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Randall K. Edwards; Christensen & Jensen; Attorneys for Appellant.
Brent A. Burnett; Assistant Attorney General; Jan Graham; Utah Attorney General; Attorneys for Appellees.

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IN THE UTAH COURT OF APPEALS

AMANDA THIMMES,	:	
Plaintiff/Appellant,	:	Case No. 991099-CA
v.	:	
UTAH STATE UNIVERSITY, HAVEN B. HENDRICKS, and JOHN DOES I THROUGH X,	:	Priority No. 15
Defendants/Appellees.	:	

BRIEF OF DEFENDANTS - APPELLEES

Appeal from a Final Order of Dismissal of the First Judicial District Court, Cache County, State of Utah, the Honorable Gordon J. Low presiding

FILED
Utah Court of Appeals
FEB 14 2000
Paulette Stagg
Clerk of the Court

BRENT A. BURNETT (4003)
Assistant Attorney General
JAN GRAHAM (1231)
Utah Attorney General
160 East 300 South, Sixth Floor
P. O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100
Attorneys for Defendants/Appellees

RANDALL K. EDWARDS
CHRISTENSEN & JENSEN, P.C.
50 South Main, Suite 1500
Salt Lake City, Utah 84144
Attorneys for Plaintiff/Appellant

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED BY DEFENDANTS - APPELLEES

IN THE UTAH COURT OF APPEALS

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BRENT A. BURNETT (4003)
Assistant Attorney General
JAN GRAHAM (1231)
Utah Attorney General
160 East 300 South, Sixth Floor
P. O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100
Attorneys for Defendants/Appellees

RANDALL K. EDWARDS
CHRISTENSEN & JENSEN, P.C.
50 South Main, Suite 1500
Salt Lake City, Utah 84144
Attorneys for Plaintiff/Appellant

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LIST OF ALL PARTIES

To the best of Defendant's knowledge, all interested parties appear in the caption of this Brief.

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IN THE UTAH COURT OF APPEALS

AMANDA THIMMES,	:	
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v.	:	
UTAH STATE UNIVERSITY, et al.,	:	Priority No. 15
Defendants/Appellees.	:	

BRIEF OF DEFENDANTS - APPELLEES

STATEMENT OF JURISDICTION

The instant action comes within the original jurisdiction of the Supreme Court of the State of Utah under Utah Code Ann. § 78-2-2(3)(j) (1996). On February 11, 2000, this matter was transferred to this Court by the Supreme Court of Utah pursuant to Utah Code Ann. §§ 78-2-2(4) and 78-2a-3(2)(j) (1996).

STATEMENT OF THE ISSUES

1. The trial court correctly dismissed this action with prejudice due to the failure of the plaintiff to file the requisite notice of claim with the Attorney General.

This issue was raised by the defendants' motion to dismiss. R. 21-31.

STANDARD OF REVIEW: This matter was decided below upon the defendants' motions to dismiss. Because this issue raises only questions of law, the Court

should give the trial courts' ruling no deference and review it under a correctness standard. Zion's First National Bank v. Fox & Co., 942 P.2d 324, 326 (Utah 1997).

DETERMINATIVE STATUTES

Utah Code Ann. § 63-30-12 **Claim against state or its employee - Time for filing notice.** (1987)
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.

STATEMENT OF THE CASE

Amanda Thimmes filed this action against Utah State University and its employee, Haven B. Hendricks, on January 11, 1999. R. 1-6. The defendants responded by filing a motion to dismiss for lack of jurisdiction. R. 21-31.

On September 14, 1999, the trial court entered its Memorandum Decision granting the defendants' motion to dismiss. R. 148-50. Plaintiff objected to the form of the proposed order of dismissal and sought reconsideration of the trial court's decision (R. 176-94). The trial court signed the order of dismissal on October 12, 1999. R. 194a-96. By a Memorandum Decision dated November 12, 1999, the trial court denied the plaintiff's objections and her sought for reconsideration and signed a final order of dismissal on December 6, 1999. R. 231-32, 236-37. Thimmes filed the present appeal on December 15, 1999. R. 241-43.

STATEMENT OF RELEVANT FACTS

Amanda Thimmes alleged in her complaint that she was struck by a state vehicle on March 17, 1997 that was operated by Haven B. Hendricks, a state employee. R. 2. The actual facts concerning Ms. Thimmes' claim against the defendants were not disputed by the defendants' motion to dismiss. The only facts in question concern the adequacy of the notices of claim filed by Ms. Thimmes.

