

2002

Katie Shafer v. State of Utah : Reply Brief

Utah Supreme Court

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Peter W. Summerill; Attorney for Appellant/Plaintiff.

Nancy Kemp; Assistant Attorney General; Mark Shurtleff; Attorney General; Attorneys for Appellees/Defendants.

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IN THE UTAH SUPREME COURT

KATIE SHAFER,

Plaintiff/Appellant,

vs.

STATE OF UTAH,

Defendant/Appellee.

Case No. 20020120-SC

REPLY BRIEF OF APPELLANT KATIE SHAFER

Appeal From the Third District Court, Salt Lake Department
Judge Leslie Lewis Presiding

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UTAH SUPREME COURT
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PAT BARTHOLOMEW
CLERK OF THE COURT

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ARGUMENT

I. THE STATE CONFUSES FAILURE TO CITE AUTHORITY IN SUPPORT OF AN ARGUMENT WITH FAILURE TO RAISE THE ARGUMENT.

The State claims Shafer has waived argument that Utah Code Ann. §§ 68-3-8.5 and 68-3-12 (West 2002) demonstrate delivery of a notice of claim.¹ The State points to the general rule that issues not raised in the trial court cannot be raised for the first time on appeal. Although "the principle is correct... its application here is not." *Rich v. McGovern*, 551 P.2d 1266, 1268 (Utah 1976). In order to preserve an issue for appeal, "(1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority." *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 447 Utah Adv. Rep. 3.

Under the first and second factors, Appellant Shafer argued that receipt of certified mail constituted delivery of the notice and the person receiving the certified mail had authority to do so or else the mail would have been rejected (R. at 73). Under the third factor, Shafer provided the court with supporting evidence in the form of return receipts showing delivery of the notice of claim via certified mail. Accordingly, the issue of whether delivery of notice of claim via certified mail satisfied the statutory requirements

¹ In support of its position, the State cites two cases, neither of which provide an analysis regarding whether an issue has been preserved for consideration on appeal. *Connor v. Union Pacific R.R.*, 972 P.2d 414 (Utah 1998)(party wholly failed to raise issue in trial court) and *Ellis v. Swensen*, 2000 UT 101, 16 P.3d 1233 (court found that issue was properly raised in trial court and therefore could be considered on appeal).

was properly raised and preserved.

The State confuses the failure to raise an argument below with the failure to cite authority in support of that argument. The law has long recognized that even though statutory authority is not cited to the trial court, it may nonetheless be considered on appeal.² "[A] statute not addressed below but pertinent to the substantive issues which were raised below may be considered for the first time on appeal." *Bennett v. Hardy*, 918, 784 P.2d 1258, 1260 (Wash. 1990). The simple failure by counsel for Shafer, counsel for the State and the trial court itself to cite relevant statutory authority cannot provide a basis on which to wholly ignore clear legislative enactments.

This Court already recognizes that "[a]n appellate court has inherent authority to consider issues which the parties have not raised if doing so is necessary to a proper decision." *Kaiserman Associates, Inc. v. Francis Town*, 977 P.2d 462, 464 (Utah 1998). The doctrine that arguments cannot be raised for the first time on appeal "is not [] applied in a vacuum. Where some countervailing principle is to be served, the doctrine must occasionally yield." *Cox Rock Products v. Walker Pipeline Const.*, 754 P.2d 672, 676 (Utah Ct. App.1988). Indeed, judicial notice of Utah Code Ann. § 68-3-8.5's presumption that return receipt demonstrates delivery may be taken "where there is a

² *Walker v. Lloyd*, 4 N.E.2d 306, 308 (Mass.1936)("fact that certain pertinent statutes of Vermont were not brought to the attention of the trial judge does not preclude this court from considering decisions and statutes"); *Wilson v. Martinez*, 307 P.2d 605, 605 (Wyo.1957)(holding appellate court is "bound to notice" the "relevant law of this state."); *Peterson v. Paoli*, 44 So.2d 639, 640 (Fla.1950)(Taking judicial notice of applicable statute "even though such statute was overlooked in the proceedings in the court below.").

compelling countervailing principle to be served." *Finlayson v. Finlayson*, 874 P.2d 843, 847 (Utah Ct. App. 1994) One such countervailing principle "exists when to do otherwise would permit deviation from a legislative scheme." *Mel Trimble Real Estate v. Monte Vista Ranch, Inc.*, 758 P.2d 451, 456 (Utah Ct. App. 1988). Failure to take notice of Utah Code Ann. § 68-3-8.5 departs from the legislative scheme for delivering a notice to the attorney general.

