

1980

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 Respondents Uintah County And Uintah
County Hospital

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 the Division of)
Family and Community Medi-)
cine, University of Utah;)
UINTAH COUNTY; UINTAH COUNTY)
HOSPITAL; VERNAL DRUG COM-)
PANY, a Utah Corporation;)
and GORDON LEE BALK, M.D.,)
)
Defendants-)
Respondents.)

Case No. 16602

BRIEF OF RESPONDENTS UINTAH COUNTY
AND UINTAH COUNTY HOSPITAL

Appeal From a Judgment of the
Fourth Judicial Court for Uintah County
Honorable Allen B. Sorensen, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

VELMA GLADYS YATES,)

Plaintiff-)

Appellant,)

vs.)

Case No. 16602

VERNAL FAMILY HEALTH CENTER,)

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Family and Community Medi-)

cine, University of Utah;)

UINTAH COUNTY; UINTAH COUNTY)

HOSPITAL; VERNAL DRUG COM-)

PANY, a Utah Corporation;)

and GORDON LEE BALKA, M.D.,)

Defendants-)

Respondents.)

BRIEF OF RESPONDENTS UINTAH COUNTY
AND UINTAH COUNTY HOSPITAL

NATURE OF THE CASE

This action was commenced by Plaintiff against Defendants alleging injuries sustained as a result of various acts of health care malpractice.

DISPOSITION OF THE LOWER COURT

After extensive briefing by all parties the Honorable Allen B. Sorenson granted the motions of Uintah County and Uintah County Hospital for dismissal based upon the failure of Plaintiff to comply with the requirements of Section 78-14-8, U.C.A., Section 17-15-10, U.C.A. and Section 63-30-13, U.C.A. (R., p. 220).

RELIEF SOUGHT ON APPEAL

Defendants Uintah County and Uintah County Hospital seek affirmance of the lower court's Order of Dismissal.

STATEMENT OF FACTS

Appellant's "Statement of the Facts" erroneously implies that facts alleged by Plaintiff in her complaint are in fact true. In addition, Plaintiff fails to state certain critical procedural facts necessary for determination of this appeal. For these reasons, the following factual statement is offered by Respondents Uintah County and Uintah County Hospital.

It is undisputed that during certain periods of time between December, 1975 and March, 1977 Plaintiff received medical care or medical supplies from the various defendants. It is also undisputed that Plaintiff's first contact with Respondent Uintah County Hospital occurred on March 12, 1977, the date of her first hospitalization. She subsequently received medical care at the facility for a short period of time, was later readmitted for approximately one week and was finally discharged on April 12, 1977.

Plaintiff has alleged that in March of 1978 it was discovered that Plaintiff suffered permanent mental disability because of the claimed negligence of the various defendants. (R., p. 3).

On April 7, 1978 the following letter was prepared and served upon the four addressees:

April 7, 1978

TO: Vernal Family Health Center
Dr. Lee Balka
Vernal Drug Company
Uintah County Hospital

Gentlemen:

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, claimant'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.

Claimant is unable to supply further information about the details of the possible claim or the possible believed responsible parties until an exam of all the books and records of recipients of this notice has been accomplished.

s/_____
Marzine Yates

s/_____
Robert M. McRae
Attorney for Claimant

SUBSCRIBED AND SWORN TO before me on this 7th day of April, 1978.

No notice of claim in any form was ever filed with the Uintah County Commissioners. In addition, no notice of claim has ever been filed with the Uintah County Auditor. (R., p. 203).

On July 19, 1978 Plaintiff filed a complaint with the Uintah County Clerk's Office alleging various acts of malpractice by Defendants. (R., pp. 1-3). All defendants filed answers to this Complaint and all moved for dismissal based upon Plaintiff's failure to comply with various provisions of Utah statutory law.

Although some of the arguments advanced by the defendants were common to all defendants, other claims were peculiar to each defendant because of differences in political status. Respondents Uintah County and Uintah County Hospital filed their motion for dismissal based upon the failure of Plaintiff to comply with specific statutory notice requirements pertaining to county governments and county health providers. (R., p. 145).

After extensive argument and review of legal memoranda submitted by all parties, the trial court took the motions of defendants under advisement. The court granted the motion of Defendants Uintah County and Uintah County Hospital and dismissed Plaintiff's complaint for failure to comply with Section 78-14-8; Section 17-15-10; and Section 63-30-13, Utah Code Annotated, 1953. (R., pp. 219-220). It is from this Order that Plaintiff now appeals. (R., p. 221).

