

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 Respondent Vernal Family Health Center

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Yates v. Vernal Family Health Center*, No. 16602 (Utah Supreme Court, 1980).
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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 RESPONDENT VERNAL FAMILY HEALTH CENTER

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

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Case No. 16001

ORDER OF THE DISTRICT COURT OF THE STATE OF UTAH

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 District Court for Utah County
 Honorable Allen B. Buchanan, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

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 Defendants-)
 Respondents.)

Case No. 16602

BRIEF OF RESPONDENT
VERNAL FAMILY HEALTH CENTER

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 written and oral arguments by all parties, the Honorable Allen B. Sorenson granted the motion of Vernal Family Health Center for dismissal based upon the failure of plaintiff to comply with the requirements of Utah Code Ann., Section 78-14-8, (1953 as amended) (R. 218, 234).

RELIEF SOUGHT ON APPEAL

Defendant Vernal Family Health Center seeks affirmance of the lower court's Order of Dismissal.

STATEMENT OF FACTS

(The factual and legal issues addressed in this brief are those which relate to the respondent, Vernal Family Health Center, and are relevant to this appeal and no attempt is made to refer to the factual or legal issues unique to other respondents.)

Appellant's statement of facts contains "facts" which are incorrect, without any factual basis in this record, and totally irrelevant to a determination in this appeal. For this reason, respondent chooses to submit its own statement of facts. In this appeal from a dismissal of appellant's complaint viewing the record in the light most favorable to the appellant, [McKay v. Salt Lake City, 547 P.2d 210, 211 (Utah 1976)], the following essential facts are established.

In her complaint, the appellant, Velma Gladys Yates, alleges that respondent, Vernal Family Health Center, was liable for "negligent diagnosis and treatment" of her through its employee, Gordon Lee Balka, M.D., also a respondent herein (R.3). The Vernal Family Health Center, as alleged, is a project of the Division of Family and Community Medicine of the College of Medicine, University of Utah (R.1). It was established in 1975 as a demonstration project of exemplary primary medical and health care in a remote rural site. Its primary objective is to provide clinical training for health professionals from the fields of medicine, nursing, pharmacy, social work, and health education while at the same time providing medical and health care (R.192).

Appellant alleged that Dr. Balka "permitted [her] to receive prescribed drugs and narcotics which resulted in plaintiff becoming addicted to same" (R.1). She further alleged that she was hospitalized for "drug overdose and abuse" on or about March 12, 1977 (R.2) but that after testing in ordinary recovery it was not discovered until March, 1978 that she was suffering permanent disorders resulting from the negligence of defendants (R.3).

Paragraph 11 of appellant's complaint alleged:

Timely claim and notice has been served upon the defendants, a copy of which is attached and by reference incorporated herein. (R.3)

The attached notice to which paragraph 11 refers is in the form of a letter dated April 7, 1978. However, it is not from the appellant but instead is signed by her husband and his attorney and reads as follows:

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 afore-

said 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.

Except for the allegation in paragraph 11 of the complaint that notice had "been served" there is no evidence on the face of the document, nor any supporting documentation in the record as to manner, date or time of such alleged service, or the identity of the individual purportedly affecting such alleged service, on the part of the respondents generally or on Vernal Family Health Center specifically.

Furthermore, there is no allegation in the complaint or in any supporting documentation that any claim was made pursuant to the Utah Governmental Immunity Act, Utah Code Ann. Section 63-30-1 (1953 as amended), either on the Vernal Family Health Center, the University of Utah, or the attorney general. (R.1, 107, 111-112)

Vernal Family Health Center moved to dismiss the complaint on the basis that (1) plaintiff failed to comply with the notice requirements of the Governmental Immunity Act, (2) plaintiff failed to comply with the notice requirements of the Health Care Malpractice Act, (3) the Vernal Family Health Center is not a sui juris entity and, therefore, not a proper party, and (4) factually the complaint failed to state a cause of action against Vernal Family Health Center (R. 27-28, 106-109, 175-181).