Courts also consider issues not raised below where that issue is the very right to maintain the action. "We have recognized another exception to the general rule and have considered issues not raised below when the question raised affects the right to maintain the action." *Bennett*, 784 P.2d at 1260. Because the very question at issue is the right to maintain an action against the state through compliance with the Governmental Immunity Act's notice provisions, the Court ought to consider the statutes which govern whether a notice was delivered.

Finally, consideration of the statutory law pertinent to delivering a notice of claim is necessary to reach a proper decision in this case. "In our view, an overlooked or abandoned argument should not compel an erroneous result. We should not be forced to ignore the law just because the parties have not raised or pursued obvious arguments." *Kaiserman Associates, Inc. v. Francis Town*, 977 P.2d 462, 464 (Utah 1998).

Importantly, because the Court's decision in this case will effect future construction of the Act's notice provision, a correct interpretation compels consideration of all available statutory authority. Where "we are construing a legislative act that will be controlling not

only in this case but in future cases... [w]e cannot alter a correct construction simply because both parties misconstrued the Act in the trial court." *Adkins v. Uncle Bart's, Inc.*, 2000 UT 14, ¶ 40, 1 P.3d 528. A correct construction of the Governmental Immunity Act notice provisions requires application of the legislative intent regarding delivery of notices to the attorney general's office. Utah Code Ann. § 68-3-8.5's presumption that return receipt demonstrates delivery remains the law and cannot be ignored on appeal because it bears directly on the issues now before the Court.

II. THE ATTORNEY GENERAL RECEIVED NOTICE AT A LISTED OFFICE BY AN EMPLOYEE PERFORMING THE DUTIES OF THE ATTORNEY GENERAL.

The State argues that this Court's decision in *Greene v. Utah Transit Authority* "forecloses plaintiff's contention that receipt of notice by someone other than the attorney general is consistent with the statute." (See, Appellee's Brief at p. 9). The State's position is inconsistent with reality in that it pretends all notices must be received by the individual currently occupying the office of attorney general. No matter which office the notice is delivered to, it is idealistic to believe that Mark Shurtleff, Jan Graham or any other Attorney General will step out of meetings, interrupt a telephone call, or even be physically present to receive a Notice of Claim. Additionally, the State's position runs contrary to other statutory directives which are more specific and, hence, controlling.

When we are faced with two statutes that purport to cover the same subject, we seek to determine the legislature's intent as to which applies. In doing this, we follow the general rules of statutory construction, which provide both that the best evidence of legislative intent is the plain language of the statute and that a more specific statute governs instead of a more general statute.

Jensen v. IHC Hospitals, Inc., 944 P.2d 327, 332 (Utah 1997)(citations omitted). Here, the Governmental Immunity Act's plain language does not require delivery to any one particular office or person, nor does it specify where delivery may be accomplished and how it is demonstrated. By contrast, Utah Code §§ 68-3-12 and 68-3-8.5 expressly sets forth who is authorized to receive notice and how it may be delivered.

Receipt of a notice of claim by a person performing work on behalf of the attorney general is the same as delivery to the attorney general him or herself. As admitted by the State, Utah Code Ann § 68-3-12(2)(v) is "permissive." (See, Appellee's Brief at p. 9). Accordingly, a person other than the Attorney General *may* receive a notice of claim under the Governmental Immunity Act if performing those duties assigned to the Attorney General. Holding otherwise will arguably drive claimants to embark on a course of formally serving the attorney general him or herself where ever they might be found whether at church, social gatherings, or home with family. Allowing an employee to receive notice is a common sense construction which recognizes that the Attorney General cannot always be available to attend to such mundane and trivial administrative tasks.

