

1999

# Joanna Banford and Amber Banford v. David Quinley and Kaysville Clty Corp, and Kaysville City Police Department : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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980300-CA

JOANNA BANFORD, and AMBER  
BANFORD, a minor, by and through her  
parent and natural guardian, Joanna  
Banford,

Case No. 980300-CA

Plaintiffs and Appellants,

vs.

DAVID QUINLEY, an individual and  
KAYSVILLE CITY, CORP., a Utah  
political subdivision, and, KAYSVILLE  
CITY POLICE DEPARTMENT,

Defendants and Appellees.

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BRIEF OF APPELLEES

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APPEAL OF FINAL JUDGMENT OF THE SECOND JUDICIAL DISTRICT  
COURT IN AND FOR DAVIS COUNTY, STATE OF UTAH  
THE HONORABLE RODNEY PAGE PRESIDING

---

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**COURT OF APPEALS**

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## TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF JURISDICTION .....	1
ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW .....	1
DETERMINATIVE STATUTE .....	1
STATEMENT OF THE CASE .....	2
A. <u>Nature of the Case</u> .....	2
B. <u>Course of Proceedings</u> .....	2
C. <u>Disposition in the Trial Court</u> .....	2
D. <u>Statement of Facts</u> .....	2
SUMMARY OF ARGUMENT .....	7
ARGUMENT .....	8
POINT I	
THIS COURT SHOULD AFFIRM THE JUDGMENT OF DISMISSAL BECAUSE PLAINTIFFS FAILED TO PROPERLY DRAFT AND SERVE A NOTICE OF CLAIM UPON THE GOVERNING BODY OF KAYSVILLE CITY .....	8
A. <u>Plaintiffs Must Strictly Comply with the Governmental             Immunity Act</u> .....	10
B. <u>The Letter of July 12, 1995 Does Not Comply with the Act</u> .....	11
C. <u>The Letter of November 16, 1995, Does Not Comply with the Act</u> .....	12
D. <u>Actual Knowledge of the Claim by City or Its Insurance Carrier             Does Not Salvage a Defective Notice of Claim</u> .....	14

E.	<u>Kaysville and Reliance Insurance Did Not Waive Compliance with the Governmental Immunity Act and Are Not Estopped to Assert Jurisdiction and Limitations as a Defense</u> .....	15
POINT II		
	PLAINTIFFS' LAWSUIT IS UNTIMELY .....	20
A.	<u>Plaintiffs' Claim Was Deemed Denied on February 14, 1996, and the Filing of Suit on February 18, 1997 Is Untimely Pursuant to U.C.A. § 63-30-15(2)</u> .....	20
B.	<u>The Trial Court Correctly Disregarded the Affidavits of Kenneth Sondgeroth and His Secretary as Lacking in Foundation and Therefore Inadmissible</u> .....	22
	CONCLUSION .....	24

#### ADDENDUM

Letter dated July 12, 1995  
 Letter dated July 25, 1995  
 Letter dated November 16, 1995  
 Ruling on Defendant's Motion to Dismiss  
 Ruling on Plaintiff's Motion to Reconsider Court's Ruling on Motion to Dismiss  
 Findings and Judgment

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>Cases</b>	
<u>Bellonio v. Salt Lake City Corporation</u> , 911 P.2d 1294 (Utah App. 1996) . . .	9, 10, 12, 14
<u>Bischel v. Meritt</u> , 907 P.2d, 275 (Utah App. 1995) . . . . .	11, 19
<u>Brittain v. State of Utah</u> , 882 P.2d 666 (Utah App. 1994) . . . . .	10
<u>Busch v. Salt Lake International Airport</u> , 921 P.2d 470 (Utah App. 1996) . . . . .	14, 15
<u>Debry v. Noble</u> , 889 P.2d 428 (Utah 1995) . . . . .	1, 20
<u>Harline v. Barker</u> , 912 P.2d 433 (Utah 1996) . . . . .	1
<u>Lamarr v. Utah State Dept. of Transportation</u> , 828 P.2d 535 (Utah App. 1992) . . . . .	10, 11
<u>Larson v. Park City Corporation</u> , 955 P.2d 343 (Utah 1998) . . . . .	9
<u>Lister v. Utah Valley Community College</u> , 381 P.2d 933 (Utah App. 1994) . . . . .	22, 23
<u>Lund v. Hall</u> , 938 P.2d 285 (Utah 1997) . . . . .	18
<u>Madsen v. Borthick</u> , 769 P.2d 245 (Utah 1988) . . . . .	10
<u>Maverick Country Stores v. Industrial Commission</u> , 860 P.2d 944 (Utah App. 1993) . . . . .	21
<u>Nielson v. Gurley</u> , 888 P.2d 130 (Utah App. 1994) . . . . .	9, 10
<u>Rice v. Granite School District</u> , 456 P.2d 159 (Utah 1969) . . . . .	17, 18
<u>Sears v. Southworth</u> , 563 P.2d 192 (Utah 1977) . . . . .	14

<u>Shunk v. State</u> , 924 P.2d 879 (Utah 1996) .....	15, 16, 18, 19
<u>Yates v. Vernal Family Health Ctr.</u> , 617 P.2d 352 (Utah 1980) .....	11

## Statutes

Utah Code Ann. § 10-3-105 .....	13
Utah Code Ann. § 10-1-104(2) .....	7, 12, 13
Utah Code Ann. § 63-30-1 .....	8
Utah Code Ann. § 63-30-11 .....	8, 9, 11
Utah Code Ann. § 63-30-12 .....	22
Utah Code Ann. § 63-30-13 .....	1, 7, 9
Utah Code Ann. § 63-30-14 .....	7, 14, 20
Utah Code Ann. § 63-30-15 .....	20, 21
Utah Code Ann. § 63-30-15(2) .....	1, 20
Utah Code Ann. § 63-37-1 .....	20-22
Utah Code Ann. § 68-3-7 .....	21

## Rules and Regulations

Rule 24(b), Utah Rules of Appellate Procedure .....	1
Rule 6, Utah Rules of Civil Procedure .....	21
Rule 6(e), Utah Rules of Civil Procedure .....	21

Pursuant to Rule 24(b), Utah Rules of Appellate Procedure, Defendants/Appellees, through undersigned counsel, hereby submit the following Appellees' Brief.

### **STATEMENT OF JURISDICTION**

Defendant Kaysville City agrees with plaintiff's statement of jurisdiction.

### **ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW**

1. Did the trial court correctly grant defendants' Motion to Dismiss ruling that plaintiffs failed to file a notice of claim with defendant as mandated by Utah Code Annotated § 63-30-13?

Orders Granting Motions to Dismiss are reviewed for correctness. Harline v. Barker, 912 P.2d 433, 438 (Utah 1996).

2. Even if plaintiffs properly filed their notice of claim, was their suit filed within the time period allowed by Utah Code Annotated § 63-30-15(2)? Legal conclusions are reviewed for correctness. Harline v. Barker, 912 P.2d 433, 438 (Utah 1996). Although not decided by the court in its ruling, this court can affirm the trial court's ruling on other grounds, even though the trial court relied on some other ground. Debry v. Noble, 889 P.2d 428, 444 (Utah 1995).

### **DETERMINATIVE STATUTE**

Interpretation of the following statutory provisions are determinative of the issues on appeal. The language of these designated statutes are set forth in the addendum to Appellees' brief.



## STATEMENT OF THE CASE

### A. Nature of the Case.

Defendants/Appellees agree with Plaintiffs' Statement regarding the disposition in the Trial Court.

### B. Course of Proceedings.

Defendants/Appellees agree with Plaintiffs' Statement about the Course of Proceedings.

### C. Disposition in the Trial Court.

Defendants/Appellees agree with Plaintiffs' Statement regarding the disposition in the Trial Court.

### D. Statement of Facts.

1. Plaintiff Joanna Banford was the driver of a vehicle involved in an accident on February 18, 1995 in Davis County. Plaintiff Amber Banford was a passenger in the vehicle. (R. 2, Complaint ¶ 7).

2. The second vehicle in the collision was being driven by David Quinley, a Kaysville City Police Officer, who was on duty at the time of the collision. (R. 2, Complaint ¶ 8).

3. Plaintiffs allege that the negligence of Quinley was the proximate cause of plaintiffs' injuries. (R. 2-4 , Complaint ¶s10-17).

4. Some time between April and May of 1995, plaintiffs retained the services of attorney Kenneth Sondgeroth of Bullhead City, Arizona. Although plaintiffs claim several conversations occurred prior to the July 12, 1995, the affidavits are largely irrelevant because plaintiffs retained the services of an attorney who objected to direct contact between Clay Johnson and the Banfords. No settlement agreement was reached. (R. 31-82, pg. 2 ¶6).

5. On July 12, 1995, through attorney Sondgeroth, plaintiffs caused a letter “re: personal injury of Joanna Banford and Amber Banford Date of accident: 2-18-95” to be sent “to whom it may concern.” and the letter was simply addressed to “Kaysville City Corp.”

The letter specifically states:

We represent Joanna Banford and Amber Banford in their claim for personal injuries sustained in the automobile collision of February 18, 1995. David J. Quinley was driving a vehicle which you owned that was involved in this accident.

This letter is to request that you contact our office within ten days with the name of your insurance carrier, or to advise us of your status of insurance at the time of the accident. Please notify your insurance company of this accident if you have not already done so. Please have a representative of your insurance company contact us as soon as possible but no later than thirty days from the date of this letter. This will eliminate the need for us to contact you further.

Thank you for your cooperation and assistance.

Very truly yours,

WEISS & SONDGEROTH

Kenneth Sondgeroth

The letter was unsigned. (R. 24) A copy of the letter is attached in Appellees' Addendum.

6. In response to plaintiffs' letter of July 12, 1995, Dean Storey, Finance Director, sent a letter to plaintiffs' counsel providing the requested information regarding the names and addresses of the City's insurance carrier, City Attorney and Insurance Agent. The letter closed by saying "please contact me as the City representative." (R. 26). A copy of the letter is attached in Appellees' Addendum.

7. On or about November 16, 1995, counsel for plaintiffs sent a letter to Mr. Storey in response to his letter dated July 25, 1995. This letter is apparently the document that plaintiff claim is their notice of claim. It is entitled "Re: claim- Joanna and Amber Banford." It is not entitled "notice of claim."

In the letter, Sondgeroth states:

It was with great relief that I received your letter of July 25, 1995. As you are aware, my office represents both Joanna and Amber Banford in their claims that arose from a vehicle accident with a member of your police force. Clearly, as is evident from the police report, the police officer was grossly negligent and that my clients were nothing but innocent victims. ...

My purpose in writing you directly is to obtain some help with your insurance company. Mr. Clay Stevens has been assigned this case from Reliance Insurance Company. Unfortunately, Mr. Stevens has taken an abrupt and confrontational attitude toward my clients which has left this office, and Ms. Banford, faced with the prospect of filing suit to remove Mr. Stevens from this matter. Hopefully, this will not be necessary once you have been made aware of Mr. Stevens outrageous and unethical conduct.

On page two of the letter, attorney Sondgeroth states the following about settlement:

Mr. Stevens said he would take care of the bills and pay \$20,000.00 for all of Mrs. Banford's damages. Mrs. Banford's injuries for her shattered knee

are in excess of \$750,000. This is substantiated by settlements across the nation for injuries that have required bone grafting and permanent disablement. Potentially it could be much larger.

