriminatory in the sense of being arbitrary and unconstitutional. If a reasonable basis to differentiate those included from those excluded from its operation can be found, it must be held constitutional...

No such reasonable basis exists in the instant case to justify the special procedural treatment afforded governmental tort-feasors that is not provided to all other tort-feasors. That

Legislature intended governmental and private tort-feasors to be on equal footing is clearly manifested by a reading of 63-30-4, Utah Code Ann.:

"... Wherein immunity from suit is waived by this act, consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person."

Since express statutory language negates any possible rational basis for the differentiation between private and governmental tort-feasors, the requirement of 63-30-11, Utah Code Ann. providing for the filing of a notice of claim with a governmental tort-feasor prior to maintaining an action is a denial of equal protection. Reich v. State Highway Dept., 194 N.W.2d 700 (Mich. 1972); Turner v. Staggs, 510 P.2d 879 (Nev. 1973).

POINT V

THE NOTICE OF INTENT REQUIRED BY 78-14-8, UTAH CODE ANN., IS UNCONSTITUTIONAL AS IT VIOLATES ARTICLE VI, SECTION 26, ARTICLE I, SECTION 24 AND ARTICLE I, SECTION 2 OF THE UTAH CONSTITUTION AND THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Although this Court recently held in McGuire v. University of Utah Medical Center, et al., No. 15984, filed November 1, 1979, that the 1979 amendments to the Health Care Malpractice Act did not constitute special legislation, it has yet to rule as to whether Section 78-14-8, Utah Code Ann., does constitute special

legislation. Article VI, Section 26 of the Utah Constitution provides that "No private or special law shall be enacted where a general law can be applicable." The distinction as to what constitutes a special law and what constitutes a general law was drawn in State v. Kallas, 94 P.2d 414 (Utah 1939), where the court defined general laws as:

"Laws which apply to and operate uniformly upon all members of any class of persons, places, or things requiring legislation peculiar to themselves in the matters covered by the laws in question..."

and special laws as:

"...such as relates either to particular persons, places, or things, or to persons, places, or things which, though not particularized, are separated by any method of selection from the whole class to which the law might, but for such legislation, be applied..."

Thus, a law is a special law if it imposes particular disabilities or conditions upon a class of persons arbitrarily selected from the general body of those who stand in the same relation to the subject of the law. In this case, 78-14-8 constitutes special legislation in that it requires a different and more stringent procedure for tort claimants whose injury arises from the acts or omissions of a health care provider than is required of tort claimants who are injured by nonhealth care providers. No justification exists for singling out the medical profession and providing it with procedural protection not afforded other groups. Certainly other professional groups have as great a need for procedural safeguards as does the medical profession.

On the other hand, should the Court find that the statute is a general law, then it violates Article I, Section 24 of the Utah Constitution. That section states: "All laws of a general nature shall have uniform operation." This notice provision does not have uniform application to all plaintiffs similarly situated and there is no rational basis for this disparate treatment of classes.

Both of the above cited constitutional sections are closely related to the question of equal protection. State Tax Commission v. Department of Finance, 576 P.2d 1297 (Utah 1978). Traditionally, a two-tiered analysis has been employed in the area of equal protection. That is, a standard of strict scrutiny will be employed when the statute contains a suspect class or impinges on a fundamental right. Under this standard, the statute will be upheld only if it furthers a compelling state interest. All other classification schemes have traditionally been tested under the rational basis standard which requires the validation of the classification scheme if there is any conceivable justification for its existence.

Recently, the United States Supreme Court has begun to adopt an intermediate level of scrutiny which has been termed the "means scrutiny standard". Under this standard, the inquiry is whether the classification substantially furthers the purpose for the classification. In Jones v. State

Board of Medicine, 555 P.2d 399 (Idaho 1976), the Idaho Supreme Court held that an equal protection challenge to medical malpractice legislation is to be measured by the means scrutiny test. Thus, the constitutionality of the provisions of the Utah Health Care Malpractice Act should be gauged either by the means scrutiny test of Jones or by the higher strict scrutiny standard since the right of access to the courts is a fundamental right. Utah Constitution, Article I, Section 11; State ex-rel Schneider v. Liggett, 576 P.2d 221 (Kan. 1978).

For the notice provision of 78-14-8 to stand under either the strict scrutiny or means scrutiny standards, it must be shown that a medical malpractice crisis does in fact exist in Utah, that a classification based upon the lines of health care providers and non-health care providers is not arbitrary, and that the legislation does in fact reduce the number and amount of medical malpractice awards. Absent such a showing, the Utah Health Care Malpractice Act must be declared unconstitutional as violative of equal protection.


CONCLUSION

Appellant complied with the applicable notice of claim provisions of the Utah Health Care Malpractice Act and the Utah Governmental Immunity Act. Furthermore, Section 63-30-11 is unconstitutional as a denial of equal protection and Section 78-14-8 is unconstitutional as violative of equal

protection and Article VI, Section 26 and Article I, Section 24 of the Utah Constitution.

For these reasons, the trial court erred in granting respondents' Motion to Dismiss appellant's complaint.

RESPECTFULLY SUBMITTED this 6 day of December, 1979.


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