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Sandra L. Steinvoort; Assistant Attorney General; Attorneys for Appellees.

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IN THE COURT OF APPEALS

STATE OF UTAH

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

APPELLANT'S OPENING BRIEF

AN APPEAL FROM TWO ORDERS OF THE FIRST JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF CACHE, UTAH, HON. GORDON LOW, PRESIDING.

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FILED

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<u>LIST OF ALL PARTIES TO THIS ACTION</u>

1) AMANDA THIMMES, Appellant/Plaintiff;

2) UTAH STATE UNIVERSITY, Appellee/Defendant;

3) HAVEN B. HENDRICKS, Appellee/Defendant;

4) JOHN DOES I THROUGH X, Appellees/Defendants (named fictitiously)

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JURISDICTION

Jurisdiction in this court is proper pursuant to Utah Code Ann. § 78-2-2(3)(j).

ISSUES PRESENTED FOR REVIEW

In this appeal, Appellant claims that the bases upon which the district court's orders were predicated were factually unsupported and legally infirm. In summary, the issues for this Court's review are as follows:

1) Whether a claimant against the State of Utah has complied with the Utah Governmental Immunity Act's notice of claim provisions if her attorney, pursuant to verbal instructions from a representative of the State, filed the notice of claim with the Risk Management Division of the State of Utah (which has a full-time Assistant Attorney General on staff and located in the division office), instead of the Attorney General's State Capitol office.

2) Whether it is reversible error for the district court to refuse to reconsider its decision to grant a motion to dismiss after it has been shown that crucial factual conclusions upon which the district court based its decision to dismiss are demonstrably incorrect.

The standard of appellate review in this case is as follows:

Where a case is dismissed on the pleadings or on a motion for summary judgment, the appellate court views the facts in a light most favorable to the losing party below. In determining whether those facts require, as a matter of law, the entry of judgment for the prevailing party below, the appellate court gives no deference to the trial court's conclusions

of law, which are reviewed for correctness. *Blue Cross & Blue Shield v. State*, 779 P.2d 634 (Utah 1989); *see also Neiderhauser Blders. & Dev. Corp. v. Campbell*, 824 P.2d 1193 (Utah Ct. App. 1992); *Schurtz v. BMW of No. Am., Inc.*, 814 P.2d 1108 (Utah 1991). Dismissal on the pleadings or summary judgment are not appropriate where there exist genuine issues of material fact. URCP 12; URCP 56(c); *see also, Bill Brown Realty, Inc. v. Abbott*, 562 P.2d 238 (Utah 1977).

STATEMENT OF THE CASE

Nature of the case:

This appeal is from two orders of the First Judicial District Court, Hon. Gordon J. Low presiding:

The first is the Order of Dismissal, in which the district court granted Defendants' Motion to Dismiss, which was based on Defendants' assertions that Plaintiff had not complied with the notice of claim requirements of the Utah Governmental Immunity Act. (Record on Appeal, hereafter R., 236 – 238); found in the Appendix hereto as Exhibit A.

The second is the Order on Objection to Proposed Order, Motion for Reconsideration or, Alternatively, Motion to Alter or Amend Judgment or to Set Aside Judgment. (R. 233 – 235; found in the Appendix hereto as Exhibit B). Plaintiffs objected to the entry of an Order of Dismissal because the district court's Memorandum Decision, upon which the Order of Dismissal was based, was founded on erroneous factual assertions contained in an affidavit from the State that had not been made available to Plaintiff's

counsel. (R. 148 - 151). In her Objection, Plaintiff pointed out the factual errors in the affidavit, and requested that the district court reconsider its Memorandum Decision now that the district court had been made aware of the truth. (R. 176 – 186). The district court refused to do so. Reconsideration of the decision in light of the existence of a correct understanding of the facts would have led a rejection of Defendants' Motion to Dismiss.

Statement of Facts:

On March 17, 1997, Plaintiff Amanda Thimmes was struck by a Utah State University Utility truck, driven by Defendant Haven B. Hendricks, while she was a pedestrian crossing in a crosswalk at the intersection of 700 East and U.S. 89 in Logan, Utah. She sustained serious injuries as a result of this collision. (R. 4).

Plaintiff thereafter employed services of Robert B. Hart, Attorney at Law, to prosecute her claims against Utah State University and Haven B. Hendricks. (R. 3).

On April 8, 1997, less than a month after than the accident, Mr. Hart's office sent a letter to Jim Sefandonakis at the Division of Risk Management, located at 5120 State Office Building, Salt Lake City, Utah, advising Mr. Sefandonakis that the firm represented Ms. Thimmes, and forwarding information to Mr. Sefandonakis relating to Ms. Thimmes' claims against Utah State University and Mr. Hendricks. (R. 52).