Return receipt for certified mail conclusively establishes delivery of the notice. The State offers no substantive grounds to contradict Utah Code Ann. § 68-3-8.5's presumption that return receipt certified mail evidences delivery of the notice. The State claims that Shafer's reliance on the delivery of certified mail under Utah Code Ann. § 68-3-8.5 is 'misplaced' and 'proves too much.' (See, Appellee's Brief at p. 11). The State

argues that, under Shafer's theory, a claimant could direct and deliver a document to the president of a major university at a remote campus or the CEO of a national corporation at a far flung manufacturing facility. Of course, the State fails to observe that the statute in question applies only to the State and its political subdivisions, and not to either CEO's or University administrators. More importantly, the State does not even offer a reason why certified mail receipts would not serve to establish delivery of a notice to a CEO or University administrator. The State's argument provides no compelling reason to ignore the return receipt as demonstrating delivery of the notice.

The State also suggests that because Shafer "did not use the listed address for the executive offices of the attorney general... [s]uch misdirection does nothing to provide the notice." (See, Appellee's Brief at pp. 11-12)(emphasis added). The State is attempting to import requirements wholly unsupported by the language of the Act. Nowhere does either the Governmental Immunity Act or the general mailing provisions specify that any one particular office must receive the notice, let alone that the 'executive office' is the only appropriate location for delivery of notice.

The State supports its position by citing *Thimmes v. Utah State Univ.*, 2001 UT App 93, 22 P.3d 257. However, the claimant there directed her claim to the Utah State Government Risk Management Division, not to the Attorney General at a designated office. Utah State's Risk Management Division maintains an entirely separate listing and office from that of the Attorney General. (R. at 82, 79-80). The *Thimmes* claimant made no attempt to direct or deliver a written notice to the attorney general's office and only

delivered notice to Utah State's Risk Management Division. Here, by contrast, no question exists that an office of the attorney general received certified mail directed to the Attorney General, Jan Graham.

In fact, the State admits that the office which received the notice held authority to accept certified mail on Attorney General Jan Graham's behalf. "[N]othing indicates that State Mail is unauthorized to accept documents... under the Attorney General's name." (Appellee's Brief at p. 12). If the authority exists to receive certified mail, then the office must have a procedure to deliver the document to the Attorney General. This should not be misconstrued as an attempt to resurrect an 'actual notice' standard. Rather, this is delivery at an office of the attorney general admittedly authorized to receive paperwork on behalf of the Attorney General. Nothing more is required under the plain language of the Governmental Immunity Act. Accordingly, Shafer successfully directed and delivered a notice of claim to the Attorney General and dismissal was inappropriate.

III. BECAUSE THERE EXISTS AN INHERENT AMBIGUITY IN APPLYING THE NOTICE PROVISIONS, NOTICE IS DELIVERED WHERE THE PURPOSES OF PROVIDING A NOTICE ARE MET.

The State of Utah offers no argument against Shafer's contention that, because there exist several offices listed by the attorney general, an inherent ambiguity exists as to which office is qualified to receive notice of claim. The State's argument is that only the Attorney General him/herself may receive notice and it must be sent to the 'executive office' of the attorney general. (See, Appellee's Brief at p. 11). The State offers no reason why other listed offices fail as an office of the Attorney General. In fact, the State

has already argued in another proceeding that delivery to the Attorney General's office of litigation is also ineffective. (See, Memorandum In Supp. State's Motion to Dismiss, Fourth Judicial District Court, Case No., attached as Addendum). Under the State's argument that the Attorney General him/herself must receive the notice, nothing prevents argument that even delivery to the executive office fails to satisfy the statute.

Accordingly, in the face of these ambiguities, it is appropriate to look to whether the purpose of the notice requirement has been met. The State offering no argument to the contrary, the purpose of a notice has been met in this case and the trial court's decision should be reversed.

IV. NOTICE TO THE EXECUTIVE DIRECTOR SATISFIES THE ACT'S REQUIREMENTS.

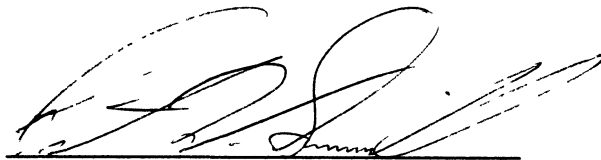
According to the State, delivering notice of claim to executive director Craig Lacey "would be effective only were the claim against a public board... *other than* the State." (See, Appellee's Brief at p 14)(emphasis in original). However, the statute expressly allows that notice of claim can be delivered to "the attorney general, when the claim is against the State of Utah; or ... the executive director when the claim is against any other public board, commission or body." See, Utah Code Ann. § 63-30-11(3)(b)(ii)(E) & (F) (West 2002)(emphasis added). The State admitted Heber Valley Historic Railroad was maintained "as part of defendant." (See, Def. Mem. Supp. Dismiss at para 1). Here, the claims asserted by Ms. Shafer are against Heber Valley through the State of Utah's admitted operation of that public body. Accordingly, receipt by the

executive director satisfies the notice of claim provisions.

