

2000

# Lloyd Morris, Judy K. Morris, and Great West Casualty Company v. Utah Department of Transportation : Brief of Appellee

Utah Court of Appeals

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Nancy L. Kemp; Assistant Attorney General; Jan Graham; Utah Attorney General; Attorneys for Defendant/Appellee.

Michael F. Richman; Michael F. Richman; Michael F. Richman and Assocs.; Preston L. Handy; Siegfried and Jensen; Attorneys for Appellants.

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## Recommended Citation

Brief of Appellee, *Great West Casualty Company v. Utah Department of Transportation*, No. 20000010 (Utah Court of Appeals, 2000).  
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IN THE UTAH COURT OF APPEALS

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LLOYD MORRIS, JUDY K. MORRIS, :  
Plaintiffs, : Case No. 20000010-CA  
and GREAT WEST CASUALTY :  
COMPANY, :  
Plaintiff/Appellant, :  
v. :  
UTAH DEPARTMENT OF : Priority No. 15  
TRANSPORTATION, :  
Defendant/Appellee. :

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BRIEF OF APPELLEE

On Appeal from an Order of the  
Third Judicial District Court in and for  
Salt Lake County, State of Utah,  
Honorable Tyrone E. Medley, Presiding

NANCY L. KEMP (5498)  
Assistant Attorney General  
JAN GRAHAM (1231)  
Utah Attorney General  
Attorneys for Defendant/Appellee  
160 East 300 South, Sixth Floor  
P. O. Box 140856  
Salt Lake City, Utah 84114-0856  
Telephone: (801) 366-0100

MICHAEL F. RICHMAN (4180)  
Michael F. Richman & Assocs.  
Attorney for Appellant  
5684 South Green Street  
Salt Lake City, Utah 84123  
Telephone: (801) 266-5572

PRESTON L. HANDY (6239)  
Siegfried & Jensen  
Attorney for Appellant  
5684 South Green Street  
Salt Lake City, Utah 84123  
Telephone: (801) 266-0999

**FILED**

Utah Court of Appeals

APR 19 2000

Julia D'Alessandro  
Clerk of the Court

ORAL ARGUMENT REQUESTED BY DEFENDANT/APPELLEE

IN THE UTAH COURT OF APPEALS

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JAN GRAHAM (1231)  
Utah Attorney General  
Attorneys for Defendant/Appellee  
160 East 300 South, Sixth Floor  
P. O. Box 140856  
Salt Lake City, Utah 84114-0856  
Telephone: (801) 366-0100

MICHAEL F. RICHMAN (4180)  
Michael F. Richman & Assocs.  
Attorney for Appellant  
5684 South Green Street  
Salt Lake City, Utah 84123  
Telephone: (801) 266-5572

PRESTON L. HANDY (6239)  
Siegfried & Jensen  
Attorney for Appellant  
5684 South Green Street  
Salt Lake City, Utah 84123  
Telephone: (801) 266-0999

ORAL ARGUMENT REQUESTED BY DEFENDANT/APPELLEE

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UTAH DEPARTMENT OF	:	
TRANSPORTATION,	:	
	:	
Defendant/Appellee.	:	

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is taken from an order of the Third Judicial District Court, dated December 3, 1999 (R. 112-13), which granted summary judgment against Great West for failure to file a notice of claim under the Utah Governmental Immunity Act. Great West filed a timely notice of appeal on December 30, 1999 (R. 119-20) and an amended notice on January 6, 2000 (R. 123-24), which corrected the case caption. Utah Code Ann. § 78-2a-3(2)(j) (1996) gives this Court jurisdiction over the appeal by order of transfer from the Supreme Court of Utah dated February 23, 2000.

ISSUE PRESENTED UPON APPEAL AND STANDARD OF APPELLATE REVIEW

The sole issue before the Court is whether the insurer of a damaged, company-owned semi-tractor can evade the notice-of-claim requirement of the Utah Governmental Immunity Act by relying

solely on the notice filed by the semi's driver in his own behalf for personal injuries he sustained in an accident while driving the insured semi. The driver's notice, while alluding to the damage to the semi, made no reference to either the semi's owner or its insurer.

