

2002

Katie Shafer v. State of Utah : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

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| KATIE SHAFER, | : | |
| Plaintiff/Appellant, | : | Case No. 20020120-SC |
| v. | : | |
| STATE OF UTAH, | : | |
| Defendant/Appellee. | : | |

Appeal from an Order of Dismissal with Prejudice
of the Third Judicial District Court in and for
Salt Lake County, State of Utah,
Honorable Leslie A. Lewis

BRIEF OF DEFENDANT/APPELLEE

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FILED
UTAH SUPREME COURT

JUN - 7 2002

PAT BARTHOLOMEW
CLERK OF THE COURT

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BRIEF OF APPELLEES

JURISDICTION AND NATURE OF PROCEEDINGS

Plaintiff filed the complaint in this action on October 6, 2000 (R. 1-3), alleging that she sustained injuries while deboarding a rail car operated by the Heber Valley Historic Railroad Authority. After the pleadings were amended, the State filed a motion to dismiss (R. 70-71) and supporting memorandum (R. 60-69) based on plaintiff's failure to strictly comply with the notice-of-claim requirements of the Utah Governmental Immunity Act. The motion was granted by memorandum decision entered January 16, 2002. Prior to the entry of an order of dismissal with prejudice dated March 4 and filed March 5, 2002 (R. 119-20), plaintiff filed a notice of appeal on February 11, 2002 (R. 111-12). Under Utah R. App. P. 4(c), the premature notice is deemed timely as of the date the final order was entered. This Court has jurisdiction over the appeal under Utah

Code Ann. § 78-2-2(3)(j) (Supp. 2001), as taken from an order over which the Utah Court of Appeals lacks original appellate jurisdiction.

ISSUES PRESENTED UPON APPEAL

1. Does a notice of claim against the State addressed to the attorney general at a satellite office location fulfill the statutory requirement of Utah Code Ann.

§ 63-30-11(3)(b)(ii) (Supp. 2001) that notice be "directed and delivered to: . . . (E) the attorney general"?

Plaintiff fails to identify, pursuant to Utah R. App. P. 24(a)(5(A), the point in the record at which this issue was preserved. While she did raise the issue generally in her memorandum opposing the State's motion to dismiss (see R. 72-77), she did not make any argument in the district court based on evidentiary presumptions created by Utah Code Ann. § 68-3-8.5 (Supp. 2001) or its predecessor statutes, Utah Code Ann. §§ 63-37-1 and -2 (1997). Nor did she contend in the district court that under the rules of statutory construction contained in section 68-3-12 (Supp. 2001), the legislature intended the statute to authorize delivery of notice to someone other than the incumbent holder of the official title. Consequently, these arguments, addressed in Point I of plaintiff's brief (Applt. Brief at 4-9), have been waived and are not properly before this Court for review.

See Connor v. Union Pac. R.R. Co., 972 P.2d 414, 418 (Utah 1998) (declining to address argument not raised below).

Standard of Review:

Compliance with the Immunity Act is a prerequisite to vesting a district court with subject matter jurisdiction over claims against governmental entities. Accordingly, a district court's dismissal of a case based on governmental immunity is a determination of law that we afford no deference. We review such conclusions for correctness.

Wheeler v. McPherson, 2002 UT 16, ¶9, 40 P.3d 632 (citations omitted).

2. Where a claim is made against the State, does a notice of claim sent to the executive director of an independent state agency satisfy the notice requirements of the Utah Governmental Immunity Act?

Plaintiff likewise fails to identify, pursuant to Utah R. App. P. 24(a)(5)(A), the point in the record at which this issue was preserved. She did, however, raise the issue in her memorandum opposing the State's motion to dismiss. See R. 76-77.