After providing an opportunity to counsel to brief and argue these issues before the Court, the Honorable Alan B. Sorenson, district judge, ruled on July 16, 1979 as follows:

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

Because this ruling is dispositive, the Court does not reach other issues raised by defendants, Vernal Family Health Center and Uintah County. (R.218)

Thereafter, on August 8, 1979, Judge Sorensen signed an Order dismissing plaintiff's complaint against Vernal Family Health Center based on his ruling of July 16, 1979 regarding plaintiff's failure to comply with the notice requirement of Section 78-14-8, Utah Code Ann. (1953 as amended).

At no time in this case has the appellant, or anyone in her behalf, alleged, petitioned for, or received a declaration that she is incompetent or needed a guardian or guardian ad litem. The only mention of this in the record is found in the minute entry of the pre-trial conference dated June 8, 1979 (R. 206-207). At that time, Mr. Snow, counsel for Vernal Drug Company, suggested the need for the appointment of a guardian and the Court granted the request of appellant's counsel to have a guardian ad litem appointed. The record does not indicate, however, that this has ever been accomplished.

ARGUMENT

POINT I

THE TRIAL COURT WAS CORRECT IN DISMISSING APPELLANT'S ACTION AGAINST VERNAL FAMILY HEALTH CENTER FOR FAILING TO COMPLY WITH THE NOTICE REQUIREMENTS OF UTAH'S HEALTH CARE MALPRACTICE ACT.

A. APPELLANT, VELMA GLADYS YATES, DID NOT SERVE ANY NOTICE REQUIRED BY THE HEALTH CARE MALPRACTICE ACT.

Appellant relies on the letter of April 7, 1978 attached to her complaint as evidence of her compliance with the Utah Health Care Malpractice Act notice requirements. However, comparing the letter with the requirements of the Act clearly shows that she failed to comply in any way with those requirements.

The Utah Health Care Malpractice Act, Utah Code Ann. Section 78-14-1 et seq. (1953 as amended) [all statutory references are to the Utah Code Ann.], first enacted by the 1976 Legislature,

L. 1976, Chapter 23, was enacted to deal with the "malpractice crisis" in the health care field. The Legislature specifically declared its findings and purposes in Section 78-14-2 to the effect that health care related suits, claims, judgments, and settlements had increased greatly, thus increasing the cost and decreasing the availability of malpractice insurance. This, in turn, increased the cost and decreased the quality of available health care, all to the public's detriment. The purpose of the Act, in part, was to "alleviate the adverse effects" of these trends by establishing reasonable limitations on such actions and providing "other procedural changes to expedite early evaluation and settlement of claims".

In addressing this problem, the Legislature provided for prior notice of intent to commence a malpractice action to be given to the health care provider. At the time appellant commenced her action, Section 78-14-8 provided, in part:

No malpractice action against a health care provider may be commenced 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. 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 nature of the alleged injuries and other damages sustained. Notice may be in letter or affidavit form executed by the plaintiff and his attorney. Service shall be accomplished by persons authorized and in the manner prescribed by Utah Rules of Civil Procedure for the service of summons and complaint in a civil action. Such notice shall be served within the time allowed for commencing a malpractice action against a health care provider. . . .

This provision was amended slightly in 1979 (L. 1979, Ch. 128, Section 2), but it remains essentially the same and those amendments are not significant to a determination of this appeal. The word "initiated" was substituted for "commenced" in the first sentence; the phrase "a general statement of" was inserted in the second sentence; the phrase "or his attorney" was substituted for the phrase "and his attorney" in the third sentence; a new provision for alternate service by certified mail was added in the fourth sentence.

Appellant cites the case of Foil v. Ballinger, 601 P.2d 14 (Ut. 1979) in asserting that the notice she relies on dated April 1978 should be interpreted in light of the statute as it was amended a year later. Foil indeed holds that procedural statutes may be applied retroactively to causes of action that accrued prior to the procedural amendments because there is no vested right in a future procedure. However, this reasoning does not apply in the case where both the incident giving rise to the cause of action and the procedure itself have preceded the procedural amendments. Once the notice has been relied upon as allegedly prepared and served, and suit filed based thereon, that notice procedure stands. Therefore, respondent, Vernal Family Health Center, maintains that the letter must be interpreted pursuant to the notice requirements as they then existed. However, as will be shown, the letter is clearly defective under either criteria.