ARGUMENT

As noted previously the grounds for dismissal in this case are both common and also peculiar to each of the defendants since the statutory requirements differ according to the type of entity involved. For this reason, therefore, Respondent Uintah County and Uintah County Hospital shall only address the statutory provisions specifically pertinent to Plaintiff's claim against them and shall defer discussion of other grounds to the remaining defendants.

POINT I

THE TRIAL COURT WAS CORRECT IN DISMISSING PLAINTIFF'S ACTION AGAINST UINTAH COUNTY AND UINTAH COUNTY HOSPITAL FOR FAILING TO COMPLY WITH THE UTAH HEALTH CARE MALPRACTICE ACT.

A. Plaintiff Failed to File ANY Notice Required Under the Act.

The "Utah Health Care Malpractice Act" was passed by the Utah Legislature in 1976. Among its numerous provisions the Act required that a Notice of Intent be served upon a potential defendant at least 90 days prior to the commencement of any action against such defendant. Section 78-14-8, U.C.A.

The Act was subsequently amended in 1979 at which time several changes not pertinent to this appeal were made. Since Defendant Uintah County Hospital had no part in the medical care of Plaintiff until March 12, 1977 it is clear that the provisions of Section 78-14-8 were applicable at the time Plaintiff desired to commence an action against the county and the

hospital.

Defendants Uintah County and Uintah County Hospital maintained that no valid notice was ever served upon the hospital since the notice which was received was not signed by the plaintiff nor did it state that Velma Gladys Yates would be the claimant.

The statute, both in its original and amended form, clearly mandates that the "plaintiff" give the required notice.

The statute states in pertinent part:

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 90 days prior notice of intent to commence an action. . . . Notice may be in letter or affidavit form executed by the plaintiff or his attorney.

Comparing this statutory requirement with the letter of April 7, 1978 clearly shows that Velma Yates was not the "plaintiff" giving the required notice. That letter stated in pertinent part:

Pursuant to 78-14-8, U.C.A., 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.

The notice then continues to state alleged facts concerning "claimant's wife" which caused "claimant's wife" to suffer

injuries. The notice then concludes by noting that "claimant is unable to supply further information about the details of the possible claim." The notice is signed by Marzine Yates and by Robert M. McRae, "Attorney for Claimant".

A reading of this letter unquestionably shows that the proposed plaintiff referred to in the notice was Marzine Yates-- not the plaintiff in this action, Velma Gladys Yates. Clearly, anyone reading the April 7 letter would conclude that the plaintiff in any subsequent action would be Marzine Yates and that Mr. McRae would represent him.

The trial court in its memorandum decision noted the failure of Plaintiff to file any notice by stating:

Plaintiff in reliance on Hatch v. Weber County, 23 U.2d 144, 459 P.2d 436, asserts that Plaintiff complied substantially with the notice requirement of 78-14-8, U.C.A. '53. Nothing in the record indicates that Velma Gladys Yates complied at all with the statutory notice requirements. Defendants' motions to dismiss are granted. (R., p. 218). (Emphasis in original).

As will be discussed in detail in the next subsection, a statute which is a condition precedent to the filing of an action must be strictly complied with if a plaintiff wishes his or her day in court. In this case it would have been a simple matter for the April 7, 1978 letter to state that Velma Gladys Yates was asserting a potential claim and could be a plaintiff in a subsequent action. This was not done nor was any reason advanced by Plaintiff in the lower court for such

failure.

For this reason, the trial court was correct in concluding that no valid notice whatsoever was ever given to Defendants by Plaintiff Velma Gladys Yates and the court correctly dismissed the action for failure to give the necessary notice. Vealey v. Clegg, 579 P.2d 919 (Utah 1978).

B. The Notice Filed by Plaintiff's Husband was Itself Insufficient as a Matter of Law.

Even if it were assumed arguendo that the April 7 notice filed by Plaintiff's husband was properly filed by the "plaintiff", the contents of the notice itself are insufficient as a matter of law to comply with the other requirements of Section 78-14-8.

The notice required to be given under the Health Care Malpractice Act is jurisdictional. Until such notice is given a District Court has no jurisdiction over a complaint filed. Section 78-14-8, U.C.A. (1979 Supp.) is therefore similar to Section 63-30-11 and Section 63-30-13, U.C.A. (1979 Supp.) which are contained in the Governmental Immunity Act. Statutes of this type are jurisdictional and the plaintiff must allege and prove compliance with them before an action may be maintained. Bowen v. Waymire, 478 P.2d 691 (Colo. App. 1970).