There ensued a series of communications and actions between Mr. Hart's office and Mr. Sefandonakis at the Utah Division of Risk Management. For example, two letters were sent to Mr. Sefandonakis from Mr. Hart's office on April 15, 1997, (R. 54, 56), another

letter was sent from Mr. Hart's office to Mr. Sefandonakis on April 22, 1997, (R. 59), another letter was sent from Mr. Hart's office to Mr. Sefandonakis on May 20, 1997, (R. 61), and another letter was sent from Mr. Hart's office on May 21, 1997 (R. 63).

During this time, the State Risk Management Division, under Mr. Sefandonakis' direction, made payments of Personal Injury Protection (PIP) benefits, as well as for property damage. A letter sent to Mr. Hart's office from Mr. Sefandonakis on May 27, 1997 acknowledged that the State had now paid $3,000 in Personal Injury Protection (PIP) limits, and indicated that "I will await your demand package once you complete it." (R. 65). A letter from Mr. Hart's office to Mr. Sefandonakis, dated June 26, 1997, questioned the use of PIP moneys to pay for property damage. (R. 67).

In addition to the correspondence between Mr. Hart's office and Mr. Sefandonakis, there was telephone communication between Mr. Hart and Mr. Sefandonakis as well. In at least one of these conversations, Mr. Sefandonakis affirmed to Mr. Hart that the State of Utah would not be denying liability on the part of Mr. Hendricks or Utah State University, because of the driver's obvious negligence (R. 74, 139).

By early February, 1998, Ms. Thimmes' claims against the State of Utah had not yet been resolved, despite the verbal and written communications between her attorney and Mr. Sefandonakis. Wishing to be in compliance with the notice of claim requirements of the Utah Governmental Immunity Act, Mr. Hart instructed his paralegal, Barbara Reissen, to

prepare a notice of claim for Service on Utah State University and on the Utah Attorney General's office. (R. 75; R. 137 - 140; R. 129 – 130).

At that time, the statute regarding the filing of a notice of claim against the State of Utah, UCA 63-30-12, read:

> 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.

(The statute was amended in 1998 to require service on the attorney general only, deleting the requirement of service on "the agency concerned." *See* UCA 63-30-12, post-1998 amendment).

The Utah Attorney General has offices in various locations throughout the State of Utah. In addition to the office of the Utah Attorney General, located at the State Capitol Building (236 State Capitol), the Attorney General has an office located at 160 East 300 South, Salt Lake City, another at 515 East 100 South, Salt Lake City, another at 5272 College Drive, Murray, another at 341 South Main, Salt Lake City, another at 5094 West North Temple, Salt Lake City, another at 55 North University, Provo, and another at 2540 Washington Boulevard, Ogden. In addition, the Attorney General has attorneys representing the Attorney General's office housed in office space with the state departments whom the Attorney General represents. For example, the Attorney General has an office in

Logan, Utah, wherein an Assistant Attorney General assigned to Utah State University has an office at the Utah State University campus. The Utah Attorney General also has an office located at 5120 State Office Building, Salt Lake City, Utah, with the Division of Risk Management. (R. 42–43).

Mr. Hart instructed his paralegal, Barbara Reissen, to contact the Attorney General's office in order to ascertain whether service of the notice of claim on the Attorney General's office required service at the address of the Utah Attorney General in the State Capitol Building, or whether another person or party could accept service of the notice of claim on the Attorney General's behalf. (R. 137–140; R. 129–130).

On or about February 1, 1998, as per Mr. Hart's instructions, Ms. Reissen called the Utah Attorney General's office and asked who the notice of claim was to be sent to. After being transferred from three different departments of the Attorney General's office, she was ultimately told to send the notice of claim to Mr. Jim Sefandonakis at the Risk Management Division. The person with whom Ms. Reissen spoke confirmed to her that the office to which she had instructed Ms. Reissen to send the notice of claim was a division of the Attorney General's office. (R. 129-130).

Based on this advice, on or about February 6, 1998, Ms. Reissen sent the notice of claim to the Division of Risk Management, attention Jim Sefandonakis, rather than to the attention of the Assistant Attorney General at the Risk Management Division or to the Attorney General's office in the State Capitol. (R. 132). (She also sent a notice of claim to

Utah State University, attention George Emert, president of the University) (R. 129-132). The notice of claim was received by the Risk Management Division on February 12, 1998. (R. 136). It affirmed that "We have been communicating with Mr. Stefandonakis [sic] regarding this claim and await your approval or denial as outlined in UCA 63-30-14." (R. 70). Mr. Sefandonakis did not review the notice of claim for its compliance with Utah statute that day. In fact, he did not review the notice for almost three months (R. 114, 115, para. 62, 116, para. 11).

On March 17, 1998, over a month after Mr. Hart's office sent the notice of claim to the Risk Management Division, as instructed, the one-year statutory period for filing the notice of claim expired. *See* UCA 63-30-12 (pre-1998 amendments).