And on page three of the letter, attorney Sondgeroth concludes with:

Please advise whether you can help my clients gain a better attitude from our insurance provider. In sincerely hope that we can work together to minimize this conflict and obtain appropriate compensation for the injuries that have occurred. This process so far has been quite intolerable.

This letter was signed. (R. 55-57). This letter is attached to Appellees' Addendum.

8. No other correspondence was sent by counsel for plaintiffs to any representative or officer of Kaysville City during the one year period following the accident. (R. 18, ¶6).

9. Plaintiff filed this action on February 18, 1997. (R. 1-4).

10. Defendants filed a motion to dismiss on June 19, 1997. (R. 14-30).

11. Plaintiffs filed a memorandum in opposition which, among other things, contained the affidavits of Kenneth Sondgeroth, Brian Jensen and Joanna Banford detailing their conversations with city officials and the adjustor for Reliance Insurance. (R. 49-52).

12. Defendants moved to strike the affidavits. (R. 84-85). Specifically, defendants moved to strike the affidavits of Sondgeroth, Jensen and Banford because:

1. Affidavit of Kenneth Sondgeroth is objectionable and should be stricken for several reasons. His statement that he had several phone discussions with Reliance Insurance and that they showed a willingness to discuss settlement is irrelevant. The proper service of a notice of claim is jurisdictional. The alleged statement by Clay Stevens that there was clear liability in the matter and that the only question to be looked at was the amount of damages is irrelevant. The statute mandates that the acceptance

of a claim be in writing. The claim was not acted upon and was deemed denied. Only a written acceptance claim could salvage plaintiffs' efforts to turn settlement negotiations into a waiver or estoppel.

2. Affidavit of Brian Jensen is irrelevant and should be stricken. Jensen alleged that he contacted the mayor of Kaysville who ultimately led him to contact the insurance company whose representative indicated that they would not pay the claim until further documentation was supplied. The Jensen affidavit further indicates that the Banfords then obtained counsel. This information is irrelevant. The affidavit does not allege that anyone from Kaysville misled them into misfiling or failing to serve the notice of claim. The affidavit should therefore be stricken.

3. Affidavit of plaintiff Joanna Banford is also irrelevant and should be stricken. Banford alleges Clay Stevenson, an adjustor for Reliance Insurance, told her "that everything would be taken care of" and "our client is at fault and we will get this settled." This is not a written acceptance of the claim and is so vague as to be irrelevant. Moreover, plaintiff retained counsel after this statement was made, seven months prior to the November 16, 1995, letter. It was simply improperly drafted and served after the alleged statement through no fault of Kaysville or Reliance. Moreover, no reasonable lawyer would deem this verbal statement as constituting a reason to forego the clear requirements of the governmental immunity act. Accordingly, this statement is irrelevant. Finally statements regarding Reliance's settlement offers and promises to pay medical bills are inadmissible pursuant to Rules 408 and 409 of the Utah Rules of Evidence.

(R. 84-85)

Although the court rejected these affidavits, Defendants renew their objection to their inclusion in Plaintiff's brief for the reasons contained above.

13. Plaintiffs were represented by counsel at least two months prior to the July 12, 1995, letter and at least seven months prior to the November 16, 1995, letter. (Appellees Brief, p. 3, ¶3).

14. Defendants agree with the remainder of Plaintiffs/Appellants' Statement of Facts ¶¶ 15 through 21.

### **SUMMARY OF ARGUMENT**

Claimants seeking relief under the Governmental Immunity Act must strictly comply with the notice of claim provisions of the Act. Neither the letter of July 12, 1995, nor the letter of November 16, 1995, constitute a proper notice of claim under the Utah Governmental Immunity Act. Neither letter specified the necessary information to constitute a notice of claim. Neither letter was filed with the governing body of Kaysville City as is mandated by U.C.A. § 63-30-14(1995). Indeed, the letter of July 12, 1995, was not even signed by plaintiffs or their attorney. The letter of November 16, 1995, fails to specify it was a notice of claim and was not filed upon the governing body of Kaysville City as required by U.C.A. § 63-30-13 (1995).

Even if the letter can be deemed a notice of claim, it was service of the notice upon the city finance manager is not proper service pursuant to U.C.A. § 63-30-13 because the letters were not directed to or served upon the governing body of the city. In this case, the governing body of Kaysville is the mayor and city council. U.C.A. § 10-1-104(2). Service of a notice of claim on the governing body of the entity is a statutory prerequisite to suit, and plaintiffs' failure to do so deprives this Court of subject matter jurisdiction.

Moreover, the statement in a letter from Dean Storey, "contact me as the city representative" does not create an estoppel because it was in response to plaintiffs' counsel's

letter and did not say to file the claim with him. Because plaintiffs were represented by counsel for at least two months prior to the filing of the first alleged notice of claim in July 1995, plaintiffs' estoppel arguments should be rejected.

In addition, the lawsuit was not timely filed. Plaintiff's suit was filed more than one year after the claim was deemed denied. Accordingly, the court lacked jurisdiction over the case. Plaintiff cannot salvage the process by attempting to introduce evidence of office custom and practice. The proffered affidavits only establish general office policy and not specific facts about this notice. Accordingly, because the letter of November 16, 1995, was deemed file the same day it was dated and mailed, plaintiffs' suit is not timely.

## **ARGUMENT**

### **POINT I**

#### **THIS COURT SHOULD AFFIRM THE JUDGMENT OF DISMISSAL BECAUSE PLAINTIFFS FAILED TO PROPERLY DRAFT AND SERVE A NOTICE OF CLAIM UPON THE GOVERNING BODY OF KAYSVILLE CITY.**

The Utah Governmental Immunity Act, §§ 63-30-1, *et seq.*, (hereinafter, the Act) sets forth the procedures that a litigant suing the State of Utah, or one of its political subdivisions, must follow. Section 63-30-11 requires a claimant to file a written notice of claim with the government entity as a prerequisite to filing an action in court.

U.C.A. § 63-30-11 mandates that a notice of claim contain the following information:

- (3)(a) The notice of the claim asserted shall set forth:
  - (i) a brief statement of the facts
  - (ii) the nature of the claim asserted; and

- (iii) the damages incurred by the claimant so far as they are known.
- (b) The notice of claim shall be:
  - (i) signed by the person making the claim or that person's agent, attorney, parent, or legal guardian; and
  - (ii) directed and delivered to the responsible governmental entity according to the requirements of Section 63-30-12 or 63-30-13.

U.C.A. § 63-30-11(1995)(emphasis added).

The Act further provides:

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 claim arises. . . .

Utah Code Ann. § 63-30-13 (emphasis added).

Service of a notice of claim on the governing body of the entity is a statutory prerequisite to suit, and plaintiffs' failure to do so deprives the court of subject matter jurisdiction. Larson v. Park City Corporation, 955 P.2d 343 (Utah 1998); Bellonio v. Salt Lake City Corporation, 911 P.2d 1294, 1298 (Utah App. 1996). In Bellonio v. Salt Lake City Corp., the Court of Appeals reversed the trial court's refusal to dismiss the complaint for failure to comply strictly with the requirements of § 63-30-13, noting that:

[s]ince a Notice of Claim is a statutory prerequisite to suit, the trial court was without jurisdiction to hear Bellonio's case and erred by allowing him to proceed.

Bellonio, 911 P.2d at 1298.

The notice of claim requirements in the Utah Governmental Immunity Act have always been treated as jurisdictional by Utah courts. As the court in Nielson v. Gurley, 888 P.2d 130 (Utah App. 1994), explained:



The failure to comply with the notice requirements of the Utah Governmental Immunity Act deprives the trial court of subject matter jurisdiction, and therefore compliance with the act is a precondition to maintaining an action.

...

Nielson, 888 P.2d at 13; see also Lamarr v. Utah State Dept. of Transportation, 828 P.2d 535, 540-1 (Utah App. 1992); Madsen v. Borthick, 769 P.2d 245, 250 (Utah 1988) (improper notice deprives court of jurisdiction).

A. Plaintiffs Must Strictly Comply with the Governmental Immunity Act.

Before analyzing plaintiffs' failure to comply with the provisions of the Utah Governmental Immunity Act, the standard of compliance must first be established. Plaintiffs have incorrectly argued "substantial compliance" is all that is necessary. Although the haphazard effort to file a notice of claim in this case does not even constitute "substantial compliance," Utah appellate court decisions have repeatedly rejected substantial compliance and specifically adopted strict compliance as the legal standard for the filing and service of notices of claims.

In Bellonio v. Salt Lake City, 911 P.2d 1294 (Utah App. 1996), the court stated:

Nevertheless, in two recent opinions from this court, plaintiffs have been allowed to proceed despite certain inadequacies in their notice of claim filings. See Bischel, 907 P.2d at 279; Brittain, 882 P.2d at 672-73. However, the precedential effect of those cases is limited by their unique factual underpinnings and, therefore, neither should be construed as an indication that we are prepared to abrogate the long-standing rule requiring strict compliance with all aspects of the Governmental Immunity Act.

Id. at 1296 (emphasis added).

As the court stated in Bischel v. Meritt, 907 P.2d, 275, 279 (Utah App. 1995), “Utah courts have established a rule of strict compliance with the notice provisions of the Utah Governmental Immunity Act.” See, e.g., Yates v. Vernal Family Health Ctr., 617 P.2d 352, 354 (Utah 1980); Lamarr v. Utah State Dep't of Trans., 828 P.2d 535, 541 (Utah App. 1992).” (Emphasis added).

Although plaintiffs have not even substantially complied with the act, under the clearly established standard of “strict compliance,” plaintiffs’ letters of July 12, 1995, and November 16, 1995, fall far short of strict compliance as is outlined below.

**B.     The Letter of July 12, 1995 Does Not Comply with the Act.**

The July 12, 1995, letter addressed “to whom it may concern” failed to comply with 63-30-11. Specifically, it did not contain a the statement of facts, the nature of the claim asserted or the damages incurred by the claimant so far as known and was not served upon the governing body of Kaysville City. The alleged notice of claim merely states the date of the accident, the name of the driver of the Kaysville vehicle and requests the name of the City’s insurance carrier. It contains no information regarding the facts of the accident nor any facts about damages. It was not even signed by the claimant or her attorney.

This terse letter hardly constitutes compliance with the above provisions. The letter failed to specify the nature of the claim, facts or damages as mandated by the above section. Because plaintiffs failed to provide the necessary information mandated by U.C.A. § 63-30-11, the court should affirm the judgment of dismissal in this case.

Even if this letter is deemed a sufficient notice of claim, it was not properly served upon the governing body of Kaysville. A letter addressed to “Kaysville City, To Whom It May Concern” is not service upon the governing body.

Indeed, it is difficult to imagine how a letter simply addressed to “Kaysville City, to whom it may concern” can constitute compliance with the act when this court has rejected a much more thorough, albeit misguided, effort that occurred in Bellonio. At least in Bellonio, the claimant addressed the letter to the Airport Authority and City Attorney. Nonetheless, this court held notice insufficient because the notice was not filed with the city council.

C. The Letter of November 16, 1995, Does Not Comply with the Act.

The letter of November 16, 1995, sent to Dean Storey, City Finance Director does not constitute strict compliance with the Act. The letter of November 16, 1995, is no more a notice of claim than any other letter sent between July 5, 1995 and November 16, 1995.