Where a jurisdictional notice is required to be given in a certain manner any means other than that prescribed is ineffective. Hart v. Bayless Investment and Trading Company, 346

P.2d 1101 (Ariz. 1960); Lewis v. Ehrlich, 513 P.2d 153 (Ariz. App. 1973).

Appellant in her brief quotes from this Court's case of Tooele Meat and Storage Company v. Morse, 136 P. 965 (Utah 1913) and argues that a notice requirement should be liberally construed. (Appellant's brief, p. 5). Appellant, however, has omitted the sentence following that quoted in her brief and has therefore distorted the rule to be applied in the instant case. The entire quotation is as follows:

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. Of course, where the statute prescribes a particular form of notice, then, as a general rule, the form required must be followed with reasonable strictness, as under such circumstances the form may be regarded as matters of substance. But where the statute does not prescribe a form, the question ordinarily is whether the notice actually given constitutes a substantial compliance with the statutes. 136 P. at 966 (Emphasis added).

Section 78-14-8 clearly enumerates the requirements that any notice must contain. The April 7 letter specifically refers to this statutory section so it is evident that the drafter of the letter was aware of its requirements. The statute states the following:

Such notice shall include the nature of the claim, the persons involved, the date, time and place of the occurrence, the circumstances thereof, specific allegations of misconduct on the part of the prospective defendant, the na-

ture of the alleged injuries and other damages sustained.

The determination of whether a notice complies with a statute is a question of law for the court. Himes v. City of Flint, 196 N.W.2d 321 (Mich App. 1972). Thus, as a matter of law, the April 7 notice is patently inadequate to meet the criteria necessary for Plaintiff to successfully file an action against Uintah County and Uintah County Hospital.

This is not a question of "substantial compliance" as argued by Appellant. (Appellant's brief, pp. 3-8). Rather, it is a question of whether Plaintiff complied with all of the mandatory requirements of the notice statute.

Comparing the statutory requirements with the April 7 Notice, the following deficiencies are readily apparent as to any claim against Uintah County or Uintah County Hospital:

- a. Nature of Claim - The notice states that the claim may be commenced for "possible negligent prescribing, negligent dispensing of drugs or other forms of prescribing medicine, and negligent hospitalization and treatment." Such statement may be sufficient except that it fails to specify which of these acts was committed by Defendant Uintah County and Uintah Hospital.
- b. The Persons Involved - No specific personnel or even general description of hospital personnel are given in the notice.
- c. The Date, Time, and Place of the Occurrence - The only reference to any date in the letter is March, 1976 to March, 1978 but such reference refers only to prescriptions from the Vernal Drug Company as prescribed by Dr. Lee Balka. Absolutely no date, time or place reference

is made as to Defendants Uintah County or Uintah County Hospital.

d. Specific Allegations of Misconduct on the Part of the Prospective Defendant - No allegations whatsoever are made as to Uintah County or Uintah County Hospital conduct. In fact, the name "Uintah County Hospital" does not appear anywhere in the notice. While some reference is made to prescribing drugs there is no reference that Defendant Uintah County Hospital was in any way connected to such prescribing or dispensing of drugs. There is no allegation whatsoever as to any conduct of the hospital except for the conclusionary statement of "negligent hospitalization and treatment".

e. Nature of the Alleged Injuries - The letter refers to a "seizure and subsequent coma" but does not allege any permanent disability as is now claimed by the plaintiff.

This Court has repeatedly held that under the Government Immunity Act the notice provision must be complied with before a cause of action can be commenced. Edwards v. Iron County, 531 P.2d 476 (Utah 1975; Varoz v. Sevey, 506 P.2d 435 (Utah 1973; and Gallegos v. Midvale City, 497 P.2d 1335 (Utah 1972).

Moreover, in order to meet the requirements of the Governmental Immunity Act the information demanded by the statutory language must be supplied. Scarborough v. Granite School District, 531 P.2d 480 (Utah 1975).

The requirements of the Utah Health Care Malpractice Act are no less demanding. The statute specifically states that no malpractice action "may be commenced unless and until" the notice is given in the correct form. Section 78-14-8. Plaintiff,

however, attempts to distinguish this notice requirement and its similarity to the Governmental Immunity Act and this Court's interpretations of that act. Plaintiff argues that prior to the enactment of the Utah Health Care Malpractice Act Plaintiff had a common law right to sue Defendant and therefore any statutory restriction cannot be controlling. (Appellant's brief, pp. 6-7). Thus, Plaintiff argues the Governmental Immunity Act is not comparable because there was no pre-existing right to sue a government prior to the waiver of immunity passed by the State Legislature.