CONCLUSION

The State confuses the failure to raise an argument with the failure to cite authority in support of the argument. Appellant Shafer properly raised the issues of whether return receipt evidence of mailing to the attorney general at a listed office established delivery of a notice. The State offers no compelling grounds for rejecting return receipt as evidence of acceptance by a listed office of the attorney general. Moreover, the State does not even argue against finding an inherent ambiguity under the plain language of the Governmental Immunity where several offices are listed for the attorney general, but the Act fails to specify which office is qualified to receive a notice of claim. Finally, the claims asserted in this action are against Heber Valley Railroad, through the State's admitted operation of that public body. Directing and delivering a notice to the executive director of the public body complied with the Act's notice of claim requirement. Because a notice of claim was directed and delivered, the trial court erred in granting the State's Motion to Dismiss and should be reversed.

DATED this 8th day of July, 2002

A handwritten signature in black ink, appearing to read 'Peter W. Summerill', is written over a horizontal line.

PETER W. SUMMERILL
Attorney for Appellant/Plaintiff

CERTIFICATE OF MAILING

This is to certify that on 8th day of July, 2002, I mailed two true and correct copies of the above and foregoing Appellants' Reply Brief, postage prepaid, to:

Nancy Kemp
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A handwritten signature in black ink, appearing to read "Mark Shurtleff", is written over a horizontal line.

ADDENDUM

COPY

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IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
WASATCH COUNTY, STATE OF UTAH

DONALD T. WILLS and RITA WILLS,	:	
Plaintiffs,	:	MEMORANDUM IN SUPPORT OF
	:	DEFENDANT'S MOTION TO DISMISS
vs.	:	PLAINTIFFS' COMPLAINT
	:	
HEBER VALLEY HISTORIC	:	Case No. 010500542
RAILROAD AUTHORITY,	:	
	:	
Defendant.	:	

Defendant, by and through Sandra L. Steinvoort, Assistant Attorney General, submits this Memorandum in support of its Motion to Dismiss Plaintiffs' complaint. The Plaintiffs have failed to comply with Utah Governmental Immunity Act, and are thus barred from pursuing suit.

FACTUAL BACKGROUND

1. The plaintiffs were injured on December 20, 2000 when they collided with the defendant's railroad engine. (Comp. ¶¶ 4 and 6).
2. On June 19, 2001, the plaintiffs served a Notice of Claim. (See Exhibit A)

ARGUMENT

FAILURE TO COMPLY WITH THE UTAH GOVERNMENTAL IMMUNITY ACT BARS RECOVERY AND REQUIRES DISMISSAL WITH PREJUDICE

I. U.C.A. SECTION 63-30-12

It is well established that the Utah Governmental Immunity Act ("the Act") mandates the filing of a Notice of Claim as a jurisdictional precondition to suit. (U.C.A. § 63-30-12) Failure to comply with the Notice of Claim requirement within one year of the incident giving rise to the lawsuit bars the action because it denies the court subject matter jurisdiction. Madsen v. Borthick, 769 P.2d 245, 250 (Utah 1998); Lamarr v. Utah State Dep't. of Transp., 828 P.2d 535, 541 (Utah App. 1992). The Act requires that the Notice of Claim be delivered to **the Attorney General**. (U.C.A. § 63-30-11(3)(b)(ii)(E))

It is undisputed that the plaintiffs filed a Notice of Claim as required by statute. However, the Notice of Claim was mailed to a division within the Attorney General's office, not

addressed to the Attorney General, nor sent to his office.¹ The plain language of the Act requires that the Notice be “directed and delivered” to “the Attorney General” when the claim is against the State of Utah. (U.C.A. §§ 63-30-11(3)(b)(ii)(E) and 63-3012) Notice to anyone else is insufficient. Bellonio v. Salt Lake City, 911 P.2d 1294, 1297-98 (Utah App. 1996); (notice to city employees was defective because plain language of statute designates city’s “governing body” as proper recipient.)