Nearly two months later, on May 6, 1998, Mr. Sefandonakis received a letter from Mr. Hart's office requesting payment for household services. Only then did Mr. Sefandonakis review the notice of claim to see if he could possibly use a defense in the case that it didn't strictly comply with the Utah Governmental Immunity Act. (R. 116, para 8). He then spoke with Bruce Garner, the Assistant Attorney General whose offices are in the Risk Management Division, about denying the claim based on non-compliance with the statute. (R. 115, para 7; 116, paras. 10, 11; 121).

On or about May 21, 1998, Mr. Sefandonakis called Mr. Hart's office and told Mr. Hart's secretary that because the notice of claim relative to Ms. Thimmes' case had not been properly filed in the correct office, he was denying the claim. Mr. Sefandonakis did not

speak with Plaintiff's counsel, Robert Hart, on this occasion. (R. 116, R. 189–190, R. 192–194).

On June 9, 1998, Mr. Hart sent a letter to Mr. Sefandonakis explaining that he had complied with the notice of claim requirements, because a representative of the State had specifically directed his paralegal to file the notice of claim for the Attorney General's office with the Division of Risk Management. (R. 74–76; 192–194; 190). Mr. Sefandonakis did not reply to that letter.

On January 11, 1999, Ms. Thimmes' Complaint was filed against Utah State University and Haven B. Hendricks, *inter alia*. (R. 1–6).

On March 2, 1999, the Attorney General's office filed its Motion to Dismiss under URCP 12(b)(6), arguing that Plaintiff had not complied with the Utah Governmental Immunity Act's notice of claim requirements. (R. 10–31).

Plaintiff opposed the Motion to Dismiss, and moved the district court to treat the motion as a motion for Summary Judgment. Plaintiff further requested that the district court allow discovery to be undertaken on the facts underlying the motion in accordance with URCP 56(f). (R. 40–76). In opposition to this motion, Defendants argued that no further facts needed to be adduced, and that the district court could issue a decision without further facts. (R. 81–89). Plaintiff replied that discovery was necessary in order to uncover the truth about whether Plaintiff's counsel's office had been misled by a representative of the State. (R. 90–97).

A hearing on Defendants' motion was held on Monday, June 28, 1999. At that hearing, the district court instructed the parties to supplement the briefing in this case with affidavits from Mr. Hart and his paralegal, as well as from Bruce Garner and Mr. Sefandonakis. (R. 113).

Plaintiffs' counsel supplemented the record with the affidavits of Mr. Hart and Ms. Reissen. In her affidavit, Ms. Reissen confirmed that she was employed by Mr. Hart in February, 1998, and affirmed that at Mr. Hart's direction, she contacted the Utah State Attorney General's office and asked who the notice of claim was to be sent to. She stated that she was instructed by a representative of the Attorney General's office to send the notice of claim to Mr. Jim Sefandonakis at the Risk Management Division. Ms. Reissen stated unequivocally that the person with whom she spoke confirmed to her that the office to which she had instructed Ms. Reissen to send the notice of claim was a division of the Attorney General's office, and that based on the information provided to her by this representative, Ms. Reissen sent the notice of claim to Mr. Sefandonakis. (R. 129–130).

Mr. Hart's affidavit confirmed that he has practiced law in the State of Utah for 17 years, and that he had experience in suing the State of Utah. He indicated that he was familiar with the requisites of the Governmental Immunity Act, and had complied with them in the past. He further testified that in this case, he instructed his paralegal to confirm with the Attorney General's office the exact location to which the Attorney General's copy of the notice of claim should be sent. He also stated that after Ms. Reissen had confirmed to

him that the Attorney General's office had instructed her to send the notice of claim to the address given to her. (R. 137–140).

Defendants also filed supplemental material with the district court. It was as interesting in what it did *not* contain as for the misleading statements it did contain. For example, Defendants adduced no evidence that Mr. Hart's paralegal, Ms. Reissen, had not been instructed by the staff at the Attorney General's Office or the Risk Management Division to file the notice of claim with the Risk Management Division. In fact, Defendants did not dispute either Ms. Reissen's or Mr. Hart's recitation of the facts in that regard.

What Defendants' supplemental brief *did* say was misleading and false, however. It contained an affidavit from Mr. Sefandonakis, in which he made assertions that were simply untrue. Unfortunately, the district court ultimately relied on these untrue assertions.

Paragraph 12 of the Sefandonakis affidavit states, "I did not wait for the statute of limitations to run before I advised the Plaintiff's counsel that the notice of claim was deficient. When I received the notice of claim, the Plaintiff still had approximately one month to comply with the statute and I had no reason to think that counsel would not do so." (R. 117). By making this statement, it was obvious that Mr. Sefandonakis intended the district court to believe that he notified Plaintiff's counsel that his notice of claim was deficient at least a month before the one-year notice of claim statute ran – in plenty of time for Plaintiff's counsel to remedy any deficiency. In fact, this was what the district court ended up believing, as discussed *infra*. *This statement was not true, however.* According to

Mr. Sefandonakis' other affidavit testimony, he did *not* contact Mr. Hart before the one-year statute ran to tell him that the notice was defective. In fact, Mr. Sefandonakis acknowledged in his affidavit that he was not even aware of any alleged defect in the notice of claim until after the one-year statute expired. (R. 116, paras. 8 – 11).