This argument is without merit. In Berlandi v. Union Freight Railroad Company, 16 N.E.2d 17 (Mass. 1938) a defendant moved to dismiss an action brought by a plaintiff for allegedly defective railroad tracks owned by the private corporation. The defendants argued that notice under a statutory provision was required in order for a proper suit to have been commenced. The plaintiffs argued that since a common law right existed before the statute that such notice was not required. The Supreme Court of Massachusetts discussed this argument and stated:

The plaintiffs have argued, however, that their actions are at common law and therefore that they were not required to give the statutory notice provided for in Section 89. It is true that "At common law, the defendant would be liable for any person injured by such negligence". . . . The statute is in affirmance of the common law and the liability declared is substantially the same as that which the common law imposes upon persons who place obstructions in the public

highway whereby injury is done to persons or property. It was enacted to relieve cities and towns from liability for injuries to travelers in fact caused by railways if notice is not given and an action begun as provided in Chapter 84, Section 18. . . . Although by its terms the common law liability was affirmed, the conditions imposed in enforcing that liability must be observed, and the plaintiffs were bound to proceed under its terms. . . . The notice required is not a mere step in enforcing the plaintiff's actions, "but is a condition precedent to [their] existence, which in other words is one of [their] essential elements." Id. at 20.

Cases in other jurisdictions in which statutory notice requirements have not been fulfilled clearly indicates the strictness which must be applied in supplying the information demanded by a mandatory notice statute. In Nelson v. Dunkin, 419 P.2d 984 (Wash. 1966) a statute required notice to be given to the county describing any defect causing injuries, a description of the injuries, the amount of damages incurred, and a "statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six months immediately prior to the time the claim accrued."

The Supreme Court of Washington affirmed the lower court's dismissal of the action based upon the failure of the claimant to include in his notice the residency requirement. The court stated the following:

There was absolutely no attempt to state the actual residence of the claimant at the time the claim was presented and filed; the only effort to meet the further require-

ment of a statement of the actual residence for six months prior to the time the claim accrued was the above-quoted statement to the effect that the claimant and his son had been residents of the State of Alaska for a period of six months immediately preceding the accident.

The purpose of the requirements, relative to residence, is to give the county an opportunity to investigate the claimant as well as his claimed injuries.

We agree with the trial court that the quoted reference to the State of Alaska cannot be regarded as a substantial compliance with a request for a statement as to the actual residence at the time of presenting the claim and for six months preceding the accrual of the accident. There was no attempt to give any meaningful information. We need not expatiate on the size of Alaska; for all practical purposes the claimant might just as well have said that they were residents on the Planet Earth. Id. at 985-986. (Emphasis added).

The court then concluded by noting that statutory requirements must be complied with and that it is not a judicial function to decide whether such requirements were necessary for the county to investigate the claim. The court then stated:

It is not for the court to decide whether a claimant's failure to comply with the statutory requirement relative to his claim is prejudicial to the county in any particular case. The legislature has required certain information. If this requirement is no longer meaningful, it is for the legislature and not for this court to take it out of the statute. Id. at 988.

Similarly, in Himes v. City of Flint, 196 N.W.2d 321 (Mich. App. 1972) the court held that a statutory notice of fire violation had not been complied with since the city had failed to

meet at least three of the mandatory standards prescribed by the ordinance. Just as in the present case, the city argued that the notice substantially complied with the statute and was adequate as a matter of law. The court rejected this argument and stated the following:

It cannot be said from a reading of the notice that the mandatory contents were impliedly, or expressly, included therein. Since the directives are mandatory, the City Commission has determined that there shall be no room for administrative discretion to omit a portion of the contents of a notice whenever it appears to be unnecessary in the circumstances of an individual violation.

The concept of "substantial compliance" can only be drawn upon in situations where the provisions of the notice are ambiguous. In such cases the court would then determine whether the notice "substantially complied" despite the ambiguity. However, the presently considered notice does not fall within this category--there being no language which could be construed as complying with the mandatory content requirements. Id. at 324. (Emphasis in the original).