Standard of Review: "When reviewing summary judgment determinations, [the court] review[s] for correction of error, considering the facts and inferences in the light most favorable to the non-moving party." Tallman v. City of Hurricane, 1999 UT 55, ¶1, 985 P.2d 892; see also Petersen v. South Salt Lake City, 1999 UT 93, ¶2, 987 P.2d 57.

#### CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

All relevant text of constitutional provisions, statutes, and rules pertinent to the issue 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

Plaintiffs Lloyd and Judy Morris filed the original complaint in this case on February 10, 1999 (R. 1-8). The complaint alleged that an accident in which the semi-tractor driven by Lloyd Morris struck a cow on a state-controlled highway was caused by the negligence of the Utah Department of Transportation (UDOT) and resulted in serious injury to both

plaintiffs. Five weeks later, an amended complaint was filed (R. 23-31), adding appellant Great West Casualty Company as a plaintiff and a new subrogation claim of \$42,492.50 on its behalf for damage to the semi, which was owned by M&P Transportation (R. 28, ¶¶ 22-25). After filing its answer (R. 34-43), UDOT moved for summary judgment against Great West (R. 71-72), asserting in its supporting memorandum (R. 73-79) that Great West's cause of action should be dismissed for failure to file a notice of claim. In response (R. 87-93), Great West argued that because Lloyd Morris' notice of claim stated that "damage to claimant's semi exceeds \$48,000.00" (R. 79)--even though "claimant" was clearly identified in the notice as "Lloyd Morris" (R. 78), and the notice made no mention of Great West--Morris' notice was effective to fulfill any notice obligation on Great West's part. By minute entry of November 18, 1999, the district court granted UDOT's motion "based upon the analysis and authorities set forth in Defendant's memoranda in support and in reply" (R. 110). An order to the same effect was entered on December 3, 1999 (R. 112-14), and a stipulated dismissal of the Morris's' claims was filed on December 21, 1999 (R. 117-18). This appeal followed (R. 119-20; R. 123-24).

B. Statement of Relevant Facts

In their memorandum opposing summary judgment, plaintiffs agreed that the facts on which UDOT's motion was based are undisputed (see R. 88). They are as follows (R. 73-74 and the documents referenced therein):



On October 20, 1997, Lloyd Morris was driving a semi-tractor on Interstate 80 in Tooele County. Judy Morris was also riding in the vehicle. The semi struck a cow in the road and rolled, injuring the Morrises and damaging the vehicle, which was owned by M&P Transportation and insured by Great West. Great West compensated M&P for the damage. Neither Great West nor M&P filed a notice of claim pursuant to the Utah Governmental Immunity Act. On May 13, 1998, Lloyd Morris, as claimant, filed a notice of claim through his attorney, Mitchell R. Jensen, which states: "The damage to claimant's semi exceeds \$48,000.00. Claimant alleges his injuries and property damage are the direct and proximate result of an improperly maintained fence which allowed the animal to stray onto the highway" (R. 74, ¶ 6).

#### SUMMARY OF ARGUMENT

Utah case law has consistently held that the notice-of-claim provision of the Utah Governmental Immunity Act requires strict compliance. Under the act, any person who has a claim against a governmental entity must file a written notice of claim, signed by the claimant or the claimant's attorney. Under the rules of statutory construction, "person" includes corporations and companies. Therefore, Great West Casualty Company, as a "person" with a claim, was obligated to file its own notice. Moreover, Great West's argument that UDOT received actual notice of its claim is of no significance. Case precedent has conclusively

established that actual notice does not relieve a plaintiff of the duty to file a notice of claim.

Great West attempts to circumvent this requirement by arguing, for the first time on appeal, that Lloyd Morris was, at all times, its agent (see Apl't. Brief at 4) and the agent of M&P (see id. at 8). However, it fails to identify any legal elements of agency authority or to cite evidence of record demonstrating an agency relationship with Mr. Morris. In addition, because it made no mention of an agency theory in the district court, its argument is waived for purposes of appeal.