Standard of Review: This issue also involves dismissal of a case based on governmental immunity and is reviewed without deference for correctness. Wheeler, 2002 UT 16 at ¶9.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

All relevant text of constitutional provisions, statutes, and rules pertinent to the issues before the Court is contained in the body of this brief.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

Plaintiff filed her complaint and jury demand on October 6, 2000 (R. 1-3), seeking damages for injuries she sustained while exiting the Heber Creeper, a train operated for scenic and historic purposes. The complaint was subsequently amended (R. 8-12) to allege compliance with the notice-of-claim requirements of the Utah Governmental Immunity Act (R. 9, ¶ 6). The State answered (R. 13-18), raising as a defense that the claim is barred by the immunity act's provisions (R. 17, Ninth Defense). After a substitution of its counsel (R. 26-27), the State moved to amend its answer (R. 28-39) in order to expressly raise a jurisdictional defense (R. 31). The motion was granted (R. 50-51 and 56-57) over plaintiff's objection (R. 40-44).

Following the filing of its amended answer (R. 52-55), the State moved to dismiss the case for lack of jurisdiction (R. 60-71) on the ground that plaintiff's notice of claim was not served in compliance with Utah Code Ann. § 63-30-11 (Supp. 2001). Memoranda were exchanged (R. 72-84 (plaintiff's opposition) and 89-92 (the State's

reply)), and a hearing was held on December 13, 2001 (R. 106). On January 16, 2002, the trial court judge issued a memorandum decision (R. 107-10) dismissing the claim for plaintiff's failure to properly serve her notice of claim on the attorney general. The court explicitly rejected plaintiff's alternative argument that notice to the executive director of the Heber Valley Historic Railroad sufficed to satisfy plaintiff's statutory duty of notice (R. 109). Plaintiff filed her notice of appeal on February 11, 2002 (R. 111-12), which became effective when the order dismissing the case with prejudice was issued on March 5, 2002 (R. 119-20).

B. Statement of Relevant Facts

Following plaintiff's June 23, 1999 injury, plaintiff's counsel submitted a notice of claim dated May 2, 2000 (R. 35-38 and 65-68). The notice was addressed to Craig H. Lacey, the Railroad's executive director, in Heber City, Utah, and to "Jan Graham, Utah State Attorney General, 515 E. 100 S., Salt Lake City, Ut. 84101" (R. 35 and 65). A certified mail receipt shows that Dawn Grams signed for the copy of the notice directed to Craig Lacey on June 7, 2000 (R. 44 and 83). A second certified mail receipt for the copy directed to Jan Graham is simply stamped, "RECEIVED JUN 08 2000 Utah State Mail" (R. 44 and 81). In pages bearing the identification "qwestdex.com," attached as Exhibit A to plaintiff's memorandum opposing the State's motion to dismiss, the sole entry for 515

East 100 South, Salt Lake City, is the Child Support Division of the Attorney General's Office (R. 79).

No other facts are relevant to the issues before this Court for decision.

SUMMARY OF ARGUMENT

This Court has long held that the notice-of-claim provisions of the Utah Governmental Immunity Act require strict compliance. Absent strict compliance, a claim under the act must be dismissed. Recent decisions have reemphasized that a claim cannot go forward unless the notice of claim fully complies with the statutory mandates. See, e.g., Greene v. Utah Transit Auth., 2001 UT 109, 37 P.3d 1156; Brown v. Utah Transit Auth., 2002 UT 15, 40 P.3d 638.

The sole defendant named in this case is the State of Utah. Statute is clear that for claims against the State, the notice of claim must be directed and delivered to the attorney general. In this case, the district court correctly held that a notice sent to a division within the Attorney General's Office cannot substitute for delivery to the individual serving as the State's attorney general. As the district court correctly observed, a contrary decision would lead to the kind of uncertainty regarding notice that the statutory requirements exist to eliminate.

Because plaintiff's notice of claim did not strictly comply with the statute governing claims against the State, the district court's dismissal of the claim was correct and is entitled to this Court's affirmance.

