

1989

Virginia Yearsley v. OFFICER DEAN JENSEN,  
WASHINGTON TERRACE POLICE  
DEPARTMENT, OFFICER WALLERSTEIN,  
SOUTH OGDEN POLICE DEPARTMENT,  
OFFICER STEVE SMITH, RIVERDALE  
POLICE DEPARTMENT WASHINGTON  
TERRACE CITY, SOUTH OGDEN CITY, and  
RIVERDALE CITY : Opposition to Appellant's  
Petition for Writ of Certiorari

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Utah Supreme Court  
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UTAH SUPREME COURT

BRIEF

890217

IN THE SUPREME COURT, STATE OF UTAH

VIRGINIA YEARSLEY,

Plaintiff/Appellant,

vs.

OPPOSITION TO APPELLANT'S  
PETITION FOR WRIT OF  
CERTIORARI

OFFICER DEAN JENSEN, WASHINGTON  
TERRACE POLICE DEPARTMENT,  
OFFICER WALLERSTEIN, SOUTH  
OGDEN POLICE DEPARTMENT,  
OFFICER STEVE SMITH, RIVERDALE  
POLICE DEPARTMENT WASHINGTON  
TERRACE CITY, SOUTH OGDEN CITY,  
and RIVERDALE CITY,

890217

Case No. 86880145CA

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IN THE SUPREME COURT, STATE OF UTAH

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VIRGINIA YEARSLEY,

Plaintiff/Appellant,

vs.

OPPOSITION TO APPELLANT'S  
PETITION FOR WRIT OF  
CERTIORARI

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QUESTION PRESENTED

Whether there are "special and important reasons" for granting review by a writ of certiorari.

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IN THE SUPREME COURT, STATE OF UTAH

---

VIRGINIA YEARSLEY,

Plaintiff/Appellant,

vs.

OPPOSITION TO APPELLANT'S  
PETITION FOR WRIT OF  
CERTIORARI

OFFICER DEAN JENSEN, WASHINGTON  
TERRACE POLICE DEPARTMENT,  
OFFICER WALLERSTEIN, SOUTH  
OGDEN POLICE DEPARTMENT,  
OFFICER STEVE SMITH, RIVERDALE  
POLICE DEPARTMENT WASHINGTON  
TERRACE CITY, SOUTH OGDEN CITY,  
and RIVERDALE CITY,

Case No. 86880145CA

Defendants/Appellees.

---

OPINIONS BELOW

On March 30, 1989, the Utah Court of Appeals affirmed the order and judgment of the trial court. The Order of Affirmance is attached as Appendix "A." The Findings of Fact and Conclusions of Law of the trial court is attached as Appendix "B."

JURISDICTION

Defendants do not dispute the jurisdiction of this court to consider a petition for writ of certiorari to review an order of the Utah Court of Appeals.

### CONTROLLING STATUTES AND RULES

Utah Code Ann. § 63-30-13 (1953, as amended)

Utah Supreme Court Rule 43

Utah Rule of Civil Procedure 15(a)

The text of these statutes and rules is set out verbatim in Appendix "C".

### STATEMENT OF THE CASE

#### Disposition Below

This case arises out of the plaintiff's claims against Washington Terrace City, South Ogden City, Riverdale City, a police officer from each of the three cities, and their respective police departments for trespass and assault. The Second Judicial District Court for Weber County, the Honorable David E. Roth, granted summary judgment in favor of all defendants on November 16, 1987. (Appendix "B"). Plaintiff appealed to this court which transferred the case to the Utah Court of Appeals. The Utah Court of Appeals issued an order of affirmance on March 30, 1989. (Appendix "A").

#### Statement of the Facts

During the late evening hours of August 28, 1983, defendant police officers were acting in the regular course of their



duties when an altercation broke out at plaintiff's home.

(Appendix "B," Findings of Fact, ¶ 1.) Plaintiff was arrested, handcuffed, placed in a police vehicle, and taken to McKay Dee Hospital where she was examined for injuries, all prior to midnight on August 28, 1983. (Appendix "B," Findings of Fact, ¶¶ 1, 2.) After her examination, plaintiff was transferred to the Weber County Sheriff's Department where she was booked at 1:20 a.m. on August 29, 1983. (Appendix "B," Findings of Fact, ¶ 2.)

On August 29, 1984, plaintiff filed a notice of claim against defendants alleging trespass and assault. That notice of claim was filed one year and one day after the alleged trespass and assault. (Appendix "B," Findings of Fact, ¶ 3.) All of the acts that plaintiff complained of in her Complaint occurred on August 28, 1983. (Appendix "B," Findings of Fact, ¶ 4.)