By identifying only “the Attorney General” as the Notice of Claim recipient, the statute creates a bright line test for determining compliance and avoids the risks of lost or misdirected Notices of Claim. The specific designation of the Notice recipient is intended to allow prompt claim handling by the authorized public officials. Here, the plaintiffs’ Notice of Claim was directed to “Attorney General” and delivered to an address directed to an address at which there are several divisions of the Attorney General's office, but not the Attorney General Mark Shurtleff's office. The divisions, any of which could have received the Notice of Claim, lack the authority to receive Notices of Claim on behalf of the Attorney General, and have no responsibility or procedure to handle them.

In Thimmes v. Utah State University et al. , 22 P.3d 257, the Court of Appeals stated that the statute removes any ambiguity as to who is to be served. An individual making a claim does

¹ The Attorney General’s Office is located at 236 State Capitol, Salt Lake City. The Notice of Claim was mailed to the Heber Wells Building at 160 East 300 South, Salt Lake City.

not need to infer who to serve because it is clear from the statute. *Id.* at 259. In Scarborough v. Granite School District, 531 P.2d 480, 482 (Utah 1975), the Supreme Court affirmed the trial court's dismissal of the plaintiff's lawsuit because she failed to comply with the Act. The Court stated:

We have consistently held that where a cause of action is based upon statute, full compliance with its requirements is a condition precedent to the right to maintain a suit. In order to so meet the requirements of the statute... and fulfill its intended purpose... [the Notice] be directed to and delivered to someone authorized to or responsible for receiving it.... (citation omitted)(emphasis added)

In Bellonio v. Salt Lake City Corporation, 911 P.2d 1294, 1295 (Utah App. 1996), the Court of Appeals once again reiterated that the Notice of Claim must be filed with the correct person. In Shunk v. State of Utah et al., 924 P.2d 879 (Utah 1996), the Utah Supreme Court stated that proper service of the Notice of Claim is a prerequisite to suit. And in the very recent case of Greene v. Utah Transit Authority, 2001 UT 109 (December 18, 2001), the Supreme Court emphasized "Utah law **mandates** strict compliance with the requirements of the Immunity Act." (emphasis added) The Court continued, "...the statute is clear, readily available, and easily accessible by counsel, there is no reason to require anything less than strict compliance. Actual notice of a claim by a government entity does not excuse a claimant's strict compliance with the requirements of the Immunity Act." (citations omitted)

It appears obvious; failure to properly comply with the Act denies the court subject matter jurisdiction. Thus, dismissal of the complaint is warranted and appropriate.

II. U.C.A. SECTION 63-30-19


The plaintiffs' also failed to file an undertaking with the complaint as required by the Act. At the time a plaintiff files an action against a governmental entity, the plaintiff **must** also file an undertaking in a sum fixed by the Court. (Utah Code Ann. § 63-30-19 (1997))

CONCLUSION

For the foregoing reasons, the defendant requests that this court dismiss the plaintiffs' complaint with prejudice.

DATED this 21st day of December, 2001.

MARK L. SHURTLEFF
Utah Attorney General

A handwritten signature in dark ink, appearing to read "Sandra L. Steinvort", is written over a horizontal line.

SANDRA L. STEINVOORT
Assistant Utah Attorney General
Attorneys for Defendant Heber Valley Historic
Railroad Authority

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2001, I caused to be served by U.S.

Mail, postage pre-paid, a true and correct copy of the foregoing **MEMORANDUM IN**

SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT, to

the following:

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June 19, 2001

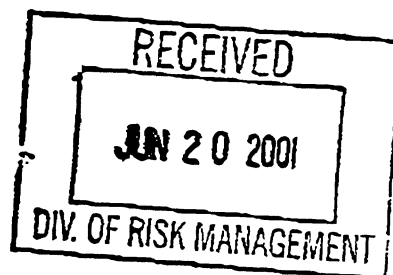
VIA CERTIFIED MAIL

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Executive Director
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Attorney General
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RE: Notice of Claim of Don and Rita Wills
Date of Loss: 12/20/00



Dear Reader:

This letter constitutes a claim under the Utah Governmental Immunity Act regarding an accident involving our clients, Donald T. and Rita Wills and a railroad engine and generator owned and operated by the Heber Valley Historic Railroad Authority, a Utah governmental agency formed under Utah Code Annotated section 9-3-301 et seq. Don and Rita Wills suffered severe injuries as a result of the accident and are seeking compensation for special and general damages as further outlined below.