Even if the letter of November 16, 1995 contained sufficient facts to qualify as a notice of claim, the Banfords did not file their notice of claim with the governing body of Kaysville City. U.C.A. § 10-1-104(2) defines the governing body as “collectively the legislative body and executive of any municipality.” Subsection (2)(b) defines the governing body of a city of the third class as the City Council.

Banfords’ argument that because the definition of “governing body” is not specified in the Governmental Immunity Act excuses their non-compliance has been specifically

rejected by the Utah Supreme Court and this court. In Larson v. Park City Corp., 955 P.2d 343 (Utah 1998), the court stated:

The Act clearly provides that the notice of claim must be filed with the “governing body” of a political subdivision. Unfortunately, the term “governing body” is not defined within the Act itself. However, the term “governing body” is defined in the general provisions of the Utah Code dealing with cities and towns, known as the Utah Municipal Code. Utah Code Ann. §§ 10-1-101 through 10-15-6. Subsection -104(2) defines “governing body” as follows:

“Governing body” means collectively the legislative body and the executive of any municipality. Unless otherwise provided:

- (a) In cities of the first and second class, the governing body is the city commission;
- (b) In cities of the third class, the governing body is the city council[.]

Utah Code Ann. § 10-1-104(2) (1996). Furthermore, section 10-3-105 states:

The governing body of cities of the third class shall be a council composed of six members one of whom shall be the mayor and the remaining five shall be councilmen.

Utah Code Ann. § 10-3-105 (1996). Therefore, Larson was required to file her notice of claim with the city council because Park City is a city of the third class.

Larson, 955 P.2d at 345.

Similarly, in Bellonio v. Salt Lake City, 911 P.2d 1294, 1296 n.2 (Utah App. 1999), this court specified that Title 10 governs the definition of governing body.

In this case, the governing body of Kaysville is the mayor and city council. U.C.A. § 10-1-104(2). Letters “to whom it may concern” or to Dean Storey, the city finance director, do not constitute service upon the governing body of Kaysville City.

Clearly acknowledging insufficient service, plaintiffs attempt to excuse their lack of compliance with the mandatory requirements of the Utah Governmental Immunity Act, § 63-30-14, by raising several arguments that have been repeatedly rejected by Utah appellate courts. Plaintiffs' specific arguments are discussed below.

D. Actual Knowledge of the Claim by City or Its Insurance Carrier Does Not Salvage a Defective Notice of Claim.

Plaintiffs argue that because defendants' mayor, city finance director and insurance company had actual knowledge of the claim through phone conversations with plaintiff Joanna Banford, her lawyer and her friend, the purposes of the Act have been met. In Busch v. Salt Lake International Airport, 921 P.2d 470 (Utah App. 1996), the court specifically held that knowledge of the claim on the part of the city risk manager, attorney or insurance company does not validate improper service. As the court stated in Busch v. Salt Lake International Airport, 921 P.2d 470 (Utah App. 1996):

The Governmental Immunity Act serves two important purposes. First, it affords the responsible public authorities an opportunity to investigate, settle, or deny a claim without expending public revenue for costly and unnecessary litigation. Brittain, 882 P.2d at 671. Also, compliance with the Governmental Immunity Act provides an opportunity to those vested with authority to remedy a dangerous condition so that further damage or injury can be avoided. Scars v. Southworth, 563 P.2d 192, 193 (Utah 1977). The city recorder and city attorney are not members of the governing body. Bellonio, 911 P.2d at 1296. Unless specifically authorized by the governing body, neither has the power to settle a claim or to remedy a dangerous condition.

We conclude that the first notice of claim served upon the city recorder and the city attorney was not sufficient to give notice of the claim to the governing body of Salt Lake City. To provide notice to the governing body of

a city under the Governmental Immunity Act, a notice of claim must be served upon the mayor or city council

Id. at 472.

Therefore, knowledge of the claim by the city finance director, the mayor and Reliance Insurance is irrelevant. Defective service of the notice of claim is jurisdictional and defendants have no duty to point out those deficiencies during settlement negotiations. Accordingly, this court should hold that it lacks jurisdiction as a matter of law. Indeed, any other holding would vitiate the notice of claim provision. Knowledge, however remote, of a potential claim by any city official could constitute notice under plaintiffs' argument. The reason that the court has repeatedly rejected this argument is precisely because of the lack of certainty and confusion such a drastic departure from precedence such a decision would cause. This court should reject plaintiffs' attempts to resurrect the "actual notice cures a defective notice of claim" argument.

E. Kaysville and Reliance Insurance Did Not Waive Compliance with the Governmental Immunity Act and Are Not Estopped to Assert Jurisdiction and Limitations as a Defense.

The Banfords have apparently argued that the verbal and written responses from Kaysville City and Reliance Insurance constitute waiver or estoppel to deny the claim. Utah courts have been reluctant to apply estoppel analysis to notices of claims. As recently as this year, the court rejected a claim of estoppel in Shunk v. State, 924 P.2d 879 (Utah 1996). In Shunk, the court rejected plaintiff's estoppel argument by holding that estoppel applies only when an agency of the state (or political subdivision) gives erroneous information to a

claimant which prevented her from timely filing a proper Notice of Claim. In the Shunk case, the plaintiff failed to properly serve the notice of claim on the proper authorities. The defendants simply did not notify plaintiff of the deficient notice. The court further stated:

Shunk points out, however that the notice of claim which he filed with the state department of education and the attorney general contained a request for assistance in the event that Shunk had not notified the proper governmental entity. Where the statutes are clear, as in this case, as to the requirement that for serving a notice on a political subdivision, we cannot require and the statutes do not require that the state or its political subdivisions promptly notify claimants of deficiencies of the notice of claim so as to allow them an opportunity to timely rectify their error or deficiency.

Id. at 882.

Thus, the Banfords' argument that Kaysville has waived or is estopped to assert deficiencies is unavailing in light of the express language of this recent, unanimous decision of the Utah Supreme Court.

Additionally, counsel cannot blame his failure to follow the statute on Kaysville. Indeed, in this case, the first letter of July 1995 from Plaintiffs' attorney specifically asked for information regarding the city's insurance carrier and stated "[p]lease have a representative of your insurance company contact us as soon as possible but no later than thirty days from the date of this letter. This will eliminate the need for us to contact you further." Apparently, no further communication was planned with Kaysville. Storey's response did nothing to mislead counsel or otherwise validate this letter as a notice of claim. The response did not admit liability. Plaintiffs' argument that "please contact me as the city repre-

sentative” somehow misled them into filing a defective notice of claim is merit less. Storey did not say, “please file your notice of claim with me.”

After apparently unsuccessful negotiations with Reliance, plaintiffs’ counsel sent another letter to Storey. It is this letter that plaintiffs now claim is their notice of claim. The letter of November 16 is hardly a notice of claim. The letter states “[m]y purpose in contacting you directly is to obtain some help with your insurance company.” Moreover, in the letter, Mr. Sondgeroth then goes on to complain about the treatment his client had received from Mr. Clay Stevens. Additionally, the letter states:

My letter is a direct result of this behavior on his part . . . please advise whether you can help my clients gain a better attitude from your insurance provider. I sincerely hope that we can work together to minimize this conflict and obtain appropriate compensation for the injuries that have occurred. The process so far has been quite intolerable.

The letter was not intended to be a notice of claim. In fact, this is hardly the type of letter one would write about a claims agent who allegedly accepted liability for the accident on behalf of Kaysville. It certainly does not indicate that Reliance lulled plaintiff or her attorney into a false sense of complacency as is required by Rice for estoppel to apply.

Rice v. Granite School District, 456 P.2d 159 (Utah 1969), involved an unrepresented woman who was actively led to believe that she did not need counsel and that her claim had been accepted. In this case, the Banfords had counsel for at least seven months prior to the filing of their alleged notice of claim. The notice of claim simply is deficient. No amount of good faith negotiation or discussions regarding medical records can constitute waiver or



estoppel. To hold otherwise would bar efforts to settle cases early on if there was any question as to the validity of a notice of claim. Moreover, the exhibits to plaintiffs' memorandum do not demonstrate any active effort to mislead. Unlike the plaintiff in Rice, the Banfords were represented by counsel who presumably can read the clear and unambiguous language of the statute. Reliance is under no obligation to point out deficiencies in the notice. Shunk v. State, 924 P.2d 879, 882 (Utah 1996).

Courts have routinely held that mere communication with counsel while the statute is running, without some active effort to mislead the plaintiffs into a false sense of complacency, does not create an estoppel.

In Lund v. Hall, 938 P.2d 285 (Utah 1997), the plaintiff filed an action after the statute of limitations had expired. Relying upon Rice v. Granite School District, 23 Utah 2d, 22, 456 P.2d 159 (1969), the principal case the Banfords cite in support of their claims, Lund argued that defendants should be estopped to argue statute of limitations because "she was involved in on-going settlement negotiations with State Farm 'immediately prior to the expiration of the statute of limitations and that State Farm had not provided her with notice of the running of the statute of limitations as required by law.'" Lund v. Hall, 938 P.2d at 288. The court rejected the argument holding that there was nothing in the letter that led the plaintiff to sit on her rights. Moreover the court distinguished Rice by stating, ". . . unlike the plaintiff in Rice, Lund was represented by an attorney prior to the time she received the letter from State Farm." Lund, 938 P.2d at 288.

Bischel v. Meritt, 907 P.2d 275 (Utah App. 1995) is also inapplicable to the facts of this case. The plaintiff in Bischel phoned the Salt Lake County Commission and was given erroneous information on where to file her notice of claim. Bischel is distinguishable because the defendant providing misleading information resulting in defective service of the notice of claim.

In this case there is no evidence of false or intentionally misleading information. Statements such as “contact me as the city’s representative” by Kaysville’s Storey or “I am now handling the case” by Reliance’s Letisa Mckenzie do not provide any false information that would lead a reasonable attorney to believe that compliance with the statute has been waived. Plaintiffs’ attempt to construe statements regarding a desire to settle or vague comments that the Banfords “would be taken care of” as creating an estoppel simply do not meet the necessary level of evidence necessary to create disputed issues of fact.

Accordingly, Kaysville is not estopped to assert lack of jurisdiction. There is no evidence that anyone from Kaysville provided any false information to the Banfords or their counsel regarding the notice of claim. Neither Kaysville nor Reliance was under any obligation to notify plaintiffs or their counsel of the deficiency in the notice of claim. Shunk v. State, 924 P.2d 879, 882 (Utah 1996). Indeed, the letter of November 16, 1995 diverged so far from the standard notice of claim that someone receiving the letter may not even have realized it was a notice of claim. Accordingly, the facts as alleged by plaintiffs, even if taken

as true, do not give rise to a material disputed issue of fact to support a claim of estoppel. This court should affirm the judgment of dismissal.

## **POINT II**

### **PLAINTIFFS' LAWSUIT IS UNTIMELY**

Although not decided by the trial court in its ruling, this court can affirm the trial court's ruling on other grounds, even though the trial court relied on some other ground. Debry v. Noble, 889 P.2d 428, 444 (Utah 1995). The untimeliness of plaintiffs' suit is an additional ground affirming the Order of Dismissal.

Utah Code Annotated § 63-30-14 provides that a governmental entity has ninety days to act upon a notice of claim or it is deemed denied. U.C.A. § 63-30-15 provides that a claimant must file an action against the governmental entity within one year after the claim is denied or the action is barred. If the July 12, 1995 letter is deemed to be plaintiffs' notice of claim, plaintiffs' suit filed February 18, 1997, is clearly untimely. Thus, in order for the timing to be relevant, this court would have to accept the letter of November 16, 1995, as a valid notice of claim. That notice of claim was rejected ninety days after it was served. Pursuant to U.C.A. § 63-30-15(2), plaintiffs' suit must be filed within one year of that date.