It is undisputed that Ms. Thimmes never filed a notice of claim with the Attorney General of Utah. Instead, her notice of claim was sent to Utah State University and the Risk Management Division of the Department of Administrative Services, two separate "agencies concerned" under the then existing statute. R. 29-31, Utah Code Ann. 63-30-12 (1987). It is also undisputed that the attorney who had misfiled Ms. Thimmes notice of claim had previously filed notices of claim correctly with the Utah Attorney General. R. 142.

Ms. Thimmes' attorney had worked directly with Risk Management (particularly Claims Adjuster Jim Sefandonakis) concerning the payment of PIP benefits. R. 52-67. In claiming that service of her notice of claim on a division of a different department of state government should count as service on the Attorney General, plaintiff relies not upon her attorney's reading of the law, but upon alleged telephone communications between a

paralegal working for her attorney and an unnamed layperson who was not employed by the Office of the Attorney General.[1]

While Barbara Reissen, the paralegal for plaintiff's then lawyer, originally called the Attorney General's Office, she does not claim that any employee of that office gave her any advice as to where a notice of claim should be filed. R. 129 ¶ 4-5. Instead, she was referred to different departments of state government, and finally spoke with an unnamed employee of the Division of Risk Management in the Department of Administrative Services.

> 5. After being referred to three different departments by the Attorney General's Office, I finally spoke with a representative from the Department of Administrative Services, Risk Management Division. The representative instructed me to send the "Notice of Claim" directly to that office. I was also instructed to address the "Notice of Claim" to Mr. Jim Stefandonakis [sic.], as he was the claims adjuster presently handling the claim.
>
> 6. Because of the specific statutory requirements governing the mailing of the "Notice of Claim," I asked the representative if this was a division of the Attorney General's office. I was told yes.

R. 129 ¶ 5-6.

SUMMARY OF ARGUMENT

A notice of claim is required of all plaintiffs who seek to file an action against the State of Utah or its employees. Thimmes filed notices of claim with Utah State

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[1] While different from the unsworn statements of hearsay in the plaintiff's original response to the defendants' motion (R. 42-44), for purposes of appeal, the defendants rely upon the sworn affidavit of Barbara Reissen as to what telephone conversations she had, and with whom. R. 129-30.

University and with the Risk Management Division. Both entities are clearly "agencies concerned" under Utah law and not the Attorney General. At no time did she file the necessary second notice of claim with the Attorney General. Plaintiff's claim that service on Risk Management should be counted as service on the Attorney General is contrary to law and would require an extension of this Court's decision in Bischel v. Merritt, 907 P.2d 275 (Utah App. 1995) that this Court has already refused to do.

The trial court correctly dismissed this action for lack of jurisdiction and this Court should affirm that decision.

ARGUMENT

I. THIMMES FAILED TO FILE THE NECESSARY NOTICE OF CLAIM WITH THE ATTORNEY GENERAL

The Utah Governmental Immunity Act governs the procedure for suing the State of Utah, its agencies, and its employees. Both this Court and the Utah Supreme Court have held that the filing of the notices of claim required by the Act is a jurisdictional precondition to filing any suit against the state or its employees. Lamarr v. Utah State Dep't of Transp., 828 P.2d 535, 540-42 (Utah App. 1992); Rushton v. Salt Lake County, 1999 UT 36, ¶18, 977 P.2d 1201; Madsen v. Borthick, 769 P.2d 245, 249-50 (Utah 1988). Full (strict) compliance with the requirements of the Utah Governmental Immunity Act is essential to maintain a cause of action thereunder. Lamarr; Rushton, 1999 UT 36, ¶19; Scarborough v. Granite School District, 531 P.2d 480 (Utah 1975).

At the relevant time, the Governmental Immunity Act required that:

> [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, ...

Utah Code Ann. § 63-30-12 (1987) (in part).

Prior to May 4, 1998, the statute had required two notices of claim, one filed with the "agency concerned" and the other with the Attorney General. Utah Code Ann. § 63-30-12 (1987). But as of May 4, 1998, the statute was amended to require that notice of claim be filed only with the Attorney General. Governmental Immunity - Notice of Claim, ch. 164, 1998 Utah Laws 498. This change in the Immunity Act, occurring only after the time for filing of notices of claim lapsed in this matter, does not apply to the present action.