Finally, this Court in Sweet v. Salt Lake City, 134 P. 1167 (Utah 1914) held that the purpose of the statute requiring notice to be given to the city for injuries (formerly Section 10-7-77, U.C.A.) is to require every claimant to state clearly all of the elements of his claim to the Board of Commissioners or City Council for allowance as a condition precedent to his right to sue the city and recover his damages in an ordinary

action. This Court held that a notice in which damages were specified as "for general impairment" of an automobile was an insufficient description of the damages and one which could not be cured by amendment. See also Stoops v. City of Denver, 73 P. 1094 (Colo. App. 1903).

It is therefore evident that a review of the statutory requirement of notice as compared with the April 7 letter clearly omits at least four of the six essential elements required by such notice before an action may be commenced against Uintah County or Uintah County Hospital. As to these defendants there is no question of "substantial compliance" since the defendants are not even mentioned in the text of the letter, no dates or places are described relating to the defendants, nor is any circumstance or allegation of specific misconduct made as to these defendants. As in the previously cited cases, this is not a question of ambiguity of a notice, but is rather a case where all requirements were completely omitted.

For this reason, the statutory notice requirement of Section 78-14-8 was not fulfilled by the plaintiff and the trial court properly dismissed the subsequently filed action.

C. Any Claimed Actual Knowledge by Defendant Uintah County and Uintah County Hospital is Immaterial.

Appellant argues in her brief that it is apparent that Section 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." (Appellant's brief, p. 9). Appellant then argues that since it's undisputed that each respondent received actual notice of the claim and had ample opportunity to investigate the claim the fact that the notice may not have been strictly complied with is not important. Appellant finally argues that actual knowledge by Respondents of a potential claim is all that is required since a "technical" reading of the statute would create a "stumbling block for unwary plaintiffs." (Appellant's brief, pp. 10-11).

This argument is without merit. Had the legislature only intended that notice of a potential claim be given to a health care provider it would have been a simple matter for the statute to merely state that notice of intent should be so provided. Instead, however, the legislature expressly and in substantial detail outlined the notice requirements. The legislature obviously felt that such information was essential in order to provide the health care recipient with enough information to conduct an investigation and to possibly enter into a settlement with the claimant. It is not the prerogative of Plaintiff to say that such required information was only a "technicality" and that the mere act of notifying the health care provider of a possible claim was sufficient.

This Court has on several occasions held that actual know-

ledge by County employees under the Governmental Immunity Act is not sufficient to dispense with the requirement of filing a properly executed notice of claim. Edwards v. Iron County, 531 P.2d 476 (Utah 1975); Scarborough v. Granite School District, 531 P.2d 480 (Utah 1975); Varoz v. Sevey, 506 P.2d 435 (Utah 1973).

In Nelson v. Dunkin, 419 P.2d 984 (Wash. 1966) a similar argument was advanced by that plaintiff in a governmental immunity action. In that case the plaintiff failed to supply information concerning his residency at the time the accident occurred. The court there stated the following:

[T]he very appealing argument is made that in this particular situation the county was not in any way prejudiced by not having this information. The boy, Lewis Gordon Nelson, was in a hospital in Whatcom County. The County Coroner, and presumably the sheriff, had made a complete investigation of all facts relative to the collision; and the avenues of the interrogatories and depositions were available and the County had availed itself of the former.

The answer to this argument is that the information required is for the County's consideration of the claim. There can be no interrogatories and depositions until the county has rejected the claim and an action has been commenced. Id. at 986.

Obviously, the purpose of Section 78-14-8 was to provide time for a health care provider to investigate an alleged claim and to allow the health care provider the opportunity to settle such claim before a court proceeding has been filed in order to avoid adverse publicity. The intent was not to merely no-

tify the health care provider that a claim may be asserted but was to provide sufficient and substantial information to such health care provider that a thorough and adequate investigation could be made.

Appellant's argument would require a health care provider to be left at the mercy of the claimant as to the amount of information which it is given or as to how knowledge of the claim is obtained. Just as with the Government Immunity Act, the purpose of the written notice is to prevent any dispute from arising as to when notice was received while at the same time providing essential information necessary for the purpose of investigation.

The notice statute of the Utah Health Care Malpractice Act is not a "technical stumbling block" for an "unwary plaintiff." The statute is clearly written and simply requires a notice to be served 90 days prior to the commencement of an action which contains six simple and common types of information which any plaintiff should readily be able to supply. In this case, the notice was prepared upon the stationery of an attorney. It is certainly not unreasonable to expect a practicing Utah attorney to be able to comply with the straightforward requirements of this statutory mandate.