Great West misapprehends Moreno v. Board of Education. Unlike the foster parents in Moreno, Lloyd Morris has no demonstrated authority, by statute or otherwise, to maintain an action or file a claim for Great West's benefit. Moreover, the subrogation theory under which Great West brought its claim permits it to stand only in the shoes of the entity whose loss it was legally obligated to pay. The loss paid here was the loss sustained by M&P, the owner of the semi, not the loss sustained by Lloyd Morris.

For these reasons, as more fully explained below, the summary judgment in UDOT's favor must stand.

## ARGUMENT

I. THE DRIVER'S NOTICE OF CLAIM FOR HIS PERSONAL INJURIES WAS INADEQUATE TO FULFILL THE STATUTORY REQUIREMENTS OF NOTICE FOR THE INSURER OF THE COMPANY-OWNED SEMI-TRACTOR.

The requirements for a notice of claim are clearly spelled out in statute. Under Utah Code Ann. § 63-30-11,

(2) 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.

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

(i) a brief statement of the facts;

(ii) the nature of the claim asserted;  
and

(iii) the damages incurred by the claimant, so far as they are known.

Utah Code Ann. § 63-30-11 (Supp. 1999). In addition, the notice must be "signed by the person making the claim or that person's agent, attorney, parent, or legal guardian" (Utah Code Ann. § 63-30-11(3)(b)(i) (Supp. 1999)).

The notice of claim filed by Lloyd Morris fails to provide adequate notice of Great West's claim in several particulars. First, by listing only Mr. Morris as claimant (R. 78), the notice fails to disclose Great West as a "person having a claim" under the statute.<sup>1</sup> Second, no facts in the notice reveal the nature

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<sup>1</sup>It is beyond dispute that Great West is a "person" for purposes of the statute. Under the rules of statutory construction, "[p]erson includes individuals, bodies politic and corporate, partnerships, associations, and companies." Utah Code Ann. § 68-3-12(2)(c) (Supp. 1999).

of Great West's claim, its subrogation interest as insurer of the company-owned semi-tractor. Finally, the notice is not signed by anyone purporting to act on Great West's behalf. In fact, Great West concedes in its brief that it did not retain the Morrises' attorneys to represent it until September 23, 1998, more than four months after Lloyd Morris filed his notice of claim (see Aplt. Brief at 7). Under these facts, Lloyd Morris' notice cannot serve as notice on Great West's behalf.

Great West bases its argument on the ground that Lloyd Morris' notice gave UDOT actual notice of the property damage claim, allowing UDOT to conduct a timely investigation (see Aplt. Brief at 7-8). However, actual notice cannot cure Great West's default. As Utah's supreme court has repeatedly held, "'[a]ctual knowledge of the circumstances . . . does not dispense with the necessity of filing a timely claim.'" Sears v. Southworth, 563 P.2d 192, 194 (Utah 1977) (quoting Varoz v. Sevey, 29 Utah 2d 158, 506 P.2d 435, 436 (1973); see also Scarborough v. Granite Sch. Dist., 531 P.2d 480, 481-82 (Utah 1975)). Further, in these cases, the actual, though ineffective, notice of the incidents giving rise to the cause of action was given directly to the defendant by the affected party. By contrast, Great West did not attempt to give any notice of its claim to UDOT prior to joining with the Morris plaintiffs in their lawsuit. If even direct, actual notice by the claiming party to a potential defendant cannot substitute for a formal notice of claim, the incidental mention of property damage to a vehicle not owned by the claimant

driver here cannot be deemed adequate to apprise UDOT of Great West's subrogation claim.