Unfortunately, Plaintiff's counsel did not receive a copy of the Sefandonakis affidavit or any other portion of Defendants' supplemental brief at the time it was sent to the district court, and thus did not have a chance to reply to factual issues raised therein before the district court issued its decision.

On September 14, the district court issued a Memorandum Decision, setting forth the facts and the law upon which the State's motion should be granted. (R. 148 – 151; found in the Appendix hereto as Exhibit C). In the Memorandum Decision, the district court relied specifically on the "affidavit filed by the State," (the Sefandonakis affidavit) which, according to the court, indicated that "the deficiency [in the notice of claim] *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." (R. 150; emphasis added). Thus, the district court found inapplicable the precedent of *Bischel v. Merritt*, 907 P.2d 275 (Utah App. 1995), discussed *infra*, which held that a plaintiff had complied with the notice of claim requirements when the plaintiff's counsel sent a notice to the wrong county office after being instructed to do so by a county representative.

The district court's Memorandum Decision placed two immediate problems before

Plaintiff. First, the "fact" from the State's affidavit upon which the district court had relied was not true. Second, because Plaintiff's counsel had not been served with a copy of this affidavit, the district court's Memorandum Decision was the first notice that Plaintiff had of the affidavit's existence.

Plaintiff's counsel quickly procured a copy of the affidavit, as well as the other supplementary material filed by Defendants. (R. 187 – 188). Meanwhile, Defendants sent a proposed order dismissing Plaintiff's action. (See R. 196).

On October 1, 1999, Plaintiff filed an Objection to Proposed Order, Motion for Reconsideration or, alternatively, to Alter or Amend Judgment or to Set Aside Judgment, pointing out that Plaintiff's counsel had not received the State's supplementary material until after the district court had issued its Memorandum Decision. The Objection also pointed out that the assertions of Mr. Sefandonakis' affidavit, upon which the district court relied in its memorandum decision, were false. The Objection further set forth a detailed chronology of events, demonstrating that Mr. Sefandonakis had not told Mr. Hart that his notice of claim was defective before the one-year statutory notice of claim period expired, and that in fact Mr. Sefandonakis was unaware of any claimed defect in the notice until long after the statutory period had run. In light of these facts, Plaintiff requested that the district court reconsider its ruling as set forth in the Memorandum Decision. (R. 152 – 194).

Defendants filed an Opposition to Plaintiff's Objection (R. 207 – 210), to which Plaintiff replied on November 12, 1999. Thereafter, the district court filed a second

Memorandum Decision, denying Plaintiff's motion (R. 231 – 232; found in the Appendix hereto as Exhibit D).). In that decision, the district court characterized the exchanges and allegations between counsel regarding the service of the Sefandonakis affidavit on Plaintiff's counsel as "unfortunate," but concluded that in any case, even if the facts were "taken in a light most favorable to the Plaintiff, [they] still would not suffice as service or result in an enlargement of the *Bischel* approach." (R. 231). The district court's decision to dismiss Plaintiff's case thus remained unchanged.

On December 6, the district court entered an Order of Dismissal (R. 236-238) and an Order on Objection to Proposed Order, Motion for Reconsideration or, Alternatively, Motion to Alter or Amend Judgment or to Set Aside Judgment. (R. 233-235).

This appeal was taken from both orders. (R. 241-243).

SUMMARY OF ARGUMENTS

1. It is undisputed that Plaintiff's counsel served the notice of claim precisely as his office was instructed by a representative of the State. Under these circumstances, Utah case law and public policy mandate a determination that Plaintiff complied with the notice of claim provisions of the Utah Governmental Immunity Act.

2. In deciding to dismiss Plaintiff's case, the district court based its decision on its understanding that Jim Sefandonakis, of the Utah Division of Risk Management had warned Plaintiff's counsel that the notice of claim was defective at least a month

before the one-year statutory deadline for filing that notice had expired. That understanding was erroneous, and was based on false representations by Mr. Sefandonakis, who didn't look at the notice of claim to determine statutory compliance until after the deadline ran. The district court erred in refusing to reconsider and change its decision to dismiss Plaintiff's case once the factual error had been pointed out to the court.

ARGUMENT

I.

UNDER UTAH CASE LAW AND PUBLIC POLICY, PLAINTIFF COMPLIED WITH THE REQUIREMENTS OF THE UTAH GOVERNMENTAL IMMUNITY ACT BY FILING HER NOTICE OF CLAIM PRECISELY AS DIRECTED BY DEFENDANTS' REPRESENTATIVE. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S COMPLAINT ON THE BASIS OF NON-COMPLIANCE WITH THE NOTICE OF CLAIM STATUTE.