At the time the plaintiff filed her notices of claim with Utah State University and the Risk Management Division of the Department of Administrative Services, the effective law of Utah required that one notice of claim be filed with the agency concerned and that another be filed with the Attorney General. It is undisputed that the plaintiff's notice of claim was not filed with the Attorney General. The trial court correctly dismissed this action due to the plaintiff's failure to file the requisite notice of claim with the Attorney General.

A. Filing of a Notice of Claim with Risk Management does not Fulfill the Requirement that such be Filed with the Attorney General.

The relevant Utah law required two notices of claim be filed against the State of Utah. One notice of claim was to be filed with the Attorney General. The second was to be filed with the "agency concerned." It is undisputed that the Division of Risk Management is not a part of the Office of the Attorney General. Service of a notice of claim, that is required by law to be served on the Attorney General, must be done on the Attorney General, not upon some other entity - even within her own office.

Prior to the mistaken filing of the notice of claim in question, this Court had already held that Risk Management was an "agency concerned" under the then existing statute, not an alter ego of the Attorney General. In Brittain v. State, 882 P.2d 666, 670-72 (Utah App. 1994) this Court found that service on Risk Management met the requirement that one of the two notices of claim be served on the concerned agency. To now permit Risk Management to be also an alter ego for the Attorney General would be to change the requirements of the statute. Instead of two notices of claim, only one would suffice if it were filed on Risk Management.

This Court, more recently, has expressly rejected this argument. In Straley v. Halliday, 2000 UT App 38, ¶ 16 n. 9, 997 P.2d 338 (citations omitted), this Court stated:

> Although filing with the Division of Risk Management may have been sufficient to comply with section 63-30-12's former requirement that the notice of claim also be filed with the agency concerned, it cannot suffice for the Immunity Act's requirement that notice be filed with the Attorney General.

B. Plaintiff failed to show estoppel against the Defendants.

Plaintiff's claim, in essence, is that the defendants should be estopped from arguing her failure to file an appropriate notice of claim with the Attorney General. "As a general rule, estoppel may not be invoked against a governmental entity." Anderson v. Pub. Serv. Comm'n of Utah, 839 P.2d 822, 827 (Utah 1992). There is only a very limited exception to this general principle, and those cases most often have involved "very specific written representations by authorized government entities." Id. Indeed, when a party seeks to use estoppel against the government, an extra element is added that must be proved. Estoppel will only apply to the state if otherwise injustice would result and there would be no substantial adverse effect on public policy. Consol. Coal v. Div. of State Lands, 886 P.2d 514, 522 (Utah 1994).

> Moreover, as a prerequisite to a finding of injustice, the party asserting estoppel must show that it acted with "reasonable prudence and diligence" in relying on the State's representations.

Id. (quoting Morgan v. Bd. of State Lands, 549 P.2d 695, 697 (Utah 1976).

By considering the facts upon which the plaintiff claims that estoppel should rest, it becomes clear that the plaintiff has failed to meet this standard.

First, the plaintiff relies upon the fact that a claim adjuster from Risk Management handled her claims for PIP benefits without benefit of a notice of claim and without indicating that such was necessary. These facts are unremarkable in that they are mandated by this Court's decision in Neel v. State, 854 P.2d 581 (Utah App. 1993).

> We therefore hold that a suit to recover PIP benefits brought directly against the State as a self-insurer of its motor vehicles is contractual in nature. The State's election to self-insure cannot become a stumbling block to the swift recovery of PIP benefits. Neel's benefit claim should therefore be resolved in the same speedy manner it would have been had the State purchased an independent insurance policy.

854 P.2d at 584 (footnote omitted).

In Neel, this Court expressly rejected the State of Utah's contention that notices of claim should be filed before seeking recovery of PIP benefits. The fact that Risk Management complied with this Court's interpretation of Utah law relating to the provision of PIP benefits cannot create an estoppel against enforcement of the still mandatory provision that a notice of claim be filed as to all other claims a plaintiff may have. Nor can a plaintiff and her attorney be said to be acting with reasonable prudence and diligence if they misinterpreted such conduct. An attorney should be considered to be conversant with the law applicable to his or her area of practice. Rule 1.1, Utah Rules of Professional Conduct.