II. THE NATURE OF A SUBROGATION CLAIM DOES NOT PLACE GREAT WEST IN THE SHOES OF THE SEMI-TRACTOR'S DRIVER.

"Subrogation is an equitable doctrine that allows a person or entity which pays the loss or satisfies the claim of another under a legally cognizable obligation or interest to step into the shoes of the other person and assert that person's rights." Educators Mut. Ins. Ass'n v. Allied Property and Cas. Ins. Co., 890 P.2d 1029, 1030 (Utah 1995). In the case at bar, the undisputed facts show that Great West's subrogation claim permits it to stand in the shoes of the insured semi-tractor's owner, whose loss it paid, but not its driver. As Great West explains in its brief,

In the present case, on or about October 20, 1997, Lloyd Morris was driving a semi-tractor owned by M&P Transportation ("M&P") and insured by Great West. While driving the semi-tractor eastbound on I-80 Lloyd Morris struck a cow resulting in personal injury to both he [sic] and his wife Judy Morris and property damage to the semi-tractor. Following the incident, Great West paid M&P's claim for property damage to the semi-tractor. Great West then asserted its subrogation claim against UDOT for reimbursement of the approximately \$48,000 paid on the property damage claim.

Applt. Brief at 7 (emphasis added). Under the facts admitted by Great West, the subrogation doctrine permits it to stand in the shoes of M&P, whose claim it satisfied under its legally cognizable obligation as M&P's insurer. However, there is no evidence of record that M&P made any claim or filed any notice against UDOT; in fact, Great West admitted below that neither did

(see Statement of Relevant Facts at 3-4, supra). Consequently, Great West having filed no notice of its own, its subrogation claim fails.

The injuries sustained by the Morrises, which were the subject of timely notices of claim, do not change this analysis. Great West does not assert that it paid or was under any legal duty to compensate the Morrises for their injuries. Therefore, it has no legally cognizable interest in the suit between the Morrises and UDOT.

In short, neither Great West nor its insured, M&P, gave appropriate written notice of their property damage claim to UDOT. The Morrises, who filed individual notices of claim, have no valid claim for damage to M&P's insured property, and their notices neither mentioned Great West or M&P nor listed them as claimants. Great West is consequently in default of the statutory notice provision that is a mandatory prerequisite to suit. On these grounds, the district court granted summary judgment in UDOT's favor, and Great West has failed to demonstrate error in the court's decision.

III. THE MORENO CASE INVOLVES A STATUTORY RIGHT TO SUE ON ANOTHER'S BEHALF THAT IS NOT PRESENT IN THIS CASE.

Great West places its reliance exclusively on Moreno v. Board of Education, 926 P.2d 886 (Utah 1996), to demonstrate that a notice of claim filed by one party can suffice to raise the interest of an unnamed individual who is the actual party in interest. In Moreno, the legal guardians of a minor child sued for the child's wrongful death, not naming the natural mother as

a plaintiff, and the supreme court held the guardians' notice of claim sufficient to provide notice of the natural mother's claims. While a superficial reading of Moreno may suggest a factual similarity to the case at bar, the underlying legal analysis reveals its inapplicability to Great West's claim.

The Moreno case involved two separate opinions. The first involved extensive legal analysis of the statutes governing the guardians' right to sue and concluded

that while the rights and responsibilities of a guardian flowing out of legal custody of the ward terminate upon the death of the ward, the guardian's ability to maintain an action for the wrongful death of a minor flows from the guardian's residual duty of accounting and does not terminate upon the minor's death. This obligation is not for the personal benefit of the guardian, but is among a guardian's residual duties upon the death of his ward, and therefore any wrongful death action must be brought in behalf of the ward's heirs.

Moreno, 926 P.2d at 890. All five justices agreed with this analysis. Two justices further concluded on the basis of this analysis that the guardians' notice of claim, specifically filed on their own behalf, was legally insufficient to raise the interests of the unnamed natural mother. The remaining three justices concluded to the contrary. However, the linchpin of their conclusion was the guardians' statutory authorization to maintain suit on the heirs' behalf: "Since section 78-11-6 authorizes a guardian to maintain an action for the wrongful death of his ward, it follows that the guardian has the authority to file the prerequisite notice of claim." Id. at 892.