Recent rulings of this Court make it clear that compliance with the notice provision is mandatory relative to a malpractice action against a health care provider. Foil v. Ballinger, 601

P.2d 144 (Ut. 1979); Vealey v. Clegg, 579 P.2d 919 (Ut. 1978). Section 78-14-3 (1) defines "health care provider" as "any . . . facility or institution who causes to be rendered . . . health care or professional services. . . .". Respondent Vernal Family Health Center clearly falls under the protections of the Utah Health Care Malpractice Act.

Section 78-14-8 required the notice to be "executed by the plaintiff and his attorney". However, that notice is signed by one, Marzine E. Yates, appellant's husband, as "claimant" and Robert M. McCrae as "attorney for claimant", giving notice of Marzine Yates' intent to assert his claim. Marzine Yates has never filed a malpractice action against Vernal Family Health Center. There is no suggestion in the notice or anywhere else in the record that Marzine Yates acted as appellant's guardian or representative or in any other than his own capacity.

Furthermore, assuming, arguendo, the notice could have been signed in the alternative by either "plaintiff or his attorney" under the 1979 amendments, the fact that Robert M. McCrae signed as attorney for Marzine Yates does not suggest in any way that he was also signing as attorney for Velma Gladys Yates. If at that time he also represented Velma Gladys Yates for this or any other purpose, that capacity is nowhere reflected in the record, and his signature as attorney for Marzine Yates could not affect notice in behalf of her or anyone else who also might happen to be his client at the time.

Further deficiencies in the notice are referred to *infra*, at Point I. B., but it is clear, without more, that the plaintiff (appellant) and her attorney had to give notice of her intent to commence action. Neither she nor her attorney signed it and it did not give any notice of her intent to do anything. Therefore, appellant's action was properly dismissed.

B. ASSUMING, ARGUENDO, THE ALLEGED NOTICE HAD BEEN SIGNED BY VELMA GLADYS YATES AND HER ATTORNEY, IT STILL WOULD NOT HAVE SATISFIED THE NOTICE REQUIREMENTS OF THE HEALTH CARE MALPRACTICE ACT.

Because the Health Care Malpractice Act is a recent enactment, respondent Vernal Family Health Center is not aware of any cases which directly consider the criteria for the sufficiency of a notice under that Act. The recent cases of Vealey v. Clegg, 5 P.2d 919 (Ut. 1978) and Foil v. Ballinger, 601 P.2d 144 (Ut. 1980) refer to the effective date and timeliness of the notice but do not address the sufficiency except to make it clear that the notice is, in fact, mandatory and cannot be satisfied by the mere filing of the complaint itself, Vealey v. Clegg, *supra*.

Point I. A., *supra*, establishes that the most basic requirement, that the plaintiff give notice of her intent, was ignored. However, assuming, arguendo, that appellant and her attorney signed the notice in question, a step-by-step analysis of the statute relative to the alleged notice clearly shows the insufficiency of that notice.

The statute requires "notice of intent to commence an action". However, there is no such notice of intent at all, but only a statement that the claimant "potentially is asserting and claiming and may commence a civil action for damages arising out of possible negligent prescribing . . . of drugs . . . of his wife". The words, "potentially", "may", "possible", all suggest that his suspicions have not yet ripened into an "intent to commence action".

The notice must include "the nature of the claim . . . specific circumstances thereof, specific allegations of misconduct". The only arguable "claim" relative to Vernal Family Health Center is for "damages arising out of possible negligent prescribing . . . of drugs . . . of his wife". There is no further statement whatsoever of "specific circumstances" nor "specific allegations of misconduct" relative to Vernal Family Health Center or Dr. Balka. In this regard, the letter impliedly acknowledges this very deficiency by the statement that:

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.