ARGUMENT

I. DIRECTING AND DELIVERING NOTICE TO A SATELLITE DIVISION OF THE ATTORNEY GENERAL'S OFFICE DOES NOT CONSTITUTE DIRECTION AND DELIVERY TO THE ATTORNEY GENERAL.

The Utah Governmental Immunity Act controls all claims for injury against governmental entities:

Any person having a claim for injury against a governmental entity, or against its employee for an act or omission occurring during the performance of the employee's 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.

Utah Code Ann. § 63-30-11(2) (Supp. 2001). The requirement to file a written notice of claim is mandatory. The statute further prescribes the person to whom notice must be provided. In each case, the notice is to be directed and delivered to a specified individual:

- (b) (ii) (A) *the city or town recorder*, when the claim is against an incorporated city or town;
- (B) *the county clerk*, when the claim is against a county;
- (C) *the superintendent or business administrator of the board*, when the claim is against a school district or board of education;

(D) *the president or secretary of the board*, when the claim is against a special district;
(E) *the attorney general*, when the claim is against the State of Utah;
or
(F) *a member of the governing board, the executive director, or executive secretary*, when the claim is against any other public board, commission, or body.

Utah Code Ann. § 63-30-11(3)(b)(ii) (Supp. 2001) (emphasis added). As the Court observed in Greene v. Utah Transit Authority, prior to 1998 the notice provisions were somewhat ambiguous regarding the identity of the person to whom notice must be delivered. However, in 1998 the legislature clarified the delivery requirements to make explicit "how, what, when, and to whom a party must direct and deliver a Notice in order to preserve his or her right to maintain an action against a governmental entity." Greene, 2001 UT 109, ¶15. In the Court's words, the amendment "has resolved any potential ambiguities as to whom the Notice must be delivered." Id. at ¶14. The Court concluded that "[w]here, as here, the statute is clear, readily available, and easily accessible by counsel, there is no reason to require anything less than strict compliance." Id. at ¶14.

Plaintiff makes two arguments based on statute: first, under Utah Code Ann. § 68-3-8.5 (Supp. 2001), that the existence of a certified mail receipt raises an evidentiary presumption that the certified mail has been delivered to the person to whom it was addressed; and second, under section 63-30-11(3)(b)(ii), that under the rules of statutory construction, the statute contemplates receipt by someone other than the attorney general.

As noted above, these arguments were not made in the district court and are consequently waived for purposes of appeal. "This rule is based, in part, on the principle that it is unfair to fault the court for failing to rule correctly on an issue it was never given the opportunity to consider." Ellis v. Swensen, 2000 UT 101, ¶30, 16 P.3d 1233. Plaintiff has neither acknowledged this principle nor provided any rationale for ignoring it. Moreover, even if the Court were to reach these newly raised arguments, neither supports plaintiff's position.

The Court's observation in Greene that the amendment of section 63-30-11 "clarif[ied] exactly to whom Notices must be directed and delivered" (2001 UT 109, ¶13) forecloses plaintiff's contention that receipt of notice by someone other than the attorney general is consistent with the statute (see Aplt. Brief at 5). Her citation to the rules of construction contained in Utah Code Ann. § 68-3-12(2)(v) for the proposition that "attorney general" includes other individuals who perform duties falling within the attorney general's purview is unavailing. The language of subsection (2)(v), in contrast to other subsections of the same statute, is permissive, not mandatory: "words used to denote an executive or ministerial officer, *may* include any . . . other person performing" the same duties. Utah Code Ann. § 68-3-12(2)(v) (Supp. 2001) (emphasis added). Every other subsection but one uses the word "includes" or "means" as its operating verb instead of the permissive or conditional language; the definition of "town" in subsection (2)(y),