While the law of the State of Utah is quite clear that compliance with the notice of claim statute is necessary in order to bring an action against a governmental entity, it is equally clear that the public policy of the State of Utah precludes a governmental entity from misleading a party into serving a notice of claim on the wrong office and thereafter attempting to use the result of its misrepresentations as a valid defense to an action brought against it. To the contrary, both the case law and public policy mandate that notices sent under such circumstances comply with the Utah Governmental Immunity Act.

The case of *Bischel v. Merritt*, 907 P.2d 275 (Utah App. 1995) is directly on point in this regard. In *Bischel*, the Salt Lake County Attorney's office actively pursued settlement of the plaintiff's claim. The plaintiff's counsel sent a notice of claim to the county attorney's office, claiming that he had been told by a member of the staff at the county commission's office that the notice of claim should be sent to the county attorney's office. After the complaint had been filed, the county moved the district court to dismiss the case, arguing that it had been sent to the wrong office, and that in any case, the secretary at the county attorney's office was not authorized to accept service of a notice of claim.

This Court overturned the lower court's dismissal of the case, holding that the public policy of the State of Utah could not countenance such conduct by the government, and stating, "It appears at best disingenuous for the County to argue that Bischel's notice was inadequate merely because she directed and delivered it as the County Commission and County Attorney's Office instructed. The public deserves more consistent, more credible treatment from its servants." *Id.* at 279. This Court also found that in any case, the notice of claim directed to the County Attorney's Office "fulfilled the purpose of the notice requirement," inasmuch as it was the County Attorney's Office that was "entrusted with investigating and settling or defending the claim." *Id. at 278*. This Court went on to say that "[d]irecting and delivering her notice of claim to the County Attorney's Office in no way inhibited settling Bischel's claim without resort to litigation. In fact, given the powers and responsibilities the County has bestowed upon the County Attorney's Office, the

opposite is true. [citation omitted]. Filing notice with the County Attorney's Office facilitated settlement discussions. Indeed, the County Attorney's Office actively pursued settlement of Bischel's claim, even paying her property damage." *Id.* at 279-280.

The *Bischel* decision is only the latest in a long line of cases holding that a governmental entity may not mislead a claimant or claimant's attorney as to the requirements of the notice of claim and then successfully assert noncompliance with the requisites of the statute as a defense. *See Warren v. Provo City Corp.*, 838 P.2d 1125, 1129 (Utah 1992) ("*While a party may be excused for failing to pursue a claim if the party acted in reasonable reliance on a defendant's representations,* absent any representations by the defendant, a plaintiff must take reasonable steps to prosecute the claim.") (emphasis added). *See also, generally, Rice v. Granite School District*, 456 P.2d 159 (Utah 1969) ("One cannot justly or equitably lull an adversary into a false sense of security, thereby subjecting his claim to the bar of limitations, and then be heard to plead that very delay as a defense to the action when brought.")

Application of these principles of equity and fairness to the facts in this case mandates a determination that Plaintiff complied with the notice of claim requirements of the Utah Governmental Immunity Act.

In the instant case, it is undisputed that when Ms. Reissen, Plaintiff's counsel's paralegal, telephoned the Utah Attorney General's office in order to find out specifically where the notice of claim should be sent, she was directed to send it to Mr. Sefandonakis

at the Division of Risk Management, located in the State Office Building. It is undisputed that an Assistant Attorney General has an office in the Division of Risk Management. It is also undisputed that Ms. Reissen was told that the office to which she was directed to send the notice of claim was a division of the Attorney General's office. (*See* R. 129). It is further undisputed that had Ms. Reissen not been specifically instructed to send the notice of claim to the Risk Management Division's office, addressed to Mr. Sefandonakis, Plaintiff's counsel would have sent the notice of claim to the main office of the Attorney General at 236 State Capitol, Salt Lake City, Utah, as Plaintiff's counsel had done in other cases he had brought against the State. (*See* R. 139, para.7).

The fact that this evidence is uncontroverted is sufficient to establish its truthfulness for purposes of determining compliance with the Governmental Immunity Act. *See, e.g., Bischel*, 907 P.2d at 281, dissent footnote 1, confirming that this Court found compliance with the Utah Governmental Immunity Act upon the uncontroverted affidavit testimony of plaintiff's counsel: "Bischel's attorney merely alleged that an unidentified receptionist told him to file a notice with McDonald [a representative of the Salt Lake County Attorney's office] in the County Attorney's office." *See also Beck v. Farmers Ins. Exchange*, 701 P.2d 795, at 802 (Utah 1985) ("In the absence of responsive affidavits, we take the assertions of the affidavits as true and view all unexplained facts in a light most favorable to [the plaintiff])."