1. Facts.

On the evening of December 20, 2000, Don and Rita Wills were driving their Honda sedan northbound on State Route 113 near Midway, Utah. It was approximately 9:20 p.m. It was dark and the Wills were traveling within the speed limit. They were wearing seatbelts.

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A black Heber Valley Railroad engine with a generator on the back was stopped at the edge of the highway. It was hardly visible. It had been traveling eastbound operated by Ken McConnell. Although he has admitted to several witnesses including Craig Drury two days after the accident that he saw the Wills' car headlights coming but started the engine anyway and proceeded across the road at 4 m.p.h., much too slow to get across the road without causing an accident. The engine drove across the highway grade crossing without sounding any bell, horn or whistle. Don Wills saw the outline of the black engine too late to stop. He applied his brakes. However, before his car could come to a stop, it collided with the side of the train at an estimated impact speed of 20 - 30 m.p.h. The train was able to stop within about one foot.

Dr. Craig Ford was driving southbound approaching the grade crossing at the time of the accident. He likewise heard no whistle and no horn. Similarly, there were no lights or lanterns visible from the train. The train did have its narrow beam headlight on but it was not visible from the side of the train. Dr. Ford indicated that he very nearly ran into the train himself and looked at the engine afterward. All reflective devices on the side of the engine were covered with grease and grime. In fact, in the attached photos, it is apparent that even with headlights shining on the train, it can hardly be seen in the dark.

Another Heber Historic Railroad train had passed through the grade a few moments before. Its crew had put out flares with a flagman during its crossing but had picked them back up according to Dawn Grams who was on the train. In contrast, McConnell could have easily put out flares or had his brakeman flag traffic. He also could have simply waited for the Wills' car to pass rather than trying to start the train and outrun the Wills without sounding any signal.

We understand that Ken McConnell is a volunteer for the railroad but is paid when he drives. We presume he was in the scope of his employment when the accident occurred. Nancy Amos, who resides in Heber and who used to work for the railroad, indicates Mr. McConnell runs through intersections without sounding his signals all of the time. He also crashed through an engine house last July. There have been numerous customer complaints about his carelessness even before the accident yet he continued to be allowed to drive. Mike Winderton indicates McConnell was responsible for about 75% of the accidents at the railroad in 1999-2000 but never had any disciplinary action taken against him and never was restricted by management from driving the trains. Bonnie Durtschi whose family owns the farm adjacent to the grade crossing similarly indicates that the train never blows its horn or whistle before that grade crossing. Utah statutes impose a duty on a railroad to ring a bell continuously or sound a whistle or siren before reaching a grade crossing. The crossing has a railroad sign but no lights or crossing arms even though the railroad has such devices stored at its yard but has never installed

June 19, 2001

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them. We understand that since the accident, the railroad authority has put reflective tape on the engine.

Craig Lacey, the railroad manager, admitted to Dawn Grams that the accident could have been prevented and it was the railroad's fault. For your convenience, we have enclosed a draft accident report which gives a general idea of the layout of the crossing. We have also enclosed three pages of photographs showing damage to the Wills' vehicle and the lack of any side running lights or adequate reflectors on the train.

2. Medical Damages.

Following the accident, Mr. and Mrs. Wills were taken by ambulance to the Heber Valley Medical Center. Mrs. Wills was life-flighted from there to LDS Hospital. Mrs. Wills suffered a broken neck, a wrist fracture and head trauma, two rib fractures, contusions, soft tissue injuries, and head trauma including a brief loss of consciousness. She had surgery for the wrist fracture and had to receive traction for the broken neck which involved surgical attachment of a halo ring. She becomes disoriented leading to a suspicion of closed head injury. She was hospitalized for over a week.