which "*may* mean incorporated town and *may* include city," is the sole exception (Utah Code Ann. § 68-3-12(2)(y) (Supp. 2001) (emphasis added). It is clear from this disparity that the distinction between the mandatory and permissive language is intentional. To hold otherwise would deprive the word "may" of meaning, contrary to the principles of statutory interpretation articulated by this Court: "We will avoid an interpretation which renders portions of, or words in, a statute superfluous or inoperative." Platts v. Parents Helping Parents, 947 P.2d 658, 662 (Utah 1997). Further, "the word 'may' in its most usual meaning does not import certainty, but uncertainty. That is, that whatever is referred to, either *may* or *may not* be, or occur." Grant v. Utah State Land Bd., 485 P.2d 1035, 1036 (Utah 1971) (footnote omitted). Consequently, the "rule" cited by plaintiff does not support her conclusion that the immunity act's statutory reference to "attorney general" necessarily includes others performing ancillary duties.

Finally, in construing a statute, "[f]oundational rules require that we assume that each term of a statute was used advisedly; and that each should be given an interpretation and application in accord with their [sic] usually accepted meaning, unless the context otherwise requires." Id. (footnotes omitted); see also Bott v. DeLand, 922 P.2d 732, 742 (Utah 1996), overruled in part on other grounds by Spackman v. Bd. of Educ., 2000 UT 87, 16 P.3d 533; Nelson v. Salt Lake County, 905 P.2d 872, 875 (Utah 1995). Especially in the context of a list of specific individuals to whom notice must be directed and

delivered, interpreting section 63-30-11's reference to "the attorney general" as including someone other than the elected official would contradict both the usually accepted meaning of the phrase and the context in which it is placed, contrary to the principles under which the Court interprets statutory language. In accord with these principles, "the attorney general" in section 63-30-11(3)(b)(ii)(E) refers to the individual who holds that office. Plaintiff has provided no contrary authority.

Plaintiff's reliance on Utah Code Ann. § 68-3-8.5 is equally misplaced.¹ Her argument that a certified mail receipt evidences receipt by the person to whom the mail was directed "at a listed address" (Aplt. Brief at 5) proves too much. Under her theory, she could address a document by certified mail to, for example, the president of a major university at a remote "listed" campus or to the chief executive officer of a national corporation at a "listed" manufacturing facility far from the corporate headquarters. As long as someone, with or without authority, signed the return receipt, the document would be deemed delivered to the addressee. In this case, plaintiff did not use the listed address for the executive offices of the Attorney General but directed her notice of claim to an address specified only for the Child Support Division (see R. 79-80). Such misdirection

¹Section 68-3-8.5 was no effective until April 30, 2001, well after plaintiff filed her notice of claim in this case. However, the language on which her argument relies was formerly found in Utah Code Ann. § 63-37-2 (1997).

does nothing to provide the notice she argues the statute is intended to confer. Moreover, notice to an assistant attorney general in a satellite office has been held by the Utah Court of Appeals not to suffice for notice to the attorney general. See Thimmes v. Utah State Univ., 2001 UT App 93, ¶7, 22 P.3d 257 (holding notice to the Division of Risk Management "because an assistant attorney general maintains an office there" ineffective to comply with statute).

Plaintiff argues that "[i]f the person receiving the certified mail was unauthorized to accept it, it would have been rejected and Katie Shafer would have sought to deliver it to a person who could receive notice" (Aplt. Brief at 6). The mail receipt on which plaintiff relies (R. 44 and 81) shows only that it was stamped "RECEIVED JUN 08 2000 Utah State Mail." Because nothing indicates that State Mail is unauthorized to accept documents directed to the Child Support Division under the Attorney General's name for purposes of that Division, there is no reason to believe that State Mail had a duty to reject a document sent to that address. Rather, it is plaintiff's legal duty to direct and deliver her notice of claim to the individual explicitly identified by statute.