It is also undisputed that there existed an extensive history of negotiations between Plaintiff's counsel and the Division of Risk Management, the governmental entity entrusted with investigating and settling or determining to defend Plaintiff's claim, long before the expiration of the one-year statutory period for filing a notice of claim. (*See, e.g.*, R. 52-67). It is undisputed that Mr. Sefandonakis had told Mr. Hart that the State did not intend to assert a defense to liability (R.139), and that as part of the settlement process he had written to Mr. Hart, "I will await your demand package once you complete it." (R. 65). The notice of claim itself is indicative of the ongoing process of negotiating the claim, indicating therein that "We have been communicating with Mr. Stefandonakis [sic] regarding this claim and await your approval or denial as outlined in UCA 63-30-14." (R. 70). It is also clear that Mr. Sefandonakis received actual notice of claim before the statutory one-year period ran. (R. 115). It is further uncontroverted that Mr. Sefandonakis did not communicate to Mr. Hart that there might be any problem with service of the notice of claim before the one-year notice of claim statute ran. In fact, it is clear that Mr. Sefandonakis did not review the notice of claim for statutory compliance until after the one-year statute had run. (*See* R. 115-116, paras. 6-8, 11).

In light of these undisputed facts, it is clear that Plaintiff complied with the notice of claim requirements of the Governmental Immunity Act, as interpreted in the aforementioned cases. The governmental entity entrusted with investigating and settling or defending the claim received the actual and requisite notice of the claim long within the

one-year period. Plaintiff's counsel served the notice of claim, precisely as his paralegal had been instructed to do, complying with the statute's form and content requirements and in a timely manner. Under the policy of the precedents cited above, Plaintiff "strictly complied with the statute and with the [State]'s instructions." *Bischel, supra,* at 279.

The only material distinction between the cases referenced above and the instant case is that this case deals with the filing of a notice of claim with the State, while the above-cited cases deal with the filing of a notice of claim with a county or other governmental entity. This is a distinction without a difference, however. The same principles of equity and fairness apply equally to citizens, whether they are seeking redress for injuries from a local governmental entity or from a state governmental entity. It is no more acceptable for a state actor to mislead a citizen as to whether his service of a notice of claim complies with the strict requirements of service on "the attorney general" (UCA 63-13-11), than it is for a local governmental actor to mislead a citizen as to whether service of a notice of claim on a county attorney complies with the requirements to file a notice of claim on "the governing body of the political subdivision." UCA 63-30-13. It is no more acceptable for the State of Utah to argue that a plaintiff has failed to comply with a notice of claim statute where that plaintiff directs and delivers a notice of claim precisely as instructed by a representative of the State, than it is for a local government entity to make the same argument where the claimant plaintiff delivers a notice of claim precisely as instructed by a representative of the

county. The public deserves no less consistent, credible treatment from its state servants than from its other public servants.[1]

Under these circumstances, it was error for the district court to dismiss Plaintiff's case. This Court should overturn the district court's dismissal, and the case remanded for further proceedings on the merits.

II.

IT WAS ERROR FOR THE DISTRICT COURT TO REFUSE TO RECONSIDER OR OTHERWISE RELIEVE PLAINTIFF FROM ITS DECISION TO DISMISS PLAINTIFF'S CASE AFTER PLAINTIFF HAD SHOWN THAT THE FACTUAL BASIS UPON WHICH THE DECISION WAS BASED WAS DEMONSTRABLY FALSE.

As pointed out above, due to an unfortunate series of events, the district court was misled as to critical facts regarding Plaintiff's counsel's compliance with the notice of claim statute.

The first of these was a false statement contained in the affidavit of Mr. Sefandonakis, which led the district court to believe that at least a month before the one-

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[1] In this regard, it is noteworthy that since this case was brought, the Utah legislature simplified compliance with the notice of claim statute, now requiring that a notice of claim be directed only to the Attorney General's office, instead of also requiring that a notice also be directed to the state entity that is also claimed to be responsible for the injuries. *See* UCA 63-30-12 (post-1998 amendments). This legislative change is indicative of a policy to make the pursuance of grievances against the State easier, and to uncomplicate procedures for filing a notice of claim. *See, e.g., Hackford v. Utah Power & Light*, 740 P.2d 1281, 1284-1285 (Utah 1992)(Legislature presumed to be aware of legal and policy consequences of its acts).

year statutory notice of claim deadline ran. Mr. Sefandonakis told Mr. Hart that the notice of claim was statutorily defective.[2]

The second of these was the failure of the Attorney General's office to serve Mr. Sefandonakis' affidavit and its accompanying documents on Plaintiff's counsel before the district court issued its memorandum decision.[3]

As set forth in the Statement of Facts, it was only after Plaintiff's counsel received a

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[2] As pointed out in the recitation of facts, *infra*, Paragraph 12 of the Sefandonakis affidavit states, "I did not wait for the statute of limitations to run before I advised the Plaintiff's counsel that the notice of claim was deficient. When I received the notice of claim, the Plaintiff still had approximately one month to comply with the statute and I had no reason to think that counsel would not do so." (R. 117). Mr. Sefandonakis apparently intended that the district court should believe that he notified Plaintiff's counsel that his notice of claim was deficient at least a month before the one-year notice of claim statute ran – in plenty of time for Plaintiff's counsel to remedy any deficiency. This was not the case, however. In fact, Mr. Sefandonakis acknowledged in his affidavit that he was not even aware of any claimed defect in the notice of claim until after the one-year statute had run. (R. 116, paras. 8 – 11).