The trial court concluded that plaintiff's claims arising from the alleged assault and trespass on August 28, 1983, were barred by plaintiff's failure to comply with the one year notice of claim requirement of Utah Code Ann. § 63-30-13 (1953, as amended) and granted defendants' Motion for Summary Judgment. (Appendix "B," Conclusions of Law, ¶ 1.) The trial court also denied plaintiff's request to amend her complaint. The court reasoned that plaintiff's proposed claim for false or unlawful

arrest would also be barred by Utah Code Ann. § 63-30-13 (1953, as amended) since plaintiff's arrest occurred on August 28, 1983. (Appendix "B," Conclusions of Law, ¶ 2.) Additionally, the court rejected plaintiff's request to amend to include a claim for malicious prosecution since that cause of action was so different from the cause of action defendants were put on notice of in plaintiff's August 29, 1984 notice of claim. (Appendix "B," Conclusions of Law, ¶ 3.)

The Utah Court of Appeals affirmed the order and judgment of the trial court on the grounds that the notice of claim made against the defendants pursuant to Utah Code Ann. § 63-30-13 (1953, as amended), was untimely. (Appendix "A.")

#### ARGUMENT

THE TRIAL COURT AND UTAH COURT OF APPEALS APPROPRIATELY GRANTED AND AFFIRMED SUMMARY JUDGMENT TO THE DEFENDANTS ON THE BASIS OF PLAINTIFF'S FAILURE TO FILE A TIMELY NOTICE OF CLAIM. ACCORDINGLY, THIS COURT SHOULD DENY PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI.

**A. There Is No "Special and Important Reason" for Granting Review by a Writ of Certiorari.**

Review by a writ of certiorari is a matter of judicial discretion, not of right, and is granted only for "special and important reasons." Utah Supreme Court Rule 43. Rule 43 states the type of reasons that should be considered for granting certiorari. This court may review a court of appeals

case when the court of appeals decision conflicts with another court of appeals decision or a decision of this court, or when the court of appeals makes an extreme departure from the usual course of judicial proceedings or when the decision involves an important question of law which has not been, but should be, settled by this court. This case does not fall within the categories of special and important reasons for granting certiorari.

This is a simple case of failure to file a timely notice of claim pursuant to the statutory requirement of the Governmental Immunity Act. To state a claim against a governmental entity or its employee, the plaintiff must strictly comply with the Governmental Immunity Act. Cornwall v. Larsen, 571 P.2d 925 (Utah 1977). If the plaintiff does not, the claim is barred. This court has consistently held that the right to recover damages against a governmental entity is statutory, and "can be availed of when there has been compliance with the conditions upon which the right is conferred." Id. at 926 (quoting Hamilton v. Salt Lake City, 99 Utah 362, 106 P.2d 1028, 1030 (1940)). "Full compliance with [the Act's] requirements is a condition precedent to the right to maintain a suit." Cornwall, 571 P.2d at 926 (quoting Scarborough v. Granite School Dist., 531 P.2d 480, 482 (Utah 1975)). Thus, plaintiff has no right to sue a governmental entity where she has not fully complied with the Act.

Under the Act, plaintiff should have served a notice of claim within one year after the claim arose. Utah Code Ann. § 63-30-13 (1953, as amended). Plaintiff's cause of action for trespass and assault arose on August 28, 1983, but her notice of claim was not served until August 29, 1984, one day beyond the statutory period. Accordingly, under § 63-30-13 her claim is barred.

The trial court and the Utah Court of Appeals applied the statute to the facts, and upheld case law from this court requiring strict compliance with the Governmental Immunity Act. Neither court made an extreme departure from the accepted course of judicial proceedings, nor did they render a decision in conflict with Utah case law. Accordingly, the plaintiff's Petition for Writ of Certiorari should be denied.

B. The Trial Court Appropriately Denied Plaintiff's Request for Leave to Amend Her Complaint.

Plaintiff claims that the trial court erred in denying her the opportunity to amend her Complaint to include an unlawful arrest or false imprisonment claim and a malicious prosecution claim and, that the Utah Court of Appeals improperly reviewed that decision. Utah Rule of Civil Procedure 15(a) requires that leave be "freely given" to amend a complaint, but only "when justice so requires." The trial court did not step outside the bounds of Rule 15(a).

The trial court concluded that to allow the plaintiff to amend to include an unlawful arrest or false imprisonment claim would be futile in light of the fact that the alleged unlawful arrest took place one year and one day before the notice of claim was filed. A cause of action for false imprisonment arises when the plaintiff is subjected to wrongful imposition on her freedom of movement. Tolman v. K-Mart Enters., 560 P.2d 1127 (Utah 1977). Plaintiff's claim for false imprisonment, like false arrest, arose when she was handcuffed on August 28, 1983; it was then that she was denied her freedom of movement. A claim for unlawful arrest or false imprisonment is time barred and an amendment to the Complaint to include one or both is futile, because plaintiff did not file a notice of claim until August 29, 1984. The trial court appropriately denied plaintiff's request for leave to amend her Complaint to include such causes of action.