Nor do the claims of other contacts between the plaintiff, her attorney and Risk Management show any effort to mislead the plaintiff as to the necessity of filing the statutory notices of claim. Indeed, plaintiff's counsel sought to do so, but failed to comply with the clear statutory requirement that one be sent to the Attorney General. R. 138-39. Again, no facts were alleged which would show that persons acting with reasonable prudence and diligence would have considered that they had been told to ignore the statutory notice of claim requirements.

The only other claim is that an unidentified employee of Risk Management told the paralegal working for plaintiff's attorney to file her notice of claim with that agency. This is far short of the facts upon which this Court found estoppel in Bischel v. Merritt, 907 P.2d 275 (Utah App. 1995). The plaintiff reads Bischel too broadly. A more closely analogous decision of this Court's is that of Bellonio v. Salt Lake City Corp., 911 P.2d 1294 (Utah App. 1996).

> In Bischel, this court allowed a claim against Salt Lake County to proceed despite the fact that the notice of claim was, in fact, served upon the Salt Lake County Attorney, rather than upon the Salt Lake County Commission as dictated by section 13. While Bischel may, at first blush, appear to be controlling in this case, that opinion was based upon a unique set of facts which is absent in this appeal.
> In Bischel, the plaintiff was unsure of how to serve the county commission with a notice of claim; therefore, she did an entirely sensible thing and called the commission to ask for instructions. She was instructed, by an agent of the commission, to serve her notice of claim upon the Salt Lake County Attorney. On those facts, this court found that the plaintiff had complied with the statute, as misinterpreted for her by the county commission.
> . . .
> Finally, unlike the facts in Bischel, Kern was never the agent, apparently or in fact, of the mayor or the city council. While the Salt Lake Airport Authority is not a political subdivision, but rather a division of Salt Lake City Corporation, it is certainly not the governing body of Salt Lake City nor the agent of the mayor or the city council. Therefore, unlike the plaintiff in Bischel, Bellonio never even *attempted* to direct his notice of claim to the proper party, i.e., the mayor or the city council.

911 P.2d at 1297-98 (some citations omitted) (emphasis in original).

Just as in Bellonio, the plaintiff could not rely upon the alleged instructions of a city employee who was not a direct agent of the governing body (the proper person to

receive the notice of claim), plaintiff in this action cannot rely upon alleged instructions from an employee of Risk Management as to how to serve the Attorney General. To permit such would be to permit counsel to claim that he or she was instructed in how to practice law by any and all laypersons employed by the State of Utah.

That the alleged facts fall short of showing estoppel against the state is especially true when the instructions given were proper, though apparently either misunderstood or misguided. Unlike the city attorney in Bellonio, who's alleged instructions were simply wrong, Risk Management has been found by this Court to be a proper recipient of notices of claim as the "agency concerned." The alleged instructions would permit proper filing of a notice of claim with Risk Management, as was actually done. The error comes from the paralegal acting as if only one notice of claim, and not two, were involved.

Plaintiff's agent did not inquire, as did the plaintiff in Bischel as to how to serve the appropriate governing body, but rather for instructions on whom to serve a notice of claim on. The statute is clear that one of the two notices of claim must be served on, and addressed to, the Attorney General. As a matter of law the trial court correctly found that the plaintiff had failed to make her necessary showing of acting with reasonable prudence and diligence in serving a separate government entity instead of the Attorney General. This is especially so when just four or so years earlier this Court had expressly found that the agency in question was an appropriate "agency concerned" under the same statute.

Nor does this result change based upon the trial court's temporary misreading of the affidavit of the claims adjuster. Mr. Sefondonakis stated that he had not reviewed the notice of claim that he received it, nor had he made any effort to determine its validity. R. 115. It was only after the time for filing of a notice of claim had run that he reviewed the notice due to some further correspondence he had received from plaintiff's counsel, and discovered that it had never been filed with the Attorney General. R. 116. He then disavowed that he had intentionally waited until it would be too late to correct the error before communicating with plaintiff's counsel. R. 117. The trial court erroneously read this last paragraph to infer that Mr. Sefandonakis had contacted plaintiff's counsel earlier than he had.

These facts are irrelevant to the question of the validity of the notices of claim filed by the plaintiff. Indeed, the trial court, when its error was pointed out to it and seeing the growing arguments between the parties as to what was or wasn't said in sundry telephone conversations (R. 187-88, 199-206) correctly pointed out that:

> The exchanges and allegations between counsel are unfortunate but demonstrate why strict compliance to the statute is required. The facts surrounding the "providing" of notice are much in dispute, and if taken in a light most favorable to the Plaintiff, still would not suffice as service or result in an enlargement of the *Bischel* approach. Expansion of the *Bischel* doctrine in this Court's view is inappropriate.