In the Memorandum Decision issued September 14, 1998, (R. 148 – 151; attached hereto as Exhibit C) the district court made it clear that it had relied on Mr. Sefandonakis' representation that he had advised Mr. Hart that the notice of claim was deficient before the statutory notice of claim statute ran. In the opinion, the district court specifically referenced the "affidavit filed by the State," (the Sefandonakis affidavit) which, according to the court, indicated that "the deficiency [in the notice of claim] *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." (R. 150; emphasis added).

[3] The facts and circumstances surrounding this issue were treated at length in Plaintiff's Objection to Proposed Order, Motion for Reconsideration or, alternatively, to Amend Judgment or to set aside Judgment (R. 176-186), the Affidavit of Randall K. Edwards (R. 187-188) the Affidavit of Robert B. Hart (R. 189-191) and the Reply in Support of Objection (R. 211-218). Plaintiff's counsel Edwards and Hart swore under oath that they had not received the affidavits. Defense counsel claimed the affidavits had been sent. Ultimately, the district court made no determination on whether the affidavits

copy of the district court's Memorandum Decision that he became aware of the affidavit, which he quickly procured from defense counsel. (R. 187 – 188). In the Objection to Proposed Order, Motion for Reconsideration or, Alternatively, to Alter or Amend Judgment or to Set Aside Judgment, Plaintiff's counsel demonstrated that the assertions of Mr. Sefandonakis' affidavit, upon which the district court relied in its memorandum decision, were false, something Plaintiff's counsel did not know until the Memorandum Decision had been filed. In light of these facts, Plaintiff requested that the district court reconsider the conclusions in its Memorandum Decision. (R. 152 – 194).

The district court refused to do so, however, issuing a second Memorandum Decision stating that even if the facts were "taken in a light most favorable to the Plaintiff, [they] still would not suffice as service or result in an enlargement of the *Bischel* approach." (R. 231).

The district court's conclusion is erroneous for at least two reasons:

First, justice and equity required that the district court reconsider and change its decision to dismiss Plaintiff's case once it became aware that its understanding of the facts from Mr. Sefandonakis' affidavit was incorrect and that the facts were, indeed, exactly opposite to what the court had understood. *See* URCP 60(b), providing that the court may, in the furtherance of justice, relieve a party or his legal representative from an order for reasons of mistake, newly discovered evidence, fraud, or misrepresentation by an adverse

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were or were not sent, but found that it made no difference to the final outcome of the case.

party.

Second, the totality of all of the facts, including the uncontroverted testimony of Ms. Reissen and Mr. Hart, discussed *supra*, as well as the correct understanding of the facts in Mr. Sefandonakis' affidavit, when taken in the light most favorable to Plaintiff, should have led the district court to conclude that Plaintiff had strictly complied with the requirements of the notice of claim statute, for the reasons set forth in the first legal argument set forth above. Under these circumstances, the trial court abused its discretion in refusing to set aside its decision to dismiss the case because that decision was the result of a judicial error, or "mistake of law." *See Bischel, supra*, at 277 (Judicial error or mistake of law by trial court supports a Rule 60(b) motion); *see also*, *Udy v. Udy*, 893 P.2d 1097, 1099 (Utah App. 1995).

In the instant case, once it had been shown to the district court what the facts were, it should have reconsidered and changed its decision to dismiss Plaintiff's case.

CONCLUSION

For the reasons set forth above, this Court should overturn the district court's dismissal of Plaintiff's case and remand the case for further proceedings on the merits.

DATED this 11th day of July, 2000.

CHRISTENSEN & JENSEN, P.C.