For these reasons, any actual knowledge of Plaintiff's claim by Defendant Uintah County or Uintah County Hospital is immaterial and the trial court correctly dismissed Plaintiff's

complaint for failure to comply with the mandatory notice requirement.

POINT II

THE TRIAL COURT WAS CORRECT IN DISMISSING PLAINTIFF'S ACTION AGAINST UINTAH COUNTY AND UINTAH COUNTY HOSPITAL FOR FAILING TO COMPLY WITH THE UTAH GOVERNMENTAL IMMUNITY ACT.

Plaintiff's complaint alleges that Uintah County Hospital is owned and operated by Uintah County. (R., p. 1). Defendants admitted in their answer to this fact. (R., p. 22).

Defendants Uintah County and Uintah County Hospital claimed at the trial court level that Plaintiff had failed to comply with the Governmental Immunity Act by not filing a Notice of Claim with the County Commission as required by Section 63-30-11 and 63-30-13.

Plaintiff responded to this argument by claiming that this Court's case of Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975) held that the operation of a hospital was a proprietary function and therefore was not within the Governmental Immunity Act. (R., p. 209). The Greenhaugh decision was based upon an interpretation of Section 63-30-3, U.C.A., 1953 which stated that the Governmental Immunity Act only applied to activities involving governmental functions. This Court held that since the operation of the hospital was a proprietary function the procedures of the Governmental Immunity Act were not applicable since a direct action could be maintained against the city

without a waiver of immunity.

Apparently in direct response to the Greenhaugh decision the Utah legislature in 1978 amended Section 63-30-3 to include hospital operated facilities within the procedure of the act. The amended statute reads as follows:

Except as may be otherwise provided in this Act, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally owned hospital, nursing home, or other governmental health care facility. Section 63-30-3. (Supp. 1979).

Appellant has apparently recognized this amendment since she has failed to claim the proprietary distinction in her brief. Presumably, therefore, Appellant has conceded that the Governmental Immunity Act is applicable and that the notice provisions of Section 63-30-11 and 63-30-13 must be followed. (See Appellant's brief, pp. 12-13 discussing these notice provisions).

Section 63-30-13, as amended in 1978, states the following:

Claim Against Political Subdivision--Time for Filing Notice. - A claim against a political subdivision is barred unless notice of claim is filed with the governing body of the political subdivision within one year after the cause of action arises. (Emphasis added).

Appellant argues that the April 7, 1978 letter was sufficient to satisfy the requirements of Section 63-30-11. (Appellant's brief, p. 12). It is unnecessary, however, to discuss

the content of this letter with reference to the Governmental Immunity Act since it is undisputed that the April 7, 1978 letter was never filed with the Uintah County Commission--the governing body of Uintah County.

This Court has held in Scarborough v. Granite School District, 531 P.2d 480 (Utah 1975) that a necessary element of the statute is that the notice "be directed to and delivered to someone authorized to or responsible for receiving it." The failure of Plaintiff to file any notice with the Uintah County Commission clearly fails to meet the requirement of Section 63-30-11. As such, the trial court was correct in concluding that the requisite notice had not been given to the governing board of Uintah County and therefore a civil suit was barred.

As a final note, Appellant has argued that the time for filing such notice is tolled because of the alleged mental disability of the plaintiff and because of this Court's decision in Scott v. School Board of Granite School District, 568 P.2d 746 (1977). (Appellant's brief, pp. 14-15).

Once again, however, the plaintiff has failed to note that the legislature has amended Section 63-30-11 which in effect has overruled the Scott decision.

Paragraph 3 of Amended Section 63-30-11 states the following:

If the claimant is under the age of majority,
or mentally incompetent and without a legal

guardian, or in prison at the time the cause of action accrued, the court, in its discretion, may extend the time for service of notice of claim, but in no event shall it grant an extension which exceeds the general statutory period of limitation applicable to the cause of action. In determining whether to grant an extension, the court shall consider whether the delay in serving the notice of claim will substantially prejudice the governmental entity in maintaining its defense on the merits.

Thus, the amended statute requires an order from the court before any tolling can occur as to the service of notice of claim. In this case, no such request was made to the court nor has it ever been judicially determined that Plaintiff was incompetent at the time the cause of action accrued.

For this reason the one-year time limitation prescribed by the statute has expired and Plaintiff is therefore barred from attempting to file a new notice of claim arising from her treatment at the Uintah County Hospital in 1977.