The medical records of Velma Gladys Yates were available to her attorney or physician prior to her filing of an action. To the extent Marzine Yates had any assertable rights, the records would be available to him also. Nevertheless, the letter by Marzine and subsequent complaint by appellant were apparently prepared without substantial prior review of the medical records. It is this very kind of action that the Health Care Malpractice Act was enacted to prevent.

This notice should have been served in the manner prescribed for the service of summons and complaint in a civil action. Nowhere on the face of the notice, nor in the complaint, nor in any other supporting documentation is there any indication or allegation that the notice was served pursuant to Rule 4 of the Utah Rules of Civil Procedure. The record contains no hint of compliance with the requisite formalities of the manner of service [Rule 4 (e)], the manner of proof of service including a certificate or affidavit of the server [Rule 4 (g)] or endorsement of date of service, name and title of server on the copy left with the person being served [Rule 4 (j)].

The alternate manner of service now provided under the 1977 amendments is by certified mail, return receipt requested. The record does not contain any indication of such mailing and return receipt, nor any mailing certificate at all.

Appellant states at page 10 of her brief that "it is not disputed that each respondent received actual notice of the claim." However, although Vernal Family Health Center is here on its own motion to dismiss and has not specifically answered such allegation, it does not concede in any manner that a copy of this or any other letter was actually received, nor that "actual notice of the claim" of Velma Gladys Yates was received.

Appellant attempts to justify "substantial compliance" or "sufficient compliance" with the notice requirements of 78-14 on the basis of Hatch v. Weber County, 23 Ut. 2d 144, 459 P.2d 144.

436 (1969). As already noted, supra, there was no compliance at all, neither "actual", "substantial", "statutory", "sufficient", or any other compliance and the alleged notice itself is grossly deficient. Furthermore, the case of Hatch v. Weber County, supra, to the extent it may suggest that "substantial compliance" with some notice requirements is sufficient, is easily distinguishable on at least three bases. First, unlike appellant, the plaintiffs in the Hatch case (both attorneys, one of which, by coincidence, is appellant's attorney) actually attempted to serve notice on the county. The claim was properly made out for legal services they, in fact, performed. However, they served the County Commissioners, County Clerk and County Attorney rather than the County Auditor as Section 17-15-10 required. Second, unlike Section 78-14-8, that statute specifically required the county to notify a claimant if the notice were deficient, and the county never did so. Third, as this Court pointed out in Hatch, that particular claim did not involve the usual tort claim where evidence of fault or lack thereof is involved, but only involved a fee for services (459 P.2d at p. 438). The present case does involve such evidentiary matters. Hatch v. Weber County is clearly inapplicable.

In summary, the letter is not signed by the plaintiff nor her attorney, it does not refer to her claim, it does not give notice of any real intent to commence a malpractice action, it does not contain any statement of specific circumstances or specific allegations of misconduct, and was not served pursuant

to the statute. Thus, it is totally insufficient to comply with the notice requirements of the Health Care Malpractice Act and appellant's action was properly dismissed.

C. THE NOTICE REQUIREMENTS OF THE HEALTH CARE MALPRACTICE ACT ARE CONSTITUTIONAL.

Appellant has alleged that the notice requirements of the Health Care Malpractice Act are unconstitutional in violation of the equal protection clause of the United States Constitution (Amendment XIV, Section 1), the equal protection clause of the Utah State Constitution (Article I, Section 2), the requirement that "all laws of a general nature shall have uniform operation" (Utah Constitution Article I, Section 24), and the provision that "no private or special law shall be enacted where a general law can be applicable" (Utah Constitution Article VI, Section 26). Issues relative to these provisions are usually considered together by this Court. The standards of "equal protection" usually are found to encompass the considerations of "special laws" and "uniform application". Leatham v. McGuinn, 524 P.2d 323 (Ut. 1974); Cannon v. Oviatt, 520 P.2d 883 (Ut. 1974) app. dism. 419 U.S. 95 S.Ct. 24, 42 L.Ed. 2d 37, reh. den. 419 U.S. 1060, 95 S.Ct. 42 L. Ed. 2d 658 (1974).