In the present case, Great West has pointed to no statute which gives the driver of a semi-tractor authority to file a notice of claim on behalf of the insurer of a vehicle in which the driver has no insurable interest. Great West's belated assertion to the contrary, Lloyd Morris' notice of claim gives no indication that he is filing on Great West's behalf as its agent, attorney, parent, or legal guardian. There is no indication that Lloyd Morris had the authority to negotiate or compromise Great West's claim. In fact, there is no mention of Great West at all. To the contrary, Great West openly declares at the end of its brief that "the claim was filed by Morris on his own behalf rather than in a representative capacity for M&P or Great West" (Aplt. Brief at 10).

Plaintiff's agency claim fails not only factually, but procedurally. "This court will not consider issues raised for the first time on appeal absent plain error or exceptional circumstances." York v. Shulsen, 875 P.2d 590, 594 (Utah App. 1994); accord Connor v. Union Pac. R.R. Co., 972 P.2d 414, 418 (Utah 1998); Utah Med. Prods., Inc. v. Searcy, 958 P.2d 228, 233-34 (Utah 1998). Great West has not cited the record to show that the agency issue was raised below, and on appeal, it has not argued either plain error or exceptional circumstances that would justify consideration of the issue by this Court. Further, "[i]t is well established that an appellate court will decline to consider an argument that a party has failed to adequately brief." Valcarce v. Fitzgerald, 961 P.2d 305, 313 (Utah 1998);



see also State v. Thomas, 1999 UT 2, ¶ 11, 974 P.2d 269. As in that case, Great West here not only fails to cite the record, but refers to no legal authority in support of its agency claim. Its cursory mention of agency is insufficient to fulfill Great West's duty under Utah R. Civ. P. 24(a)(9): "The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to authorities, statutes, and parts of the record relied on."

Moreno is further distinguishable from Great West's case. In Moreno, the basis of the natural mother's cause of action, wrongful death, was the same ground that the guardians raised on their own behalf. Here, the basis of Great West's cause of action, damage to the semi-tractor, diverges completely from the basis of the Morrises' personal injury claims and requires completely different evidence to sustain. There is simply no factual identity between Great West's and the Morrises' claims.

Finally, in Moreno, the supreme court noted that the statutory scheme provided for the maintenance of only a single action, for the benefit of the heirs, that could be brought by either the guardian or the heirs themselves (see 926 P.2d at 889), making the guardian legally capable of filing the requisite notice (see id. at 892). In the present case, because the grounds for their claims are distinct, both the Morrises and Great West could have maintained separate actions. The lack of identity between Great West's and the Morrises' claims

distinguishes it both factually and legally from the single claim raised in Moreno. For this reason, Moreno cannot serve as precedent to save Great West from its duty of notice.

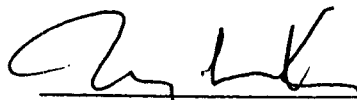
### CONCLUSION

At bottom, Great West's argument is simply that because UDOT had actual notice, through Lloyd Morris' notice of claim, of the damage to the semi-tractor, UDOT can show no prejudice to its interests that justifies dismissal of Great West's claim. As discussed above, the defendant's actual knowledge of a claim does not relieve a plaintiff of its notice obligation. No showing of prejudice on UDOT's part is necessary to overcome Great West's procedural default. Because Great West did not file a notice of claim, its action cannot go forward, as the district court correctly concluded. Because Great West has not shown error in this conclusion, UDOT respectfully requests the Court to affirm the district court's Order Granting Summary Judgment Against Plaintiff Great West Casualty Company.

### STATEMENT REGARDING ORAL ARGUMENT AND PUBLISHED OPINION

Because there is little case law addressing the meaning of Moreno v. Board of Education, defendant believes oral argument would assist in clarifying its scope. Consequently, defendant respectfully requests both oral argument and a published opinion in this case.

DATED this 19th day of April, 2000.



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

CERTIFICATE OF MAILING

I hereby certify that on this 19th day of April, 2000, I caused to be mailed, postage prepaid, two true and correct copies of the foregoing BRIEF OF APPELLEE to the following:

Michael F. Richman  
MICHAEL F. RICHMAN & ASSOCIATES  
5684 south Green Street  
Salt Lake City, Utah 84123

Preston L. Handy  
SIEGFRIED & JENSEN  
5684 South Green Street  
Salt Lake City, Utah 84123



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