A. Plaintiffs' Claim Was Deemed Denied on February 14, 1996, and the Filing of Suit on February 18, 1997 Is Untimely Pursuant to U.C.A. § 63-30-15(2).

The Banford's suit is untimely because it was filed more than one year after it was deemed denied. It is undisputed that the letter was dated November 16, 1995. Pursuant to U.C.A. § 63-37-1, a notice of claim is deemed served on the date it is mailed or postmarked.

There is no envelope and therefore the court found in its original ruling that the letter was mailed the date it was signed, November 16, 1995. At no point was the claim accepted or rejected in writing and the claim was therefore deemed denied ninety days thereafter. Pursuant to U.C.A. § 68-3-7, the claim was deemed denied on February 14, 1996. Plaintiffs did not file this action until Tuesday, February 18, 1997, more than one year after the claim was deemed denied. The savings provisions for weekends and holidays does not apply to this case because February 14, 1997 was a Friday. Thus, if the November 16, 1995, letter is a validly served notice of claim, the action is time barred for failure to file within one year after it was deemed denied as mandated by Utah Code Annotated Section 63-30-15. Plaintiffs' complaint was therefore barred by the statute of limitations.

Plaintiff's claims that Rule 6, Utah Rules of Civil Procedure which provides a three day period for mailing and therefore saves their case. The provision of Rule 6 does not apply when more specific provisions are contained in the code, Maverick Country Stores v. Industrial Commission, 860 P.2d 944 (Utah App. 1993) (U.R.C.P., Rule 6(e), three-day mailing provision, does not apply to time period to file an appeal of industrial commission order).

In this case, a more specific provision specifies when a notice of claim is deemed filed and specifically accounts for mailing. Rule 6 is inconsistent with the express language of U.C.A § 63-37-1. Therefore, the provision of Rule 6, providing for an additional three days for mailing is inapplicable due to a more specific provision of U.C.A.

§ 63-37-1. Thus, even if plaintiffs properly filed a notice of claim on November 16, 1995, the suit is still untimely.

B. The Trial Court Correctly Disregarded the Affidavits of Kenneth Sondgeroth and His Secretary as Lacking in Foundation and Therefore Inadmissible.

In their original memorandum, plaintiffs argued that their notice of claim was filed on November 16, 1995, but that the three day mailing rule applied. The court held that the notice was deemed filed on November 16, 1995, pursuant to U.C.A. 63-37-1 and that plaintiffs filed suit outside the applicable statute of limitations. Faced with untimely filing, plaintiffs altered their position with an allegation that the letter of November 16, 1995, was actually postmarked November 17, 1995, based upon standard office practice. The trial court properly denied plaintiffs' motion because the affidavits are not based upon competent evidence under Lister v. Utah Valley Community College, 881 P.2d 933 (Utah App. 1994), and should be stricken.

Evidence of office practice must be based upon competent evidence. Lister v. Utah Valley Community College, 881 P.2d 933 (Utah App. 1994). The affidavit cannot create a factual dispute as to the date of service of the notice because it is not based upon competent evidence. Id. Indeed, Lister v. Utah Valley Community College, 881 P.2d 933 (Utah App. 1994) is right on point. Lister sued Utah Valley Community College for negligence. Defendant filed a motion to dismiss alleging failure to serve the notice of claim upon the Attorney General as mandated by U.C.A. § 63-30-12 and filed an affidavit

of the lead secretary of the Litigation Division of the Utah Attorney General's Office which established that no notice of claim had been served upon the Attorney General.

Lister responded by filing an affidavit from his attorney in which the attorney claimed that it was his standard office practice to mail notices of claims to the Attorney General's Office. He provided no specific evidence, however, that this notice was ever mailed to the Attorney General's office. In affirming the trial court's dismissal of plaintiffs' case for failure to properly serve the notice of claim, the court stated:

Lister's proffered evidence fails to establish the existence of an adequate office mailing custom at the threshold level. He provides no direct evidence that the notice of claim allegedly mailed to the attorney general was ever prepared. Mr. Snuffer does not state that he dictated a letter addressed to the attorney general, signed it, or gave it to his secretary. Nor do we have an affidavit from Mr. Snuffer's secretary that she typed a notice addressed to the attorney general. We do not even have direct evidence that Mr. Snuffer's secretary photocopied the letter addressed to UVCC or placed it in an envelope addressed to the attorney general. In short, we have no direct evidence whatsoever pertaining to the preparation of the letter Mr. Snuffer's office claimed to have mailed to the attorney general. Consequently, viewed in a light most favorable to Lister's claim, Mr. Snuffer's affidavits are insufficient to establish a material issue of fact as to whether a notice of claim was mailed to the attorney general.

Id. at 941. (Emphasis added).

In this case, plaintiffs' affidavit establishes only that the office routine was to review the letter at the end of the day and place it in the outgoing mail box which would be picked up and post marked the next day. This evidence is not competent under Lister because neither Sondgeroth nor his secretary testify that they have personal knowledge that they did not place the letter in the mail until after 10:30 a.m on November 16, 1995. It is just

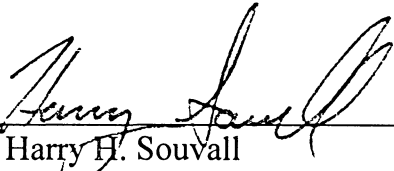
as likely that the letter could have been dictated and signed the day before or that morning and mailed in the morning pickup on the 16th. Because this office routine evidence is inadmissible as speculative and incompetent, this court should disregard plaintiffs' proffered affidavits and strike them from the record. This court should affirm the trial court's dismissal because plaintiffs' suit was not timely filed.

### CONCLUSION

For the reasons stated above, the Court should affirm the judgment of the District Court.

DATED this 14 day of February, 1999.

SNOW, CHRISTENSEN & MARTINEAU

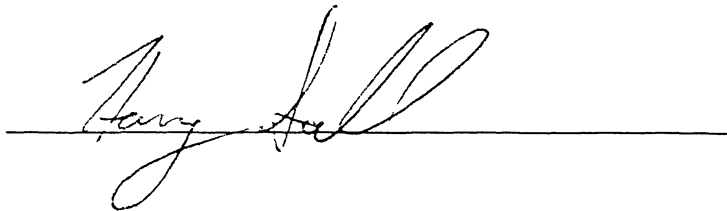
By   
Harry H. Souvall  
Attorneys for Defendants

CERTIFICATE OF SERVICE

I state that I am the attorney for Kaysville City Defendants herein; that I served the attached Brief of Appellees (Case Number 980300-CA, Utah Court of Appeals, State of Utah) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Leonard E. McGee  
Damian E. Davenport  
Lehman, Jensen & Donahue, L.C.  
Attorneys for Plaintiff/Appellant  
620 Judge Building  
Salt Lake City, Utah 84111

and caused the same to be mailed, first class, postage prepaid on the 15<sup>th</sup> day of February, 1999.

A handwritten signature in cursive script, appearing to read "Gary Hall", is written over a horizontal line.



## **STATUTORY ADDENDUM**

## Part 2

*Municipalities*

- Section 10-1-201.** Municipalities as political subdivisions of the state.
- 10-1-202.** Power to sue, contract, adopt municipal name and seal.
- 10-1-203.** License fees and taxes — Application information to be transmitted to the county assessor [Effective until July 1, 1997].  
License fees and taxes — Application information to be transmitted to the county auditor [Effective July 1, 1997].

## Part 3

## Municipal Energy Sales and Use Tax Act

- 10-1-301.** Title [Effective July 1, 1997].
- 10-1-302.** Purpose and intent [Effective July 1, 1997].
- 10-1-303.** Definitions [Effective July 1, 1997].
- 10-1-304.** Municipality may levy tax — Rate [Effective July 1, 1997].
- 10-1-305.** Municipal energy sales and use tax ordinance provisions [Effective July 1, 1997].
- 10-1-306.** Rules for delivered value and point of sale.
- 10-1-307.** Collection of taxes by commission — Distribution of revenues — Charge for services — Collection of taxes by municipality [Effective July 1, 1997].
- 10-1-308.** Report of tax collections — Allocation when location of taxpayer cannot be accurately determined [Effective July 1, 1997].
- 10-1-309.** Effective date of levy [Effective July 1, 1997].
- 10-1-310.** Existing energy franchise taxes or contractual franchise fees [Effective July 1, 1997].

## PART 1

## SHORT TITLE, DEFINITIONS, REPEALER, AND SCOPE OF CODE

- 10-1-101. Short title.**  
This act shall be known and may be cited as the "Utah Municipal Code." In enacting this code, it is the legislative intent to repeal only those provisions of Utah law set forth in Section 10-1-114. It is the legislative intent to review, modernize and incorporate into this code in later sessions other provisions of Utah law relating to municipalities not included in this act. Provisions of Utah law not specifically repealed shall continue in effect. 1977
- 10-1-102. Effective date.**  
This act shall become effective July 1, 1977. 1977
- 10-1-103. Construction.**  
The powers herein delegated to any municipality shall be liberally construed to permit the municipality to exercise the powers granted by this act except in cases clearly contrary to the intent of the law. 1977
- 10-1-104. Definitions.**  
As used in this act:
- (1) "Municipal" or "municipalities" means any city of the first class, city of the second class, city of the third class, or town in the state of Utah, but unless the context otherwise provides, the term or terms do not include counties, school districts, or any other special purpose governments.

(2) "Governing body" means collectively the legislative body and the executive of any municipality. Unless otherwise provided:

- (a) In cities of the first and second class, the governing body is the city commission;
- (b) In cities of the third class, the governing body is the city council;
- (c) In towns the governing body is the town council.

(3) "City" shall include cities of the first class, cities of the second class or cities of the third class or may refer cumulatively to all such cities.

(4) "Town" means any town as defined in Section 10-2-301.

(5) "Recorder," unless clearly inapplicable, shall include and apply to town clerks.

(6) "Provisions of law" shall include other statutes of the state of Utah and ordinances, rules and regulations properly adopted by any municipality unless the construction is clearly contrary to the intent of state law.

(7) "Contiguous" means abutting directly on the existing boundary of the annexing municipality. "Directly" includes separation by a street, alley, public right-of-way, creek, river or the right-of-way of a railroad or other public service corporation, or by lands owned by the municipality, by some other political subdivision of the state or by the state.

(8) "Affected entities" means a county, municipality or other entity possessing taxation powers within a county, whose territory, service delivery or revenue will be directly and significantly affected by a proposed boundary change involving a municipality or other local entity.

(9) "Peninsula" means an area of unincorporated territory surrounded on more than one-half of its boundary distance, but not completely, by incorporated territory and situated so that the length of a line drawn across the unincorporated area from an incorporated area to an incorporated area on the opposite side shall be less than 25% of the total aggregate boundaries of the unincorporated area.

(10) "Island" means unincorporated territory completely surrounded by incorporated area of one or more municipalities.