The test to be applied to legislation in such a case where legislative classification is attacked as a violation of equal protection is whether or not there is a rational basis for such classification. Legislation is presumed to be constitutional. See Seal v. Southworth, 563 P.2d 192 (Ut. 1977); Leatham v. McGuinn, supra

Cannon v. Oviatt, supra.

As noted in Point I. A., the Legislature carefully and explicitly enunciated its findings and reasons for the enactment of the Utah Health Care Malpractice Act and the means selected bear a reasonable and rational relationship to the objectives to be accomplished.

In fact, this Court has implicitly, if not explicitly, already ruled on the constitutionality of the Act relative to equal protection. In the case of McGuire v. University of Utah Medical Center, 603 P.2d 786 (Ut. 1979), this Court had before it an appeal from a dismissal for failure to file the proper notice in a case which arose prior to the effective date of the Malpractice Act. Relative to the claim that the 1979 amendments constituted a "special law" in violation of the Utah Constitution Article VI, Section 26, this Court held that the amendments were constitutional as uniformly applied general laws and implied that the basic act itself, along with the amendments, was valid. This Court stated:

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 notice 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. The principles of notice and fair play are sufficient to justify the classification in this case. Indeed, it would be anomalous to hold that legislation designed to clarify a previous enactment is special legisla-

tion unless the earlier enactment were also special legislation. See also State v. Kallas, 97 Ut. 492, 94 P.2d 414 (1939). (emphasis added)

By this reasoning, the Health Care Malpractice Act is clearly constitutional.

Appellant cites the case of Jones v. State Board of Medicine, 97 Id. 859, 555 P.2d 399 (1976) cert. den. 431 U.S. 914, 97 S. Ct. 2173, 53 L. Ed. 2d 223 (1977) for the proposition that the test of legislation relative to an equal protection argument is not the "rational basis" test but a more restrictive "means scrutiny" test as enunciated in Reed v. Reed, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971). This test "focuses upon the relationship between the subject legislation and the object or purpose to be served thereby" (id., 555 P.2d at page 407). Even if this more restrictive view were maintained, in light of the extensive legislative findings and purpose and the rational relationship between those purposes and the means provided in the statute, this legislation would be upheld. Nevertheless, this Court has never adopted this theory and the facts of this case do not suggest that it is appropriate to do so.

Furthermore, it should be noted that even in Jones v. State Board of Medicine, supra, under the more restrictive test the Court did not invalidate Idaho's Hospital-Medical Liability Act but remanded for further consideration only on that portion of the Act which limited recovery in such actions, an issue which is not at all present in this appeal.

The Idaho Court emphasized that they did not intend to abandon "the traditional restrained view standard of equal protection tests of legislation" and emphasized that "the burden of showing the absence of a reasonable relationship under the means-focus test remains with the one who assails the classification" (id. 555 P.2d at page 407). In the present case, appellant has not even attempted to sustain this traditional burden but, instead, attempts to shift the burden by requiring a showing by those attempting to sustain the legislation, absent which, appellant suggests the Act cannot stand. See page 20 of appellant's brief. Such a shifting of burden under the rational basis test, or even under the "means-focus" test, is without basis in practice or logic.

The Utah Health Care Malpractice Act is constitutional in every way.

POINT II

APPELLANT'S CLAIM AGAINST VERNAL FAMILY HEALTH CENTER IS BARRED BECAUSE SHE FAILED TO COMPLY WITH THE NOTICE REQUIREMENTS OF THE GOVERNMENTAL IMMUNITY ACT.

Although several of the respondents, including Vernal Family Health Center, raised the issue in District Court of compliance with various notice requirements relative to governmental entities, the District Court did not reach those issues (R. 218). However, in the order submitted by Uintah County and Uintah County Hospital, these issues purport to form part of the basis for the dismissal, and appellant addresses these issues in her brief. Since Vernal Family Health Center is also a governmental entity and raised in

the District Court the issue of compliance with the Governmental Immunity Act, respondent hereby responds to this issue.