She is now able to walk. Although her condition has not stabilized completely, her physician states she has incurred restricted movement in her neck and on her left side. She has difficulty in closing her left hand. She is continuing in physical therapy. She continues to have pain in her shoulder, back and neck. Dr. MacFarlane stated on May 16, 2001 that she may not fully recover her ability to move her head.

Don Wills suffered trauma to his chest including a pulmonary contusion and compressed disks in his thoracic spine as noted on Dr. Hopkin's radiology report of December 29, 2001. He suffered a sternal fracture, a fibular fracture in his leg and torn ligaments in his right ankle. He spent three days in the hospital. The doctor also described his condition as "significant chest and extremity trauma" (Heber Valley Medical Center record Page 2 of 3). Dr. MacFarlane stated regarding the compressed disks that if the pain is going to go away, it should do so within three months. The pain is still there. He is looking into a procedure where synthetic material is injected into the vertebra to reduce the discomfort.

Prior to the accident, Mr. Wills had occasional atrial fibrillation though no significant episodes within the year before the accident. Since the accident, however, he has suffered from frequent fibrillation and even had to be admitted into the Veteran's Hospital. We believe the significantly increased episodes of fibrillation were due to the chest trauma suffered by him and

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the post-accident stress. Mr. Wills now has decreased range of motion due to the cervical injuries, suffers from headaches and back pain and dramatically increased episodes of fibrillation. He also suffers from continued leg soreness. He cannot walk over a few hundred yards.

We have attached both Rita and Don's medical records and bills to date, including pre-accident records. Note that Rita's bills total \$32,595.26. Don's bills total \$9,036.73. Their PIP limits were \$3,000 through Farmers and that amount has been exhausted.

3. Economic Loss.

Mr. and Mrs. Wills were self-employed as property managers of their rental property. Mr. Wills was 66 at the time of the accident and Mrs. Wills was 63. They were in excellent health and worked as property managers on their rentals doing such things as painting, cleaning, replacing carpet, doing yard work and related duties. They expected to be able to perform these tasks for at least the next 10 years. Because of their injuries, they have not been able to perform even minor tasks and have had to hire replacement labor to take care of their rental properties. This additional cost amounts to up to \$500 per month. At this point, we have no reason to believe that the Wills will be able to return to doing the work they were doing and they will continue to have to pay for property maintenance on their rental properties.

4. Property Damage.

The Wills' automobile was totaled. Farmers has paid the value of the car and will subrogate against the Wills for any recovery for property damages.

5. Settlement.

Rita Wills has very high special damages in the form of her medical bills. Even more significantly, she has remained in constant pain and has suffered a serious decrease in her quality of life as a result of this accident. Don Wills was fortunately not hurt as bad as his wife but has still had significant medical damages. He was a healthy, robust gentleman who did all of his own property maintenance from plumbing through yard work. He now suffers pain which prohibits him from doing the work. His quality of life has likewise seriously declined.

We believe that several major factors give rise to liability, most particularly the facts that Mr. McConnell saw the Wills' vehicle coming, could have stopped within a matter of a couple of feet yet chose to proceed across the grade crossing without sounding his horn. Further, the railroad had a statutory duty to sound a horn, siren or bell continuously up to the crossing but

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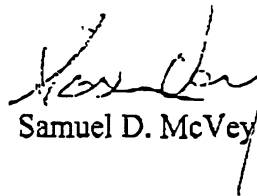
failed to do so. The engine was by and in large incapable of being seen in the dark as it was black with no running lights visible from the side and what limited reflectors there were could not be seen easily due to dirt and grime. A number of other individuals have had close calls at the intersection and have complained about McConnell and the railroad authority is aware of that fact. Based on all of these factors, we believe that we can prevail with a negligence cause of action. If a state entity were subject to punitive damages, this would be a good case for them.

If we can avoid delay and expense of trial, we are authorized to settle this case at a discount if adequate funds can be provided. At present, we are authorized to accept the statutory maximum sum of \$325,000.00 in full satisfaction of Rita Wills' claim (on July 1st the statutory maximum increases to \$500,000.00). We are also authorized to accept the sum of \$190,000.00 in full satisfaction of Don Wills' claim.

We would appreciate your adjusting this claim as soon as possible. Please contact us if we can provide additional information.

Very truly yours,

KIRTON & McCONKIE



Samuel D. McVey

SDM:cp
Enclosures

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