(11) "Urban development" means a housing subdivision involving more than 15 residential units with an average of less than one acre per residential unit or a commercial or industrial development for which cost projections exceed \$750,000 for any or all phases. 1979

**10-1-105. No changes intended.**

Unless otherwise specifically provided in this act, the provisions of this act shall not operate in any way to affect the property or contract rights or other actions which may exist in favor of or against any municipality. Nor shall this act operate in any way to change or affect any ordinance, order or resolution in force in any municipality and such ordinances, orders and resolutions which are not repugnant to law, shall continue in full force and effect until repealed or amended. 1977

**10-1-106. Scope of act.**

This act shall apply to all municipalities incorporated or existing under the law of the State of Utah except as otherwise specifically excepted by the home rule provisions of Article XI, Section 5 of the Constitution of the State of Utah. 1977

**10-1-107. Municipalities.**

All municipalities which have been incorporated under any previous act of the United States or of the State of Utah shall be treated as properly incorporated under this act. 1977

- (8) or in connection with the collection of and assessment of taxes;
- (9) the activities of the Utah National Guard;
- (10) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;
- (11) any natural condition on publicly owned or controlled lands, any condition existing in connection with an abandoned mine or mining operation, or any activity authorized by the School and Institutional Trust Lands Administration or the Division of Sovereign Lands and Forestry;
- (12) research or implementation of cloud management or seeding for the clearing of fog;
- (13) the management of flood waters, earthquakes, or natural disasters;
- (14) the construction, repair, or operation of flood or storm systems;
- (15) the operation of an emergency vehicle, while being driven in accordance with the requirements of Section 41-6-14;
- (16) a latent dangerous or latent defective condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them;
- (17) a latent dangerous or latent defective condition of any public building, structure, dam, reservoir, or other public improvement; or
- (18) the activities of:
  - (a) providing emergency medical assistance;
  - (b) fighting fire;
  - (c) regulating, mitigating, or handling hazardous materials or hazardous wastes;
  - (d) emergency evacuations; or
  - (e) intervening during dam emergencies. 1995

#### **63-30-10.5. Waiver of immunity for taking private property without compensation.**

(1) As provided by Article I, Section 22 of the Utah Constitution, immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation.

(2) Compensation and damages shall be assessed according to the requirements of Title 78, Chapter 34, Eminent Domain. 1991

#### **63-30-10.6. Attorneys' fees for records requests.**

(1) Immunity from suit of all governmental entities is waived for recovery of attorneys' fees under Sections 63-2-405 and 63-2-802.

Notwithstanding Section 63-30-11:

- (a) a notice of claim for attorneys' fees under Subsection (1) may be filed contemporaneously with a petition for review under Section 63-2-404; and
  - (b) Sections 63-30-14 and 63-30-19 shall not apply.
- (2) Any other claim under this chapter that is related to a claim for attorneys' fees under Subsection (1) may be brought contemporaneously with the claim for attorneys' fees or in a subsequent action. 1992

#### **63-30-11. Claim for injury — Notice — Contents — Service — Legal disability.**

(1) A claim arises when the statute of limitations that would apply if the claim were against a private person begins to run.

(2) Any person having a claim for injury against a governmental entity, or against an employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority shall file a

written notice of claim with the entity before maintaining an action, regardless of whether or not the function giving rise to the claim is characterized as governmental.

(3) (a) The notice of claim shall set forth:

- (i) a brief statement of the facts;
- (ii) the nature of the claim asserted; and
- (iii) the damages incurred by the claimant so far as they are known.

(b) The notice of claim shall be:

- (i) signed by the person making the claim or that person's agent, attorney, parent, or legal guardian; and
- (ii) directed and delivered to the responsible governmental entity according to the requirements of Section 63-30-12 or 63-30-13.

(4) (a) If the claimant is under the age of majority, or mentally incompetent and without a legal guardian at the time the claim arises, the claimant may apply to the court to extend the time for service of notice of claim.

(b) (i) After hearing and notice to the governmental entity, the court may extend the time for service of notice of claim.

(ii) The court may not grant an extension that exceeds the applicable statute of limitations.

(c) In determining whether or not 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. 1991

#### **63-30-12. Claim against state or its employee — Time for filing notice.**

A claim against the state, or against its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the attorney general and the agency concerned within one year after the claim arises, or before the expiration of any extension of time granted under Section 63-30-11, regardless of whether or not the function giving rise to the claim is characterized as governmental. 1997

#### **63-30-13. Claim against political subdivision or its employee — Time for filing notice.**

A claim against a political subdivision, or against its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the governing body of the political subdivision within one year after the claim arises, or before the expiration of any extension of time granted under Section 63-30-11, regardless of whether or not the function giving rise to the claim is characterized as governmental. 1987

#### **63-30-14. Claim for injury — Approval or denial by governmental entity or insurance carrier within ninety days.**

Within ninety days of the filing of a claim the governmental entity or its insurance carrier shall act thereon and notify the claimant in writing of its approval or denial. A claim shall be deemed to have been denied if at the end of the ninety-day period the governmental entity or its insurance carrier has failed to approve or deny the claim. 1985

#### **63-30-15. Denial of claim for injury — Authority and time for filing action against governmental entity.**

(1) If the claim is denied, a claimant may institute an action in the district court against the governmental entity or an employee of the entity.

(2) The claimant shall begin the action within one year after denial of the claim or within one year after the denial period specified in this chapter has expired, regardless of whether or not the function giving rise to the claim is characterized as governmental. 1987

**63-30-16. Jurisdiction of district courts over actions — Application of Rules of Civil Procedure.**

The district courts shall have exclusive original jurisdiction over any action brought under this chapter, and such actions shall be governed by the Utah Rules of Civil Procedure in so far as they are consistent with this chapter. 1983

**63-30-17. Venue of actions.**

Actions against the state may be brought in the county in which the claim arose or in Salt Lake County. Actions against a county may be brought in the county in which the claim arose, or in the defendant county, or, upon leave granted by a district court judge of the defendant county, in any county contiguous to the defendant county. Leave may be granted ex parte. Actions against all other political subdivisions including cities and towns, shall be brought in the county in which the political subdivision is located or in the county in which the claim arose. 1983

**63-30-18. Compromise and settlement of actions.**

(1) A political subdivision, after conferring with its legal officer or other legal counsel if it does not have a legal officer, may compromise and settle any action as to the damages or other relief sought.

(2) The risk manager in the Department of Administrative Services may:

(a) compromise and settle any claim of \$25,000 or less in damages filed against the state for which the Risk Management Fund may be liable;

(b) with the concurrence of the attorney general or his representative and the executive director of the Department of Administrative Services, compromise and settle any claim of \$25,000 to \$100,000 in damages for which the Risk Management Fund may be liable; and

(3) The risk manager shall comply with procedures and requirements of Title 63, Chapter 38b, in compromising and settling any claim of \$100,000 or more. 1995

**63-30-19. Undertaking required of plaintiff in action.**

At the time of filing the action the plaintiff shall file an undertaking in a sum fixed by the court, but in no case less than the sum of \$300, conditioned upon payment by the plaintiff of taxable costs incurred by the governmental entity in the action if the plaintiff fails to prosecute the action or fails to recover judgment. 1965

**63-30-20. Judgment against governmental entity bars action against employee.**

Judgment against a governmental entity in an action brought under this act shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee whose act or omission gave rise to the claim. 1965

**63-30-21. Repealed.** 1978

**63-30-22. Exemplary or punitive damages prohibited — Governmental entity exempt from execution, attachment, or garnishment.**

(1) (a) No judgment may be rendered against the governmental entity for exemplary or punitive damages.

(b) The state shall pay any judgment or portion of any judgment entered against a state employee in the employee's personal capacity even if the judgment is for or includes exemplary or punitive damages if the state

would be required to pay the judgment under 63-30-36 or 63-30-37.

(2) Execution, attachment, or garnishment may not be against a governmental entity.

**63-30-23. Payment of claim or judgment against — Presentment for payment.**

Any claim approved by the state as defined by Subsection 63-30-2(1) or any final judgment obtained against the state shall be presented to the state risk manager, or to the agency, institution or other instrumentality involved for payment, if payment by said instrumentality is otherwise permitted by law. If such payment is not authorized by law the judgment or claim shall be presented to the board of examiners and the board shall proceed as provided in Section 63-

**63-30-24. Payment of claim or judgment against political subdivision — Procedure by governing body.**

Any claim approved by a political subdivision or any judgment obtained against a political subdivision shall be submitted to the governing body thereof to be paid forthwith from the general funds of said political subdivision unless the funds are appropriated to some other use or restricted by law or contract for other purposes.

**63-30-25. Payment of claim or judgment against political subdivision — Installment payments.**

If the subdivision is unable to pay the claim or award during the current fiscal year it may pay the claim or award in more than ten ensuing annual installments of equal size or such other installments as are agreeable to the claimant.

**63-30-26. Reserve funds for payment of claims or purchase of insurance created by political subdivisions.**

Any political subdivision may create and maintain a reserve fund or may jointly with one or more other political subdivisions make contributions to a joint reserve fund, for the purpose of making payment of claims against the co-operating subdivisions when they become payable pursuant to this chapter, or for the purpose of purchasing liability insurance to protect the co-operating subdivisions from any or all risk created by this chapter.

**63-30-27. Tax levy by political subdivisions for payment of claims, judgments, or insurance premiums.**

(1) Notwithstanding any provision of law to the contrary, all political subdivisions may levy an annual property tax sufficient to pay the following:

(a) any claim;

(b) any settlement;

(c) any judgment, including any judgment against an elected official or employee of any political subdivision, including peace officers, based upon a claim for punitive damages but the authority of a political subdivision for the payment of any judgment for punitive damages is limited in any individual case to \$10,000;

(d) the costs to defend against any claim, settlement, or judgment; or

(e) the establishment and maintenance of a reserve fund for the payment of claims, settlements, or judgments as may be reasonably anticipated.

(2) It is legislative intent that the payments authorized for punitive damage judgments or to pay the premium for such insurance as authorized is money spent for a public purpose within the meaning of this section and Article XIII, Sec. 5, Utah Constitution, even though as a result of the levy the

- (2) operation of state vehicles or equipment when he is properly licensed for that operation; and  
 (3) liability protection and indemnification normally afforded salaried employees. 1981

**63-34-12. Approval prerequisite to volunteer service — Rules and regulations.**

(1) Volunteers may not donate any service to the Department of Natural Resources or its divisions unless and until the program in which volunteers would serve has first been approved, in writing, by the executive director of the Department of Natural Resources and the Department of Human Resource Management.

(2) Volunteer services shall comply with any rules adopted by the Department of Human Resource Management relating to that service that are not inconsistent with the provisions of Sections 63-34-9 through 63-34-12. 1988

**CHAPTER 34a**

**SEISMIC SAFETY**

(Terminated by Laws 1977, ch. 234, § 10.)

**63-34a-1 to 63-34a-9. Terminated.**

**CHAPTER 35**

**SOCIAL SERVICES**

(Repealed by Laws 1988, ch. 1, § 407.)

**63-35-1 to 63-35-13. Repealed.**

**CHAPTER 35a**

**SOCIAL SERVICE LICENSURE**

(Repealed by Laws 1988, ch. 1, § 407.)

**63-35a-1 to 63-35a-16. Repealed.**

**CHAPTER 36**

**INDIAN AFFAIRS**

(Renumbered by Laws 1992, ch. 241, §§ 342 to 367.)

Section  
 63-36-1 to 63-36-8. Repealed.  
 63-36-9 to 63-36-21. Renumbered.  
 63-36-101 to 63-36-213. Renumbered.