POINT III

THE TRIAL COURT WAS CORRECT IN DISMISSING PLAINTIFF'S ACTION AGAINST UINTAH COUNTY AND UINTAH COUNTY HOSPITAL FOR FAILING TO FILE NOTICE OF THE CLAIM WITH THE UINTAH COUNTY AUDITOR AS REQUIRED BY SECTION 17-15-10, U.C.A.

As a third alternative ground for dismissal the trial court found that Plaintiff had failed to file a claim pursuant to Section 17-15-10, U.C.A., 1953. This statute states in pertinent part the following:

The Board of County Commissioners shall not hear or consider any claim of any per-

son against the county. . . unless the same is itemized, giving names, dates and particular services rendered, or until it has been passed upon by the county auditor. . . . Every claim against the county must be presented to the County Auditor within a year after the last item of the account or claim accrued. . . .

It is undisputed that no type of notice or claim was ever filed with the Uintah County Auditor. (See Affidavit of Morris R. Cook, Uintah County Auditor, R., p. 203).

This Court in Edwards v. Iron County, 531 P.2d 476 (Utah 1975) held that in an action brought against a county-owned hospital for alleged malpractice it was necessary for the plaintiff to file a timely claim under the provisions of Section 17-15-10. The facts in that case as to the claim asserted were nearly identical to the claim now asserted by Plaintiff.

Appellant argues, however, that Section 17-15-10 is no longer applicable because of the enactment of the Utah Governmental Immunity Act. (Appellant's brief, pp. 11-12). Plaintiff asserts, therefore, that the Governmental Immunity Act preempts the county claim statute and eliminates the need for filing under it.

This argument is not valid. The original Governmental Immunity Act passed in 1965 provided for only a 90-day period of notice and also stated that any claim against a city was to be governed by Section 10-7-77, U.C.A. which provided a 30-day notice requirement. This latter section was the city equiva-

lent of the county 17-15-10 section.

In 1975 this Court's decision in Edwards was decided. The legislature was thus fully aware that this Court required a filing under Section 17-15-10 in cases involving malpractice against the county.

In 1978 the legislature repealed Section 10-7-77 (the city claim statute) and amended Section 63-30-13 to delete the reference to the previous city statute. (U.C.A. 1979 Supp.).

However, the legislature did not repeal or amend Section 17-15-10 pertaining to claims against the county. It is apparent that had the legislature intended for the Utah Governmental Immunity Act to preempt Section 17-15-10 it would have amended the latter statute at the same time the city statute was abolished and the Governmental Immunity Statute was revised.

In absence of such revocation or amendment Section 17-15-10 is still viable law and still requires a claim be submitted to the county auditor before a suit can be commenced.

Certainly, Plaintiff's attorney should have been aware of this statute and its requirement since he was a named plaintiff in the case of Hatch v. Weber County, 459 P.2d 436 (Utah 1969) involving an interpretation of Section 17-15-10.

In any event, Plaintiff and her attorney failed to correctly file a Notice of Claim under either the Governmental Immunity Act or the County Claim Act and therefore the trial

court correctly dismissed the complaint under either or both of these provisions.

POINT IV

THE GOVERNMENTAL IMMUNITY ACT AND HEALTH CARE PRACTICE ACT ARE CONSTITUTIONAL.

Appellant asserts two final arguments in her brief. First, that the notice section 63-30-11 of the Utah Governmental Immunity Act is unconstitutional and second that the notice provision Section 78-14-8 of the Health Care Malpractice Act is also unconstitutional. Both of these arguments are without merit.

Appellant has failed to raise the question of constitutionality of the Governmental Immunity Act at the lower trial level. This Court has held that a defendant cannot raise an issue for the first time on appeal. Neilson v. Eisen, 209 P.2d 928 (1949); Wagner v. Olson, 482 P.2d 702 (1971). This rule was recently reaffirmed in State of Utah v. Daniel Lee Laird, No. 16318 (Utah, October 11, 1979).

Even if this issue were properly before this Court it cannot stand. Since a suit against the government is discretionary with the legislature it can impose those conditions it deems necessary before such suit can be commenced. Cornwall v. Larsen, 571 P.2d 925 (Utah 1977). There are numerous reasons why a government entity should be entitled to notice before a suit can be commenced against it. See discussion in Gallegos

v. Midvale City, 492 P.2d 1335 (Utah 1972).

This Court in Crowder v. Salt Lake County, 552 P.2d 646 (Utah 1976) has upheld the notice provision of the Governmental Immunity Act as constitutional even though at that time three different time periods existed depending upon the governmental entity sued. This Court noted:

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. Id. at 647.