The trial court also found that an amendment of the Complaint to include a malicious prosecution claim would not be in the interest of justice because that cause of action was much different from the one that the defendants were put on notice of in the August 29, 1984, notice of claim. New defendants would have come into play in a malicious prosecution lawsuit because the police officers and their departments have nothing to do with the prosecution of crimes. Furthermore,

plaintiff plead guilty to disorderly conduct and all other charges against her were dismissed through a plea agreement. Because her guilty plea was entered voluntarily, it provides conclusive evidence of the existence of probable cause for the prosecution, negating any cause of action for malicious prosecution. 52 Am.Jur.2d Malicious Prosecution § 179 (1970).

The trial judge was acting within his discretion to deny plaintiff leave to amend her Complaint and the Utah Court of Appeals upheld that decision by summarily affirming his Order. Accordingly, this court should deny plaintiff's Petition for Writ of Certiorari. Neither court stepped outside of its judicial boundaries nor did they render a decision in conflict with Utah rules or case law.

C. Plaintiff's Causes of Action Are Not Continuous Torts.

Plaintiff also argues that the causes of action of assault and battery and false arrest or false imprisonment, are continuing torts, and that in her instance they continued into the early morning hours of August 29, 1983. Thus, she argues she can treat August 29 as the day her causes of action arose for purposes of the one year deadline for filing her notice of claim. Her argument has no basis in fact or law. Her cited authority does not involve assault and battery or false arrest. As a matter of law, her causes of action for assault and battery and false arrest or imprisonment arose on August 28, 1983.

Plaintiff cites a nuisance case and breach of easement case for the proposition that her assault and battery and false arrest or imprisonment causes of action are continuing torts. See Shors v. Branch, 221 Mont. 390, 720 P.2d 239 (1986); Baker v. Burbank-Glendale-Pasadena Airport, 39 Cal.3d 862, 218 Cal.Rptr. 293, 705 P.2d 866 (1985) cert. denied, 475 U.S. 1017 (1986). According to plaintiff's own authority, "continuing torts [are] those torts in which the tortious act can be readily abated." Shors, 720 P.2d at 243 (citations omitted). In Shors, the court held that the defendant's act of fencing off a road over which plaintiff had an easement was a continuing tort because it was an act that could have been abated at any time. Similarly, in Baker, the California Supreme Court explained that "the classic example of a continuing nuisance is an ongoing or repeated disturbance, such as the one before us today caused by noise, vibration, or foul odor." Baker, 705 P.2d at 870.

Neither case involves a cause of action like plaintiff's that arose from a single fight and a single arrest. The damage from the arrest and fight might have continued, but the torts themselves did not. They began and ended within a few minutes on the 28th of August, 1983. Assault, battery and false arrest or imprisonment are not continuing torts. The trial court properly considered the totality of the circumstances in granting summary judgment for the defendants, and the Utah Court of Appeals affirmed. Neither court made a departure from the law

or the ordinary course of judicial proceedings. Accordingly, plaintiff's Petition for Writ of Certiorari should be denied.

CONCLUSION

Because there are no "special and important reasons," for granting plaintiff's Petition for Writ of Certiorari, it should be denied.

DATED this 13<sup>th</sup> day of June, 1989.

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and Smith

SCMJLS377



IN THE UTAH COURT OF APPEALS

Case No. 880145-CA

I dissent because, in my view, the actions upon which plaintiff has sued continued from August 28th into August 29, 1983, on the false imprisonment and malicious prosecution claims. The notice of claim filed under Utah Code Ann. § 63-30-13 (1986) should be liberally construed to include the issues plaintiff raised in her proposed amended complaint and was, therefore, timely. Based upon that notice of claim, the trial court abused its discretion in rejecting the proposed amended complaint. Consequently, summary judgment should not have been granted.

CERTIFICATE OF MAILING

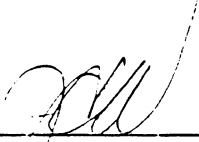
I hereby certify that on the 4th day of April, 1989, a true and correct copy of the foregoing Order of Affirmance was mailed to each of the following:

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Honorable David Roth.  
Second District  
Weber County  
#94172



---

Julia C. Whitfield  
Case Management Clerk

APPENDIX "B"

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---

IN THE SECOND JUDICIAL DISTRICT COURT FOR WEBER COUNTY

STATE OF UTAH

---

VIRGINIA YEARSLEY,

Plaintiff,

vs.