A. VERNAL FAMILY HEALTH CENTER IS A GOVERNMENTAL ENTITY UNDER THE GOVERNMENTAL IMMUNITY ACT TO WHICH NOTICE MUST BE GIVEN PRIOR TO SUIT AND NO SUCH NOTICE WAS GIVEN.

The Utah Governmental Immunity Act, Utah Code Ann. Section 63-30-1 et seq. (1953 as amended) establishes the procedural and substantive criteria upon which the State of Utah waives its immunity from suit. Section 63-30-2 (1) defines "state" as meaning

. . . the state of Utah or any office, department, agency, authority, commission, board, institution, hospital, college, university or other instrumentality thereof. . . . (emphasis added)

As a project of the University of Utah College of Medicine created, controlled, and funded through the University of Utah, the Vernal Family Health Center falls within the definition of "state".

The scope of the activities covered by the Act is defined. Section 63-30-3 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. (L 1978, Chapter 27, Section 2)

Appellant's alleged injury resulted from the exercise of a governmental function, governmentally-owned hospital, and/or governmental health care facility, and her claim is clearly governed by the Governmental Immunity Act.

Section 63-30-11 requires the filing of a written notice of claim with a governmental entity prior to such a suit and within the applicable time period. It also provides for extension of time for filing such notice in the case of a minor, mental incompetent without guardian, or prisoner as permitted by the Court "in its discretion".

Section 63-30-12 provides:

A claim against the state is barred unless notice of claim is filed with the attorney general and the agency concerned within one year after the cause of action arises.

Sections 63-30-14 and 15 further establish that a suit may not be filed until after the claim has been submitted, denied, or until 90 days after such filing.

It is important to note that these provisions apply in addition to those provisions of the Health Care Malpractice Act. Section 78-14-10 of the Health Care Malpractice Act specifically provides that:

The provisions of this act shall apply to malpractice actions against health care providers which are brought under the Utah Governmental Immunity Act insofar as they are applicable; provided, however, that this act shall in no way affect the requirements for filing notices of claims, times for commencing actions and limitations on amounts recoverable under the Utah Governmental Immunity Act.

It is a well-settled law in the state of Utah that failure to comply with the statutory notice requirements of the Utah Governmental Immunity Act is a fatal and jurisdictional defect such that any such claim is barred. Sears v. Southworth, 563 P.2d 192 (Ut. 1977); Crowder v. Salt Lake County, 552 P.2d 646 (Ut. 1976); Scar-

borough v. Granite School District, 531 P.2d 480 (Ut. 1975); Edwards v. Iron County, 531 P.2d 476 (Ut. 1975); Varoz v. Sevey, 29 U. 158, 506 P.2d 435 (1973), Roosendaal Construction and Mining Company v. Holman, 28 U. 2d 396, 503 P.2d 446 (1972).

The case of Sears v. Southworth, supra, involved a third-party complaint against the State Highway Department arising out of a highway accident wherein the defendant in the original action alleged State negligence in a third-party complaint. Because the initial complaint was not served until 18 months after the accident, the defendant did not file notice with the State within the one-year limitation. Citing Scarborough v. Granite School District, supra, and Varoz v. Sevey, supra, this Court held the third party action was barred for failure to file timely notice.

The case of Scarborough v. Granite School District, supra, involved injury to a child from fallen wires on a school ground. The mother had spoken with the principal of the school and he had filed a written report of the incident, but the mother had filed no formal claim. The Court stated:

We have consistently held that where a cause of action is based on a statute, full compliance with its requirements is a condition precedent to the right to maintain a suit.