By suggesting that another person would be authorized to receive the notice of claim, plaintiff ignores the plain language of the statute and attempts to reintroduce the very ambiguity into the notice provision that this Court has held the 1998 amendment cured. What plaintiff seeks, at bottom, is an "actual notice" standard: "Dismissal was

inappropriate and must be reversed because there can be no question that the attorney general received notice of claim" (Aplt. Brief at 6). The Court has repeatedly and conclusively rejected this position. See, e.g., Scarborough v. Granite Sch. Dist., 531 P.2d 480, 482 (Utah 1975) ("We have consistently held that where a cause of action is based upon a statute, full compliance with its requirements is a condition precedent to the right to maintain a suit"); Rushton v. Salt Lake County, 1999 UT 36, ¶19, 977 P.2d 1201 ("We have consistently required strict compliance with the requirements of the Immunity Act. Actual notice does not cure a party's failure to meet these requirements"); Greene, 2001 UT 109, ¶15, 37 P.3d 1156. Given these precedents and the plain language of the statute, plaintiff has provided no grounds on which to disturb the district court's decision.

II. NOTICE PROVIDED TO THE EXECUTIVE DIRECTOR OF AN INDEPENDENT STATE AGENCY DOES NOT FULFILL THE STATUTORY MANDATE FOR NOTICE TO THE ATTORNEY GENERAL.

Plaintiff briefly argues that section 63-30-11(3)(b)(ii)(F) provides an alternative to notice on the attorney general because the Heber Valley Historic Railroad Authority, which operates the Heber Creeper, "is a public corporation created by statute" (Aplt. Brief at 13). She contends that the notice of claim delivered to Craig Lacey, the Authority's executive director, is sufficient to fulfill her statutory duty of notice. See Aplt. Brief at 13-14 ("Based on the admission by the State that it maintains Heber Valley and the

receipt of notice by Mr. Lacey, the district court erred in concluding that notice to be ineffective. Accordingly, the dismissal must be reversed because all pleadings and admissions indicate adequate notice was delivered").

The statute belies plaintiff's construction. Under section 63-30-11(3)(b)(ii)(F), notice upon Mr. Lacey as executive director of the Heber Valley Historic Railroad Authority would be effective only were the claim against a public board, commission, or body *other than* the State or the entities specifically listed in subparts (b)(ii)(A) through (D) of the statute. Because the State is the sole defendant in the present case, any notice to Mr. Lacey is irrelevant to the determination of whether the attorney general was adequately served.² Again, plaintiff is relying on an "actual notice" standard for which she neither provides case precedent nor acknowledges precedents against her position. Her abbreviated analysis cannot be credited and provides no basis to reverse the district court's dismissal of the case.

²Plaintiff's invitation to stay this appeal pending the outcome of a newly filed case (see Aplt. Brief at 14 n.3) should be rejected. The issues that she identifies the new case as raising, application of the savings statute and governmental function analysis, are not relevant to the issue before the Court in the present case; however, the resolution of the present case may well affect the viability of a new trial court action. Moreover, no motion to stay has been properly submitted for the Court's consideration.

CONCLUSION

The notice provisions of the Governmental Immunity Act unmistakably identify the attorney general as the individual to whom notice of a claim against the State must be directed and delivered. Mailing notice to a subsidiary office staffed only by assistant attorneys general does not comply with the statute. Because, as the Court has held, the statute is clear and unambiguous, it requires strict compliance. The district court correctly concluded that plaintiff did not comply with the statute's strictures, and its dismissal of plaintiff's claim on this ground warrants affirmance here.

For these reasons, as more fully explained above, the State respectfully requests the Court to affirm the district court's judgment of dismissal.

DATED this 7th day of June, 2002.

A handwritten signature in black ink, appearing to read 'N. Kemp', is written over a horizontal line.

NANCY L. KEMP
Assistant Attorney General
Attorney for Defendant/Appellee

CERTIFICATE OF MAILING

I hereby certify that on this 7th day of June, 2002, I caused to be mailed, postage prepaid, two true and correct copies of the foregoing BRIEF OF DEFENDANT/APPELLEE to the following:

Peter W. Summerill
The McIntyre Building
68 South Main, 8th Floor
Salt Lake City, Utah 84101