OFFICER DEAN JENSEN, OFFICER  
STEVEN WALLERSTEIN, and OFFICER  
STEVEN SMITH,

Defendants.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
SUMMARY JUDGMENT

Civil No. 94172

---

This matter having come on for hearing before the Honorable

represented by John T. Caine, defendant Dean Jensen being represented by Andrew M. Morse, defendant Steven Wallerstein being represented by Joy L. Sanders, and defendant Steven Smith being represented by Dale J. Lambert, the Court having heard oral argument, having reviewed the memoranda, exhibits, and affidavits, and with good cause appearing therefor, does now enter its:

#### FINDINGS OF FACT

1. That during the late evening hours of August 28, 1983, the defendant police officers were acting in the course and scope of their duties when an altercation broke out at plaintiff's home. Prior to midnight on the 28th, plaintiff was arrested, handcuffed, placed in a police vehicle, and taken to McKay Dee Hospital where she was examined for possible injuries resulting from the altercation with police.

2. The certified copy of plaintiff's medical records from McKay Dee Hospital shows that she was admitted for her examination at 11:38 p.m. on August 28, 1983. After the examination was completed, she was transferred to the Weber County Sheriff's Department where she was booked at 1:20 a.m. on August 29, 1983.

3. On August 29, 1984, Plaintiff filed a notice of claim alleging trespass and assault. The notice of claim was filed one year and one day after the alleged trespass and assault.

4. All acts complained of in plaintiff's Complaint occurred on August 28, 1983.

5. Plaintiff's notice of claim did not comply with Utah Code Ann. § 63-30-13 (1965 as amended).

6. Plaintiff pled guilty to and was convicted of disorderly conduct as a result of the altercation on August 28, 1983.

From the foregoing Findings of Fact, the Court hereby enters its:

#### CONCLUSIONS OF LAW

1. That the plaintiff's claims arising from the alleged assault and trespass on August 28, 1983, are barred by plaintiff's failure to comply with the notice of claim provisions of Utah Code Ann. § 63-30-13 (1965 as amended).

2. That since plaintiff's arrest occurred on August 28, 1983, an Amended Complaint as requested by plaintiff, to include a claim for false or unlawful arrest would also be barred by plaintiff's failure to comply with Utah Code Ann. § 63-30-13 (1965 as amended).

3. Although plaintiff has requested leave to amend to include a claim for malicious prosecution, that cause of action is quite different from the causes of action defendants were put on notice of in plaintiff's notice of claim and in

plaintiff's Complaint and would, therefore, be improper as well as untimely

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED, AND DECREED that defendants' Motion for Summary Judgment is granted and that plaintiff's Complaint is dismissed with prejudice, no cause of action, without costs

DATED this 16 day of November, 1987

BY THE COURT.

David E Roth  
David E Roth  
District Court Judge

APPROVED AS TO FORM

SNOW, CHRISTENSEN & MARTINEAU

By Joy L Sanders  
Joy L Sanders  
Attorneys for Defendant  
Wallerstein

11/5/87  
Date

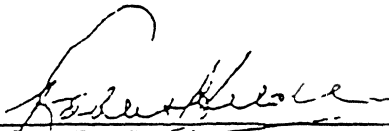
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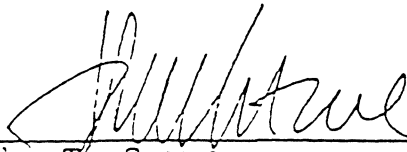
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By

  
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Smith

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Date

  
John T. Caine

Attorney for Plaintiff

11-10-87  
Date

SCMJLS194

## APPENDIX "C"

A claim against a political subdivision 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 governing body of the political subdivision within one year after the claim arises, or before the expiration of any extension of time granted under § 63-30-11(4).

Utah Code Ann. § 63-30-13 (1953, as amended).

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor wholly measuring the court's discretion, indicate the character of reasons that will be considered:

(1) When a panel of the Court of Appeals has rendered a decision in conflict with the decision of another panel of the Court of Appeals on the same issue of law;

(2) When a panel of the court of appeals has decided a question of state or federal law in a way that is in conflict with a decision of this court;

(3) When a panel of the Court of Appeals has rendered a decision that has so departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision; or

(4) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by this court.



Utah Supreme Court Rule 43 (effective April 20, 1987).

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served, or if the pleading is one to which no responsive pleading is permitted and action has not been placed upon the trial calendar, he may so amend it in time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

Utah Rule of Civil Procedure 15(a).

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief in Opposition to Plaintiff/Appellant's Petition for Writ of Certiorari by mailing four copies of the same, postage prepaid, to John T. Caine, Esq., 2568 Washington Boulevard, Ogden, Utah, 84401, this 14<sup>th</sup> day of June, 1989.

SNOW, CHRISTENSEN & MARTINEAU

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Andrew M. Morse  
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