R. 231.

For these reasons, the defendants urge this Court to affirm the trial court's dismissal of this action for lack of jurisdiction.

CONCLUSION

For the above stated reasons, defendants Utah State University and Haven B. Hendricks ask this Court to affirm the dismissal of this action.

DEFENDANTS DO NOT DESIRE ORAL ARGUMENT OR A PUBLISHED OPINION

The defendants-appellees do not request oral argument and a published opinion in this matter. The questions raised in this appeal, having already been decided by this Court in published opinions, are not such that oral argument or a published opinion are necessary, though the defendants desire to participate in oral argument if such is held by the Court.

Respectfully submitted this 14th day of August, 2000.

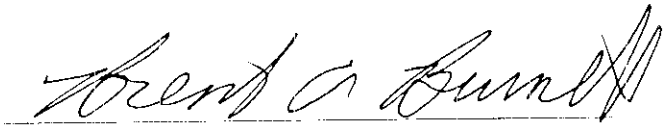
Brent A. Burnett

BRENT A. BURNETT
Assistant Attorney General
Attorney for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and exact copies of the foregoing Brief of Defendants-Appellees, postage prepaid, to the following on this the 14th day of August, 2000:

Randall K. Edwards
CHRISTENSEN & JENSEN, P.C.
50 South Main, Suite 1500
Salt Lake City, Utah 84144
Attorney for Plaintiff/Appellant



ADDENDUM "A"

FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY
STATE OF UTAH

Amanda THIMMES, Plaintiff, vs. UTAH STATE UNIVERSITY, Defendant.	)	MEMORANDUM DECISION Civil No. 990100050 Judge Gordon J. LOW

THIS MATTER comes before the Court on Defendant's Motion to Dismiss. Said motion is supported by memorandum. Plaintiff filed her Memorandum in Opposition to Defendant's Motion to Dismiss, together with Defendant's Motion to Treat Motion to Dismiss as Motion for Summary Judgment and Motion for Continuance. Having considered the foregoing, the Court now issues this Memorandum Decision.

Defendant's Motion to Dismiss prays the Court to dismiss this action because Plaintiff failed to provide statutory notice under Utah's Governmental Immunity Act, Utah Code Ann. § 63-30-13 (1998).

Plaintiff filed a Complaint with this Court on January 11, 1997, seeking recovery for injuries sustained when she was struck by a Utah State University utility truck on March 17, 1997. On March 3, 1999, Defendant filed a Motion to Dismiss, claiming that Plaintiff failed to satisfy statutory notice requirements of § 63-30-13 U.C.A. (1998) by submitting a Notice of Claim not with the State Attorney General, but with the Division of Risk Management and Utah State University. Defendant's objection rested on the requirement of Utah Code Ann. § 63-30-13 (1998) that a Notice of Claim be submitted to the Attorney General where the State is a party. On March 25, 1999, Plaintiff filed an Opposition to Defendant's Motion to Dismiss, relying in large part on Bischel v. Merritt, 907 P.2d 275 (Utah Ct. App. 1995) and the Utah Court of Appeals' discussion regarding serving notice on the governmental entities.

The issue before this Court is whether Plaintiff's form of notice is satisfactory under Bischel and Utah Code; or whether Plaintiff's notice is insufficient and Plaintiff's case should

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therefore be dismissed for lack of jurisdiction, as per Lamarr v. Utah Dep't. of Transp., 828 P.2d 535 (Utah Ct. App. 1992).

Utah Code Ann. § 63-30-11(3)(b) (1998) provides that "[t]he notice of claim shall be . . . directed and delivered to . . . the attorney general, when the claim is against the State of Utah." Absent any indication to the contrary, the statute is clear that notice must be given to the attorney general–not to the Division of Risk Management, not to the University of Utah, nor to any other person or department except for the attorney general herself. It is undisputed that Plaintiff failed to do so. Therefore the conclusion rests on any further illumination that may exist.