**63-36-1 to 63-36-8. Repealed. 1991**

**63-36-9 to 63-36-21. Renumbered as §§ 63-36-201 to 63-36-213. 1991**

**63-36-101 to 63-36-213. Renumbered as §§ 9-9-101 to 9-9-213. 1992**

**CHAPTER 36a**

**TASK FORCE ON INDIAN AFFAIRS**

(Repealed by Laws 1991, ch. 218, § 1.)

**63-36a-1 to 63-36a-4. Repealed. 1991**

**CHAPTER 37**

**MAILING REPORTS, CLAIMS, RETURNS, STATEMENTS AND OTHER DOCUMENTS TO STATE OR POLITICAL SUBDIVISIONS**

Section  
 63-37-1. When postmark date deemed filing date — When mailing date deemed filing date.  
 63-37-2. Registered or certified mail — Record as proof of delivery.  
 63-37-3. Filing date falling on Saturday, Sunday or legal holiday.

**63-37-1. When postmark date deemed filing date — When mailing date deemed filing date.**

Any report, claim, tax return, statement or other document or any payment required or authorized to be filed or made to the state of Utah, or to any political subdivision thereof, which is:

(1) Transmitted through the United States mail, shall be deemed filed or made and received by the state or political subdivisions on the date shown by the post-office cancellation mark stamped upon the envelope or other appropriate wrapper containing it.

(2) Mailed but not received by the state or political subdivisions where received and the cancellation mark is illegible, erroneous, or omitted, shall be deemed filed or made and received on the date it was mailed if the sender establishes by competent evidence that the report, claim, tax return, statement or other document or payment was deposited in the United States mail on or before the date for filing or paying; and in cases of such nonreceipt of any such report, tax return, statement, or other document required by law to be filed, the sender files with the state or political subdivision a duplicate within thirty days after written notification is given to the sender by the state or political subdivisions of its nonreceipt of such report, tax return, statement, or other document. 1967

**63-37-2. Registered or certified mail — Record as proof of delivery.**

If any such report, claim, tax return, statement or other document or payment is sent by United States mail and either registered or certified, a record authenticated by the United States post office of such registration or certification shall be considered competent evidence that the report, claim, tax return, statement or other document or payment was delivered to the state officer or state agency or officer or agency of the political subdivision to which addressed, and the date of registration or certification shall be deemed the postmarked date. 1967

**63-37-3. Filing date falling on Saturday, Sunday or legal holiday.**

If the date for filing any such report, claim, tax return, statement or other document or making any such payment falls upon a Saturday, Sunday or legal holiday, such acts shall be considered timely if performed on the next business day. 1967

**CHAPTER 38**

**BUDGETARY PROCEDURES ACT**

Section  
 63-38-1. Short title.  
 63-38-1.1. State Budget Office — Creation — Duties and responsibilities.

## CHAPTER 37

### MAILING REPORTS, CLAIMS, RETURNS, STATEMENTS AND OTHER DOCUMENTS TO STATE OR POLITICAL SUBDIVISIONS

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| 63-37-1. | When postmark date deemed filing date — When mailing date deemed filing date. |
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(2) Mailed but not received by the state or political subdivisions where received and the cancellation mark is illegible, erroneous, or omitted, shall be deemed filed or made and received on the date it was mailed if the sender establishes by competent evidence that the report, claim, tax return, statement or other document or payment was deposited in the United States mail on or before the date for filing or paying; and in cases of such nonreceipt of any such report, tax return, statement, or other document required by law to be filed, the sender files with the state or political subdivision a duplicate within thirty days after written notification is given to the sender by the state or political subdivisions of its nonreceipt of such report, tax return, statement, or other document. 1967

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#### 63-37-3. Filing date falling on Saturday, Sunday or legal holiday.

If the date for filing any such report, claim, tax return, statement or other document or making any such payment falls upon a Saturday, Sunday or legal holiday, such act shall be considered timely if performed on the next business day. 1967

## CHAPTER 38

### BUDGETARY PROCEDURES ACT

- | Section  |              |
|----------|--------------|
| 63-38-1. | Short title. |

AFFAIRS

218 § 11

shall continue to hold the same under the tenure thereof, except those offices which are abolished, and those as to which a different provision is made by these revised statutes. 1953

**68-2-6. Accrued rights not affected by repeal.**

This repeal of existing statutes shall not affect any act done, any right accruing or which has accrued or has been established, or any suit or proceeding had or commenced in any civil cause before the time when such repeal takes effect; but the proceedings in such cases shall be conformed to the provisions of these revised statutes as far as consistent. 1953

**68-2-7. Effect on limitation of actions.**

When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before these revised statutes go into effect, and the same or any other limitation is prescribed in these revised statutes, the time which has already run shall be deemed a part of the time prescribed as such limitation by these revised statutes. 1953

**68-2-8. Effect on offenses committed.**

No offense committed, and no penalty or forfeiture incurred, under any statute hereby repealed before the repeal takes effect shall be affected by the repeal, except that when a punishment, penalty or forfeiture is mitigated by the provisions herein contained such provisions shall be applied to a judgment pronounced after the repeal. 1953

**68-2-9. Effect on suits and prosecutions pending.**

No suit or prosecution, pending when this repeal takes effect, for an offense committed, or for the recovery of a penalty or forfeiture incurred, shall be affected by the repeal, but the proceedings may be conformed to the provisions of these revised statutes as far as consistent. 1953

**68-2-10. "Heretofore" and "hereafter" defined.**

The terms "heretofore" and "hereafter," as used in these revised statutes, have relation to the time when the same take effect. 1953

### CHAPTER 3 CONSTRUCTION

Section	
68-3-1.	Common law adopted.
68-3-2.	Statutes in derogation of common law liberally construed — Rules of equity prevail.
68-3-3.	Retroactive effect.
68-3-4.	Civil and criminal remedies not merged.
68-3-5.	Effect of repeal.
68-3-6.	Identical provisions deemed a continuation, not new enactment.
68-3-7.	Time, how computed.
68-3-8.	When a day appointed is a holiday.
68-3-9.	Seal, how affixed.
68-3-10.	Joint authority is authority to majority.
68-3-11.	Rules of construction as to words and phrases.
68-3-12.	Rules of construction.
68-3-13.	Printing boldface in numbered bills — Purpose — Effect — Power of Office of Legislative Research and General Counsel to change.

**68-3-1. Common law adopted.**

The common law of England so far as it is not repugnant to, or in conflict with, the constitution or laws of the United States, or the constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and

physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state. 1953

**68-3-2. Statutes in derogation of common law liberally construed — Rules of equity prevail.**

The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail. 1953

**68-3-3. Retroactive effect.**

No part of these revised statutes is retroactive, unless expressly so declared. 1953

**68-3-4. Civil and criminal remedies not merged.**

When the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other. 1953

**68-3-5. Effect of repeal.**

The repeal of a statute does not revive a statute previously repealed, or affect any right which has accrued, any duty imposed, any penalty incurred, or any action or proceeding commenced under or by virtue of the statute repealed. 1953

**68-3-6. Identical provisions deemed a continuation, not new enactment.**

The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment. 1953

**68-3-7. Time, how computed.**

The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then it also is excluded. 1953

**68-3-8. When a day appointed is a holiday.**

Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next succeeding business day with the same effect as if it had been performed upon the day appointed. 1953

**68-3-9. Seal, how affixed.**

When the seal of a court or public officer is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, as well as upon wax or a wafer affixed thereto. In all other cases the word "seal" may include a scroll printed or written. 1953

**68-3-10. Joint authority is authority to majority.**

Words giving a joint authority to three or more public officers, or other persons, are to be construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority. 1953

**68-3-11. Rules of construction as to words and phrases.**

Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition. 1953

**68-3-12. Rules of construction.**

(1) In the construction of these statutes, the following general rules shall be observed, unless such construction

Service by mail, additional time after,  
U.R.C.P. 6(e).

Third-party practice, U.R.C.P. 14.

#### NOTES TO DECISIONS

Filed depositions.

Service upon attorney.

—Presumption of authorization.

When service required.

—Default judgment.

—Appeal.

Cited.

#### Filed depositions.

Sealed pretrial depositions filed with a court are presumptively public under the Utah Public and Private Writings Act (former § 78-26-1 et seq.; see now Title 63, Chapter 2) and can be kept secret only on a showing of good cause. *Carter v. Utah Power & Light Co.*, 800 P.2d 1095 (Utah 1990).

#### Service upon attorney.

##### —Presumption of authorization.

Where defendant engaged attorney only to file motion but never so notified court or attorney, appearance of attorney to file motion raised presumption that he represented defendant in full action. Where defendant presented no clear and convincing evidence to refute presumption, notice given to attorney of date set for trial was good notice to defendant. *Blake v. Blake*, 17 Utah 2d 369, 412 P.2d 454 (1966).

#### When service required.

##### —Default judgment.

Plaintiff was under no duty to notify defend-

dants of default judgment entered against them. *Central Bank & Trust Co. v. Jensen*, 656 P.2d 1009 (Utah 1982) (decided before 1985 addition of reference to Rule 55).

Plaintiffs' failure to mail a copy of the default judgment to defendants did not invalidate the default judgment when defendants received the notice of default in time to move to set aside the judgment. *Lincoln Benefit Life Ins. Co. v. D.T. Southern Properties*, 838 P.2d 672 (Utah Ct. App. 1992).

##### —Appeal.

Under former Rule 73(h), time for appeal from default judgment in city court runs from date of notice of entry of such judgment, rather than from the date of judgment. *Buckner v. Main Realty & Ins. Co.*, 4 Utah 2d 124, 288 P.2d 786 (1955) (but see Rule 58A(d)).

Cited in *Remington-Rand, Inc. v. O'Neil*, 4 Utah 2d 270, 293 P.2d 416 (1956); *Pillsbury Mills, Inc. v. Nephi Processing Plant, Inc.*, 7 Utah 2d 286, 323 P.2d 266 (1958); *Dehm v. Dehm*, 545 P.2d 525 (Utah 1976); *Triple I Supply, Inc. v. Sunset Rail, Inc.*, 652 P.2d 1298 (Utah 1982); *Sperry v. Smith*, 694 P.2d 581 (Utah 1984); *Williams v. State*, 716 P.2d 806 (Utah 1986); *Walker v. Carlson*, 740 P.2d 1372 (Utah Ct. App. 1987); *Maverik Country Stores, Inc. v. Industrial Comm'n*, 860 P.2d 944 (Utah Ct. App. 1993).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 7 Am. Jur. 2d Attorneys at Law § 6; 61A Am. Jur. 2d Pleading §§ 350 to 352.

**C.J.S.** — 7 C.J.S. Attorney and Client § 15; 71 C.J.S. Pleading §§ 408, 409, 411, 413.

**A.L.R.** — Construction of phrase "usual

place of abode," or similar terms referring to abode, residence, or domicile, as used in statutes relating to service of process, 32 A.L.R.3d 112.

Service of process by mail in international civil action as permissible under Hague Convention, 42 A.L.R. Fed. 241.

#### Rule 6. Time.

(a) *Computation.* In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) *Enlargement.* When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended



by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b) and 73(a) and (g), except to the extent and under the conditions stated in them.

(c) *Unaffected by expiration of term.* The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

(d) *For motions — Affidavits.* A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules, by CJA 4-501, or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) *Additional time after service by mail.* Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period. (Amended effective November 1, 1997.)

**Amendment Notes.** — The 1997 amendment inserted "by CJA 4-501" in the first sentence of Subdivision (d).

**Compiler's Notes.** — Subdivisions (a), (b), (d), and (e) of this rule are substantially similar to Rule 6, F.R.C.P.

Rule 73, cited near the end of Subdivision (b), was repealed upon adoption of the Rules of Appellate Procedure.