By: [signature]
Randall K. Edwards
Attorney for Appellant/Plaintiff

APPENDIX:

EXHIBIT A –Order of Dismissal (R. 236-238)

EXHIBIT B –Order On Objection to Proposed Order, Motion for Reconsideration or, Alternatively, Motion to Alter or Amend Judgment or to Set Aside Judgment (R. 233-235)

EXHIBIT C – Memorandum Decision: September 14, 1998 (R. 148-151)

EXHIBIT D – Memorandum Decision: November 12, 1998 (R. 231-232)

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ORIGINAL

IN THE FIRST DISTRICT COURT

CACHE COUNTY, STATE OF UTAH

AMANDA THIMMES, Plaintiff, vs. UTAH STATE UNIVERSITY, HAVEN B. HENDRICKS, AND JOHN DOES 1 THROUGH X, Defendants.	:	**ORDER OF DISMISSAL** Civil No. 990100050 Judge Gordon J. Low

This matter came before the court on Defendants' Motion to Dismiss. Plaintiff filed her Memorandum in Opposition to Defendants' Motion to Dismiss, together with Motion to Treat Motion to Dismiss as Motion for Summary Judgment and Motion for Continuance. The court heard argument on the respective motions, asked the parties to file supplemental affidavits to clarify facts, and now having considered the foregoing, having issued its Memorandum Ddecision and for good cause appearing,

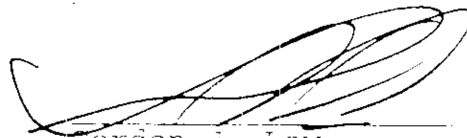
 EXHIBIT A

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The plaintiff's complaint is dismissed with prejudice.

DATED this ___ day of ~~November~~, 1999.

BY THE COURT:



Gordon J. Low
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing **ORDER OF DISMISSAL**, to be mailed, postage prepaid this 19th day of November, 1999, to the following:

Robert B. Hart, Esq.
HART & HART
349 South 200 East #110
Salt Lake City, Utah 84111

Randall K. Edwards, Esq.
CHRISTENSEN & JENSEN, P.C.
50 South Main Street, Suite 1500
Salt Lake City, Utah 84144

[signature]

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ORIGINAL

IN THE FIRST DISTRICT COURT

CACHE COUNTY, STATE OF UTAH

AMANDA THIMMES, Plaintiff, vs. UTAH STATE UNIVERSITY, HAVEN B. HENDRICKS, AND JOHN DOES I THROUGH X, Defendants.	**ORDER ON OBJECTION TO PROPOSED ORDER, MOTION FOR RECONSIDERATION OR, ALTERNATIVELY, MOTION TO ALTER OR AMEND JUDGMENT OR TO SET ASIDE JUDGMENT** Civil No. 990100051 Judge Gordon J. Low

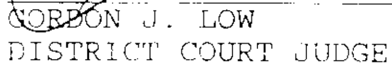
This matter came before the Court on Plaintiff's Objection to Proposed Order, Motion for Reconsideration or, Alternatively, Motion to Alter or Amend Judgment or to Set Aside Judgment. The Court reviewed the respective memoranda and affidavits filed by the parties, and now having considered the foregoing, having issued its Memorandum Decision and for good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The plaintiff's Objection to Proposed Order, Motion for Reconsideration or, Alternatively, Motion to Alter or Amend Judgment or to Set Aside Judgment is denied.

DATED this ____ day of ~~November~~ December, 1999.

BY THE COURT:



GORDON J. LOW
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing **Order on Plaintiff's Objection to Proposed Order, Motion for Reconsideration or, Alternatively, Motion to Alter or Amend Judgment or to Set Aside Judgment,** to be mailed, postage prepaid this 19th day of November, 1999, to the following:

Robert B. Hart, Esq.
HART & HART
349 South 200 East #110
Salt Lake City, Utah 84111

Randall K. Edwards, Esq.
CHRISTENSEN & JENSEN, P.C.
50 South Main Street, Suite 1500
Salt Lake City, Utah 84144

FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY
STATE OF UTAH

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

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

99-50
Sept 14, 1999

148 EXHIBIT C

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.

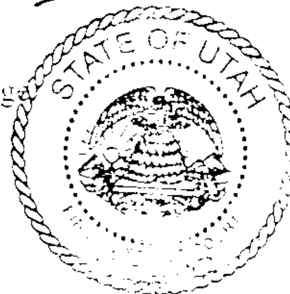
In addition to the above, the affidavit filed by the state makes it clear that notice was not only statutorily insufficient but actually not provided to the attorney general. Further, the deficiency was brought to the attention of Plaintiff's counsel a month prior to the deadline for filing, thereby 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 14 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

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.

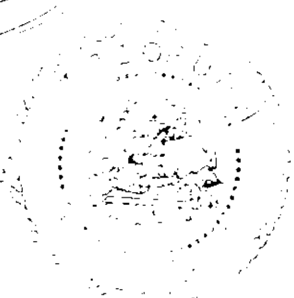
The exchanges and allegations between counsel are unfortunate but demonstrate why strict compliance to the statute is required. The facts surrounding the "providing" of notice are much in dispute, and if taken in a light most favorable to the Plaintiff, still would not suffice as service or result in 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

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EXHIBIT D

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.

Deputy Court Clerk

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2000 a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF was mailed, postage prepaid, to the following:

Sandra L. Steinvoort
Assistant Attorney General
160 East 300 South, Sixth Floor
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Salt Lake City, UT 84114-0856

Robert B. Hart
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