Plaintiff justifies the form of notice by appealing to Bischel. However, Bischel is fatally distinguishable on a number of points. First, Bischel concerned submitting a notice of claim on a county. While not in an of itself problematic, it becomes an important distinction when seen in the context of the 1993 Amendments, which were the basis of the Bischel notice issue. The 1993 Amendments to Utah Code Ann. § 63-30-11 do not specify where notice should be submitted. Rather, they cross-reference Utah Code Ann. § 63-30-13, which merely states that "[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." Bischel at 277 (quoting Utah Code Ann. § 63-30-13). In other words, the language of the 1993 Amendments lacks specificity as applied to Bischel, but which is not the problem in the instant case. The statute is clear: notice must be submitted to the attorney general. Absent such notice, this Court lacks jurisdiction.

Second, the Court of Appeals in Bischel felt that the purposes of the notice provision were satisfied. This is inapplicable in the present case, again because the statute is clear. The statute simply does not recognize notice except to the attorney general. This is not a mere expression of legislative will; rather, it is a clear statutory mandate. The argument that the statute's general purposes are met cannot provide a basis for deviation from the clear legislative language.

Third, the courts have treated the Governmental Immunity Act with particular delicacy. Absent a rare exception in an unrefined statute such as in the Bischel case, the courts follow a pattern of strict compliance with the act. So doing results in the same conclusion: notice was improper.

Fourth, while policy considerations might lean in favor of not dismissing a case where actual notice exists simply due to a procedural flaw, similar considerations favor requiring parties to meet simple statutory guidelines to ensure that notice is received and claims do not mire the wrong divisions, departments or individuals in the various government entities.

In addition to the above, the affidavit filed by the state makes it clear that notice was not only statutorily insufficient but actually not provided to the attorney general. Further, the deficiency was brought to the attention of Plaintiff's counsel a month prior to the deadline for filing, thereby allowing sufficient time for resubmitting the notice in compliance with the statute. The Plaintiff has argued that the spirit of the Bischel opinion provides this Court with sufficient latitude to waive strict compliance and accept jurisdiction. The Court will not take that liberty with the statute on the Bischel language ands\ such relief will have to be obtained, if at all, from the Bischel Court.

For the foregoing reasons, this Court has no jurisdiction and Defendant's Motion to Dismiss is granted.

Dated this 4th day of September, 1999.

BY THE COURT

Gordon J. Low
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 990100050 by the method and on the date specified.

METHOD	NAME
Mail	RANDALL K EDWARDS ATTORNEY PLA 175 South West Temple, Suite 51 Salt Lake City, UT 84101
Mail	ROBERT HART ATTORNEY PLA 349 S 200 E #110 SLC UT 84111
Mail	SANDRA L STEINVOORT ATTORNEY DEF 160 East 300 South Sixth Floor PO Box 140856 SALT LAKE CITY UT 84114-0856

Dated this 15 day of Sept, 1999.

Deputy Court Clerk

ADDENDUM "B"

IN THE FIRST JUDICIAL DISTRICT COURT
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

AMANDA THIMMES, Plaintiff, v UTAH STATE UNIVERSITY, HAVEN B. HENDRICKS, and JOHN DOES 1 through 10, Defendant.	*	MEMORANDUM DECISION Case No. 990100050

This matter is before the Court an Objection to Proposed Order, Motion for Reconsideration or, Alternatively, Motion to Alter or Amend Judgment or to Set Aside Judgment, all brought by the Plaintiff. The exchange of pleadings raise a number of concerns respecting the issuance of an earlier Memorandum Decision and Order by the Court.

The exchanges and allegations between counsel are unfortunate but demonstrate why strict compliance to the statute is required. The facts surrounding the "providing" of notice are much in dispute, and if taken in a light most favorable to the Plaintiff, still would not suffice as service or result in an enlargement of the *Bischel* approach. Expansion of the *Bischel* doctrine in this Court's view is inappropriate.

For the above reasons and more specifically those set forth in the Defendant's response, the motion is denied. Counsel for the Defendant directed to prepare a formal order in conformance herewith.

Dated the 12th day of November, 1999.

BY THE COURT

Gordon J. Low
District Court Judge

99-050
Nov 12, 1999

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 990100050 by the method and on the date specified.

METHOD	NAME
Mail	RANDALL K EDWARDS ATTORNEY PLA 175 South West Temple,Suite 51 Salt Lake City, UT 84101
Mail	ROBERT HART ATTORNEY PLA 349 S 200 E #110 SLC UT 84111
Mail	SANDRA L STEINVOORT ATTORNEY DEF 160 East 300 South Sixth Floor PO Box 140856 SALT LAKE CITY UT 84114-0856

Dated this 16 day of Nov, 1999.

M. Blake
Deputy Court Clerk