**Cross References.** — Amendment to pleadings to conform to evidence, time of motion for, U.R.C.P. 15(b).

Commencement of action, time of service, U.R.C.P. 4(b).

Corporation or association, mailing of process to, U.R.C.P. 4(e)(5).

Depositions, objections to errors and irregularities, U.R.C.P. 32(c).

Discharge of attachment or release of property, U.R.C.P. 64C(f).

Documents for state or subdivision, filing date on weekend or holiday, § 63-37-3.

Election laws, weekends and holidays included in computation of time, § 20A-1-401.

Failure of term or vacancy in office of judge, proceeding not affected, § 78-7-21.

Juvenile Court Act, time computed according to Rules of Civil Procedure, § 78-3a-27.

Legal holidays enumerated, § 63-13-2.

New trial, time of motion for, after judgment notwithstanding the verdict, U.R.C.P. 50(c)(2).

Order defined, U.R.C.P. 7(b)(2).

Pleadings and other papers, service by mail, U.R.C.P. 5(b)(1).

Probate Code, mailing of notice of hearing, § 75-1-401.

Reference to master, time of first meeting of parties after, U.R.C.P. 53(d)(1).

Relief from judgment or order, time for motion, U.R.C.P. 60.

Rules by district courts, U.R.C.P. 83.

Service by mail, U.R.C.P. 5(b)(1).

Substitution of parties, time of motion for, U.R.C.P. 25.

Summons mailed as alternative to personal service, U.R.C.P. 4(g).

Time, how computed, § 68-3-7.

Tribunal, board or office exceeding jurisdiction, notice, U.R.C.P. 65B(e).

Undertaking by nonresident plaintiff, timely filing, U.R.C.P. 12(k).

When a day appointed is a holiday, § 68-3-8.

#### NOTES TO DECISIONS

Additional time after service by mail.

—Administrative procedure.

—Failure to add days.

—Waiver of objection.

—Industrial Commission.

Computation.

—Months and years.

—Sundays.

Enlargement.

—Motion for new trial.

—Notice of appeal.

—Designation of record.

—Redemption from execution sales.

Motions and affidavits.

—Applicability of rule.

—Court orders.

## **EXHIBITS ADDENDUM**

**WEISS & SONDGEROTH, P.C.**  
**ATTORNEYS AT LAW**  
**5593 Highway 95**  
**Bullhead City, Arizona 86426**

RICHARD WEISS  
KENNETH L. SONDGEROTH

Phone: (520) 768-5997  
Fax: (520) 768-4343

July 12, 1995

Kaysville City Corp.  
23 East Center  
Kaysville, UT 84037

Re: Personal Injury of Joanna Banford and Amber Banford  
Date of Accident: 2-18-95

To Whom It May Concern:

We represent Joanna Banford and Amber Banford in their claim for personal injuries sustained in the automobile collision of February 18, 1995. David J. Quinley was driving a vehicle which you owned that was involved in this accident.

This letter is to request that you contact our office within ten days with the name of your insurance carrier, or to advise us of your status of insurance at the time of the accident. Please notify your insurance company of this accident if you have not already done so. Please have a representative of your insurance company contact us as soon as possible but no later than thirty days from the date of this letter. This will eliminate the need for us to contact you further.

Thank you for your cooperation and assistance.

Very truly yours,

WEISS & SONDGEROTH, P.C.

KENNETH L. SONDGEROTH

krp:krp



RECEIVED JUL 23 1995

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# Kaysville City

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Kaysville City Corporation  
23 East Center, Kaysville, Utah 84037  
(801) 546-1235 • FAX (801) 544-5646

July 25, 1995

Mr. Kenneth L. Sondgeroth  
5593 Highway 95  
Bullhead City, Arizona 86426

RE: Claim - Joanna and Amber Banford

Dear Mr. Sondgeroth:

The following information is provided as requested in your letter dated July 12, 1995:


Insurance Carrier: Reliance Insurance Company  
Policy No. JK 2537208  
Claims Department  
P.O. Box 16025  
2390 East Camelback Road  
Phoenix, AZ 85011

City Attorney: Mr. Felshaw King  
King and King Attorneys at Law  
330 North Main  
Kaysville, UT 84037

Insurance Agent: Olympus Insurance Agency  
Attn: Ruth Niemeyer  
P.O. Box 65608  
3269 South Main, Suite 102  
Salt Lake City, UT 84165-0608

Please contact me as the City representative.

Sincerely,

  
Dean G. Storey  
Finance Director

**WEISS & SONDGEROTH, P.C.**  
**ATTORNEYS AT LAW**  
**5593 HIGHWAY 95**  
**BULLHEAD CITY, AZ 86426**

RICHARD WEISS  
KENNETH L. SONDGEROTH

TELEPHONE: (520) 768-5997  
FAX: (520) 768-4343

November 16, 1995

Mr. Dean G. Storey  
Kaysville City Corporation  
23 East Center  
Kaysville, Utah 84037

Re: Claim -- Joanna and Amber Banford

Dear Mr. Storey:

It was with great relief that I received your letter of July 25, 1995. As you are aware, my office represents both Joanna and Amber Banford in their claims that arose from a vehicle accident with a member of your police force. Clearly, as is evident from the police report, the police officer was grossly negligent and that my clients were nothing but innocent victims. Since the accident, my clients have attempted to take all the necessary steps to mitigate the damages they have incurred. Joanna Banford underwent radical surgery which, while relatively successful, still leaves her quite permanently disabled.

My purpose in contacting you directly is to obtain some help with your insurance company. Mr. Clay Stevens has been assigned this case from Reliance Insurance Company. Unfortunately, Mr. Stevens has taken an abrupt and confrontational attitude toward my clients which has left this office, and Ms. Banford, faced with the prospect of filing suit to remove Mr. Stevens from this matter. Hopefully, this will not be necessary once you have been made aware of Mr. Stevens outrageous and unethical conduct. I cannot fathom anyone ratifying such conduct. The following is a brief overview of Mr. Stevens' conduct towards Mrs. Banford.

Mrs. Banford has incurred significant medical bills as a result of this accident. Some of those bills were paid by her own auto coverage, but significant portions were not. My client has very limited private medical insurance which has a yearly cap. When Mr. Stevens was asked to pay some of the medical providers that were demanding payment, he stated, "We won't pay anything until you settle the whole thing with us." In the meantime, the medical providers have sent some bills to collection for nonpayment. This office has

Mr. Dean G. Storey  
Kaysville City Corporation  
August 9, 1995  
Page Two

Re: Personal Injury of Banford

solicited liens from all of the providers to stop such action, but some providers do not take liens. This has resulted in great frustration and worry to my client.

Amber Banford was the minor who has sustained head injuries in this accident. She continues to suffer from dizziness and other symptoms of head trauma. Mr. Stevens has already made an offer on her damages without knowing the full extent of the damages that have been incurred. It is clear from his attitude that he is attempting to put Mrs. Banford into such a financial bind that she will compromise the health of her child to pay some bills. I cannot believe that anyone in a position of responsibility would tolerate this type of unethical conduct. It is my sincere belief, that now that you have been apprised of what has transpired, that the city of Kaysville would use whatever influence it possesses not to condone this behavior.

Mr. Stevens has been told by my client that she is represented by an attorney. When first advised that she was hiring an attorney, Mr. Stevens not only told her that "she didn't need an attorney", but told her not to retain an attorney and became quite verbally abusive when she told him that she had retained my office. Since he has been advised that she is represented, he has continued to call her rather than my office. Furthermore, Mr. Stevens has also responded by verbally abusing Mrs. Banford with quite lewd language.

My letter is a direct result of this behavior on his part. I do not wish talk to or deal with this man. It is my intention to turn this individual into the insurance commission for his conduct in this matter. I believe that your city has some influence on Reliance Insurance with respect to the party negotiating on your behalf.

Mr. Stevens said that he would take care of the bills and pay \$20,000 for all of Mrs. Banford's damages. Mrs. Banford's injuries for her shattered knee are in excess of \$750,000. This is substantiated by settlements across the nation for injuries that have required bone grafting and permanent disablement. Potentially it could be much larger.

I know that the mayor of your city has spoken to my clients. He appeared concerned that they be treated well. These people are clients of mine because they are close friends of my family. I expect that they should be treated well. The attitude of your insurance company will completely dictate how this office proceeds with this claim. My clients and I are reasonable people. However, we will not be bullied or pressured in these matters. I believe you can understand that.

Mr. Dean G. Storey  
Kaysville City Corporation  
August 9, 1995  
Page Two

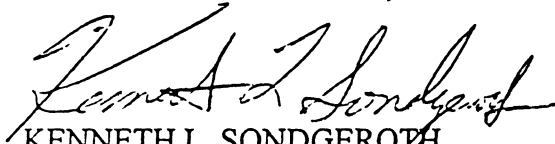
Re: Personal Injury of Banford

Our office has associated with a local firm in Salt Lake City, Hadley & Hadley, on this matter. They are one of the preeminent personal injury firms in the State of Utah.

Please advise whether you can help my clients gain a better attitude from your insurance provider. I sincerely hope that we can work together to minimize this conflict and obtain appropriate compensation for the injuries that have occurred. The process so far has been quite intolerable.

Very truly yours,

WEISS & SONDGEROTH, P.C.



KENNETH L. SONDGEROTH

KLS

F. 3011 ALER  
Dec 17 2 25 PM '97  
CLERK  
COURT

**SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY  
STATE OF UTAH  
FARMINGTON DEPARTMENT**

<p>JOANNA BANFORD, and AMBER BANFORD, a minor, by and through her parent and natural guardian Joanna Banford,</p> <p style="text-align: right;">Plaintiff(s),</p> <p>vs.</p> <p>DAVID QUINLEY, an individual and KAYSVILLE CITY, CORP., a Utah political subdivision, and KAYSVILLE CITY POLICE DEPARTMENT,</p> <p style="text-align: right;">Defendant(s).</p>	<p><b>RULING ON DEFENDANT'S MOTION TO DISMISS</b></p> <p>Case No. 970700076</p> <p>Rodney S. Page, Judge</p>
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Defendant's Motion to dismiss came on regularly for hearing before the above-entitled court. Plaintiff was represented by Mr. William Hadley and the Defendant was represented by Mr. Harry Souvall. The Court having reviewed the Memorandum submitted and having heard the arguments of counsel made certain rulings and required counsel to submit additional information on calculation of time period and took the matter under advisement. The Court now having received additional information from Defendant's counsel and being fully advised in the premises hereby rules as follows:

On February 18, 1995, Plaintiffs were involved in an accident with a vehicle owned by Kaysville City and driven by a Kaysville City employee and were injured.



Subsequently, Plaintiffs retained an attorney to assist them, and on July 12, 1995, Plaintiffs' counsel sent a letter to Kaysville City Corporation referring to the accident in question and asking the City to provide the name of their insurance carrier and to notify the insurance carrier within ten days.

On July 25, 1995, Mr. Dean Storey, Kaysville City Finance Director, sent a letter to Plaintiff's attorney providing the required information.

On November 16, 1995, Plaintiffs' attorney sent a letter to Mr. Dean Storey, Kaysville City's Finance Director, referring to the accident claiming damages and requesting help in getting the City's insurance carrier to provide partial payments and resolve the matter. The letter also indicated that Plaintiffs' then counsel, who resided in Arizona, had retained a Salt Lake City firm to assist in resolving the matter.