Likewise, the fact that a notice provision is required under the Utah Health Care Malpractice Act and is not required as to other tort feasons does not make such Act unconstitutional.

This Court in McGuire v. University of Utah Medical Center, No. 15984 (Utah, November 1, 1979) held that the 1979 amendment to Section 78-14-8 did not constitute special legislation since it applied to a class of persons equally--in that case, all persons having a cause of action arising prior to the effective date of the malpractice act. This Court noted:

The amendment does not rest on an arbitrary classification; it makes no invidious discrimination, and it applies uniformly to all within the class. The amendment merely differentiates between those classes of persons to whom the no-

tice of intent to sue provision applies and those to whom it does not apply based on the effective date of the Malpractice Act. It is within the power of the Legislature to make such a classification when enacting clarifying legislation designed to avoid hardship and injustice. Slip opinion at p. 4.

The fact that some plaintiffs must file a Notice of Intent against alleged tort feasons and that others do not does not make the law unconstitutional. The law is equally applied to all persons within the class claiming injuries sustained by a health care provider. As previously noted, the legislature may validly divide large classes of people into smaller classes without infringing upon constitutional safeguards.

Plaintiff argues in her brief that "It must be shown 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." (Appellant's brief, p. 20).

It is the burden, however, of Appellant to show that an invalid classification has occurred and not the burden of the legislature to show that such classification is valid. Crowder v. Salt Lake County, 552 P.2d 646 (Utah 1976).

The legislature has previously made "legislative findings and declarations" as contained in Section 78-14-2 of the Act itself. These findings on their face support and justify the

requirement that claimants against health care providers must follow a more stringent procedure than claimants against non-health care providers. The facts listed in this section include the high number of lawsuits, the high cost of medical insurance, the difficulty in obtaining insurance, and the purpose of encouraging private insurance companies to continue to provide malpractice insurance while establishing a mechanism to insure the availability of insurance. These are all legitimate purposes and goals of the legislature.

Hence, in the absence of proof to the contrary the classification made by the legislature is reasonable and is constitutionally sound.

For these reasons, both the Utah Governmental Immunity Act and the Utah Health Care Malpractice Act are constitutionally valid and are applicable to Plaintiff's claim against Uintah County and Uintah County Hospital.

CONCLUSION

The lower court was correct in dismissing Plaintiff's claim for failure to comply with the Utah Health Care Malpractice Act. It is evident from examining the April 7 notice that Plaintiff is not listed as a claimant which is a mandatory requirement of the Act.

In addition, the notice itself is defective since it fails to give Uintah County or Uintah County Hospital the mandatory information required by the statute. This failure is not negated by any alleged actual knowledge of the circumstances of

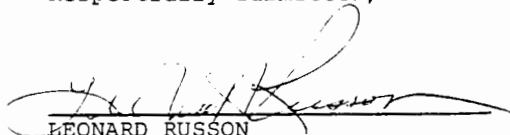
Plaintiff's claim on the part of the hospital or county.

In addition, Plaintiff failed to comply with the mandatory notice requirements of the Governmental Immunity Act by failing to file such notice with the governing body of Uintah County. The plaintiff also failed to file a claim with the county auditor as is required by Section 17-15-10, U.C.A.

Finally, both the Governmental Immunity Act and Health Care Practice Act are constitutional. Both of these acts were passed by the Utah Legislature because of the special needs and status encompassing governmental entities and health care providers. The classification under both of these acts is well within the power of the legislature and all persons asserting claims against governmental entities for health care providers must follow the same statutory requirements. The fact that these requirements are more stringent than claims against other entities is immaterial as long as a legitimate basis for classification exists.

For these reasons, the judgment of the lower court dismissing Plaintiff's complaint should be affirmed.

Respectfully submitted,



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MAILING CERTIFICATE

I hereby certify that I mailed two copies of the Brief of Respondents Uintah County and Uintah County Hospital, postage prepaid, this 21~~st~~ day of January, 1980 to the following: Robert M. McRae, 72 East 4th South #355, Salt Lake City, Utah 84111; William T. Evans, 25 South Wolcott, Salt Lake City, Utah 84112; John H. Snow, 700 Continental Bank Building, Salt Lake City, Utah 84101; D. Gary Christian, 600 Commercial Club Building, Salt Lake City, Utah 84111; and Gayle F. McKeachnie, 53 South 200 East, Vernal, Utah 84078.

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