531 P.2d at page 482.

In the case of Varoz v. Sevey, supra, the plaintiff, through a mistake, filed with the State instead of the County, thereby missing the County filing deadline. In spite of this inadvertent error, and the fact that the County appeared to have had actual knowledge of the circumstances through its own investigation,

Court stated:

Actual knowledge of the circumstances which resulted in the death of the plaintiff's mother by officials of the County does not dispense with the necessity of filing a timely claim.

506 P.2d at page 436.

In the present case, the only notice which purports to have been given was that signed by the husband of the appellant "pursuant to 78-14-8 UCA". Such notice under §78-14-8, the Health Care Malpractice Act, does not dispense with the notice requirements under the Governmental Immunity Act (Section 78-14-10). Although the Vernal Family Health Center is an instrumentality of the University of Utah and the State of Utah, and the appellant so alleged in her complaint, she made no attempt to comply with the statutory notice requirements cited above. No notice under Section 63-30-11 was given to the State of Utah, the Attorney General's Office, the University of Utah, or the Vernal Family Health Center. Therefore, appellant's complaint against Vernal Family Health Center is barred.

Appellant addresses the issue of the timeliness and the tolling provisions relative to the Governmental Immunity Act. Inasmuch as she has not alleged that any such notice was ever filed, and the court ruling did not rely on her failure to give such notice, the timeliness is not even an issue. However, in partial response to appellant's brief, it is clear from Section 63-30-11, supra, that any extension of time for such filing due to an alleged mental incompetence may be granted only by the Court in its discretion. Appellant has never attempted to file

any notice, has never attempted to approach the Court for an extension of time to do so, and has never alleged that she was mentally incompetent or needed the appointment of a guardian or guardian ad litem.

B. THE NOTICE REQUIREMENTS OF THE GOVERNMENTAL IMMUNITY ACT ARE CONSTITUTIONAL.

Appellant alleges at page 16 of her brief that the notice requirements of the Governmental Immunity Act violate the equal protection provisions of the Utah and United States Constitutions.

As already referred to above, Point I. C., the criteria used by this Court in reviewing such a statute for its compliance with the equal protection clause is that a statute is presumed constitutional and if there is a "rational basis" for the classification it will be upheld by the courts. Sears v. Southworth, 563 P.2d 192 (Ut. 1977); Crowder v. Salt Lake County, 552 P.2d 646 (Ut. 1976). The question of whether the notice requirements of the Governmental Immunity Act violate the equal protection clause of the Utah and United States Constitutions has already been before this Court in the case of Sears v. Southworth, supra. This Court stated, at 556 P.2d, page 193-194:

This court has heretofore articulated the rationale of the notice of claim requirement. Among other reasons, notice of claim provides the governmental unit with the opportunity to properly investigate and remedy any defect immediately, before additional injury is caused; it helps avoid unnecessary litigation; it minimizes difficulties that might arise from changes in administrations. See e.g., Scarborough v. Granite School District, Ut. 531 P.2d 480 (1975), and Gallegos v. Midvale, 27 Ut. 2d 27, 492 P.2d 1335 (1972).

While aware that some state courts have invalidated similar notice of claim requirements, holding that they violate equal protection, this court is not prepared to do so, finding rational basis for the classification.

There is a rational basis for the notice requirements. Appellant never even attempted to comply with such requirements and her claim is barred.

CONCLUSION


The lower court was correct in dismissing appellant's claim for failure to comply with the notice requirements of the Health Care Malpractice Act. Neither appellant, nor anyone acting in her behalf, filed any notice of intent required by that statute. Furthermore, even the letter relied upon by appellant, which lists someone else as claimant, is itself deficient in almost every respect.

Appellant failed to comply, or even allege compliance, with the notice requirements of the Governmental Immunity Act. Those provisions apply to the respondent Vernal Family Health Center and appellant's claim is barred for failure to so comply.

The notice requirements of both the Health Care Malpractice Act and the Governmental Immunity Act are constitutional in every respect.

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

Respectfully submitted,


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MAILING CERTIFICATE

Two copies of the foregoing "Brief of Respondent Vernal Family Health Center" was mailed first class United States mail this 24 day of February, 1980 to:

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