On February 18, 1997, Plaintiffs' filed their Complaint against the Defendant in this Court.

Defendant then filed a motion to dismiss for lack of jurisdiction arguing that Plaintiff had never filed a claim which met the requirements of Section 63-30-11 of the Governmental Immunity Act and further, that the Complaint was not timely filed, and therefore, this Court lacked jurisdiction.

The Plaintiffs' claimed that their letter of November 16, 1995, sent to the City's Finance Director substantially complied with the notice requirements of the Governmental Immunity Act and that their Complaint was timely filed. In the alternative, they argued even

assuming the Complaint was not timely filed that Defendant should be estopped from invoking the one-year limitation period because of the acts of their insurance carrier.

After reviewing the law in the matter and the arguments of counsel, the Court concluded at the hearing that the letter sent by Plaintiffs' counsel to Mr. Dean G. Storey, the City Finance Director, on November 16, 1995 substantially complied with the notice requirements of Section 63-30-11 of the Governmental Immunity Act.

The Court now turns to the question of whether or not the Plaintiffs' Complaint was filed within the one-year period after denial as required by statute or in the alternative whether or not Defendant should be estopped from invoking the one-year limitation period. On those issues, the Court rules as follows:

Section 63-37-1, UCA, 1953 as amended, provides that any report, claim, tax return, statement.... required to be filed or made to the State of Utah or to any political subdivision thereof which is:

- (1) Transmitted through the mail shall, be deemed filed or made and received by the State or political subdivision on the date shown by the post office cancellation marked stamped upon the envelope or other appropriate wrapper containing it.

It is uncontroverted that the letter from Plaintiffs' attorney to Mr. Storey, City Finance Director, was mailed on November 16, 1995, the date it bears.

The law is clear that where a more explicit statutory provision exists as to the time for doing a certain act by mail that the more general provisions of Rule 7 of the Utah Rules of Civil Procedure do not apply.

Therefore, the Court concludes that the notice of claim filed by Plaintiff with Kaysville City was deemed filed on November 16, 1995.

Section 63-30-14 of the Governmental Immunity Act provides that a claim shall be deemed denied if at the end of the 90-day period the Governmental entity or its insurance carrier has failed to approve or deny the claim.

In this case, there is no evidence that the City or its insurance carrier either approved or denied the claim, and therefore, the claim is deemed denied 90 days from November 16, 1995, pursuant to statute.

Calculating the 90-day period pursuant to Section 63-3-7, UCA, 1953 as amended, the Claim was deemed denied on February 14, 1996.

Section 63-30-15 of the Governmental Immunity Act requires that a claimant must file their action in the district court against the Governmental Entity or an employee within one year after denial of the claim. One year from the date of denial of the Claim here in question would be February 14, 1997, a Friday. Plaintiffs' Complaint was not filed until February 18, 1997, clearly outside the one-year period.

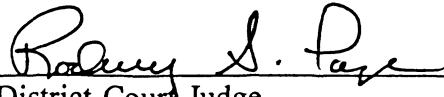
The Court, therefore, concludes that Plaintiffs' Complaint was not filed within the one-year period as required by the Governmental Immunity Act, but that does not resolve the

case. Plaintiffs' have raised an issue of estoppel as a result of the alleged actions of the insurance carrier for the City, and the Court concludes that there are questions of fact and issues raised on that issue which preclude the Court from granting Defendant's Motion to Dismiss at this time.

Defendant's counsel is to prepare Findings and Judgment in accordance with the Court's Ruling and submit it to Plaintiffs' counsel at least five days prior to the time it is submitted to the Court for signature.

Dated this 17<sup>th</sup> day of December, 1997.

By the Court:

  
\_\_\_\_\_  
District Court Judge

#### CERTIFICATE OF MAILING

I , the undersigned, do hereby certify that I mailed a true and correct copy of the foregoing, Ruling on Defendant's Motion to Dismiss, postage prepaid, to the following:

Mr. William R. Hadley  
2225 E Murray Holladay Road, Suite 204  
Salt Lake City, UT 84117

Mr. Harry H. Souvall  
10 Exchange Place, Eleventh Floor  
P. O. Box 45000  
Salt Lake City, UT 84145

Dated this 17 day of December, 1997.

  
\_\_\_\_\_  
Clerk/ Deputy Clerk

FILED IN CLERK'S OFFICE  
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D.F.

**SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY  
STATE OF UTAH  
FARMINGTON DEPARTMENT**

<p>JOANNA BANFORD, and AMBER BANFORD, a minor, by and through her parent and natural guardian, Joanna Banford,</p> <p style="text-align: right;">Plaintiff(s),</p> <p>vs.</p> <p>DAVID QUINLEY, an individual and KAYSVILLE CITY, CORP., a Utah political subdivision, and KAYSVILLE CITY POLICE DEPARTMENT,</p> <p style="text-align: right;">Defendant(s).</p>	<p><b>RULING ON PLAINTIFF'S MOTION TO RECONSIDER COURT'S RULING ON MOTION TO DISMISS</b></p> <p>Case No. 970700076</p>
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Comes now the Court and having previously granted in part and denied in part Defendant's Motion to Dismiss and the Plaintiff now having filed a Motion to Reconsider; and the Court having read Plaintiff's Motion and Memorandum in support thereof and Defendant's Memorandum in opposition thereto, and the Court having recently read the case of Larsen vs Park City, a municipal corporation, decided March 27, 1998, by the Utah Supreme Court, 339 UAR 17 Pub. March 31, 1998, and being fully advised in the premises rules as follows:

The Court hereby grants Plaintiff's Motion to Reconsider, and in light of the Supreme Court Ruling in the Larsen Case further clarifying governmental immunity act finds that the Court made an obvious error in law in its prior Memorandum Ruling.

As stated by the Supreme Court in the Larsen Case, Supra, a legal action against a city is barred unless notice of claim is properly filed in compliance with the Utah Government Immunity Act.

The Act requires that notice of claim must be filed with the "governing body" of the city. The Court recognized that "governing body" is not defined in the act but is, in the Utah Municipal Code. 10-1-101 through 10-15-6 UCA (1953)

Section 10-1-104 (2) states "governing body, means collectively the legislative body and the executives of any municipality, unless otherwise provided: (a) in cities of the second class the governing body is the city commission; (b) in cities of the third class, the governing body is the city council,..."

Section 10-3-105 provides: "Governing bodies of cities of the third class shall be a council composed of six members one of whom shall be the mayor, and the remaining five shall be councilmen." Section 10-3-105 UCA (1953)

Kaysville City is a third-class city; and therefore, under the notice provisions of the Governmental Immunity Act, notice in this case must be filed with the city council.

Neither the Act nor the Municipal Code provides how the notice is to be filed.

In the matter here before the Court, notice, such as it was, was sent to a Mr. Dean Storey, City Finance Director.

The City Finance Director is not one named for service of process pursuant to Rule 4, Utah Rules of Civil Procedure, nor is his position one of significant relationship to the City Council under the Municipal Code such as the city recorder.

The Court therefore concludes that the finance director of a city of the third class does not have such a significant relationship with the city council that service upon him would constitute service on the city council.

The Utah Government Immunity Act provides that notice of claim must be filed on the governing body within one year from the date of the accident. Section 63-30-13 UCA (1953).

Based upon the facts previously found by the Court, the accident here occurred on February 18, 1995. Under the Statute, Plaintiff had until February 18, 1996, to file a claim with the city council of Kaysville City. No claim was ever filed on the governing body as required by the Act, and in fact, Plaintiffs did not file their Complaint until February 18, 1997.

Since no claim was filed with the governing body as required by the Statute and Case Law within that one-year period, the Claim is barred and this Court is without jurisdiction.

Further, given the tenor of Plaintiff's letter to Mr. Storey on November 16, 1995, it was clear that Plaintiff's counsel was aware that the Claim was not settled and that Defendant

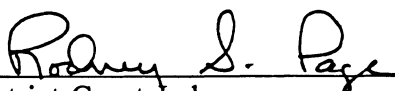
City's insurance company was refusing to settle. Given these facts, the Court finds that there is no grounds for Plaintiff's claim of equitable estoppel or waiver of the notice requirements.

Based upon the foregoing, Plaintiff's Complaint is hereby dismissed with prejudice.

Defendant's counsel is to prepare Findings and Judgment in accordance with the Court's Ruling and submit the same to Plaintiff's counsel at least five days prior to the time it is submitted to the Court for signature.

Dated this 24<sup>th</sup> day of April, 1998.

By the Court:

  
\_\_\_\_\_  
District Court Judge



CERTIFICATE OF MAILING

I , the undersigned, do hereby certify that I mailed a true and correct copy of the foregoing, **RULING ON PLAINTIFF'S MOTION TO RECONSIDER COURT'S RULING ON MOTION TO DISMISS**, postage prepaid, to the following:

Mr. William R. Hadley  
2225 East Murray-Holladay Road, Suite 204  
Salt Lake City, UT 84117

Mr. Harry H. Souvall  
10 Exchange Place, 11th Floor  
P. O. Box 4500  
Salt Lake City, UT 84145

Mr. Kenneth L. Sondgeroth  
5525 Highway 95, Suite 7  
Bullhead City, AZ 86426

Dated this 24 day of April, 1998.

  
\_\_\_\_\_  
Clerk/ Deputy Clerk

FILED IN CLERK'S OFFICE  
DAVIS COUNTY, UTAH

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CLERK, DISTRICT COURT

BY LB

HARRY H. SOUVALL (A4919)  
SNOW, CHRISTENSEN & MARTINEAU  
Attorneys for Kaysville City Defendants  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000

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IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR  
THE COUNTY OF DAVIS, STATE OF UTAH

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JOANNA BANFORD, and AMBER  
BANFORD, a minor, by and through her  
parent and natural guardian, Joanna Banford,

Plaintiffs,

vs.

DAVID QUINLEY, an individual and  
KAYSVILLE CITY, CORP., a Utah  
political subdivision, and, KAYSVILLE  
CITY POLICE DEPARTMENT,

Defendants.

FINDINGS AND JUDGMENT

Civil No. 970700076 PI

Judge Rodney S. Page

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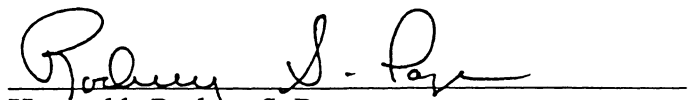
Defendants' Motion to Dismiss came on regularly for hearing before the above-entitled Court. Plaintiffs were represented by William R. Hadley and Defendants were represented by Harry H. Souvall. The Court, having reviewed the memoranda and having heard arguments of counsel, and having reconsidered and granted Defendants' Motion to Alter Findings and Amend Judgment;

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

Plaintiffs' complaint is dismissed for failure to file a Notice of Claim with Defendants as mandated by Utah Code Annotated § 63-30-13 (1953, as amended).

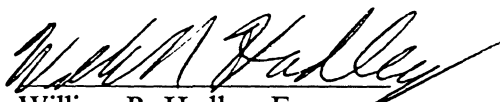
DATED this 26<sup>th</sup> day of May, 1998.

BY THE COURT:

  
Honorable Rodney S. Page  
District Court Judge

APPROVED AS TO FORM:

HADLEY AND HADLEY, L.C.

  
William R. Hadley, Esq.

N:\5968\966\FHHS\FINDINGS.JUD