

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 : Brief of Respondent

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Utah Supreme Court

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

DOCKET NO.

**890217**

VIRGINIA YEARSLEY,

Plaintiff,

Case No. 890217

vs.

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,

Defendants.

DEC

Clerk, Supreme Court

RESPONDENTS' BRIEF ON APPEAL

WRIT OF CERTIORARI FROM A DECISION  
BY THE UTAH COURT OF APPEALS

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### JURISDICTION

Jurisdiction of this appeal is by writ of certiorari to the court of appeals under Utah Code Annotated §§ 78-2-2(2) & (5) (1953, as amended). The dismissal of this tort claim was affirmed by the court of appeals.

### ISSUES PRESENTED FOR REVIEW

The issues presented for review are:

1. Whether summary judgment was properly issued by the trial court; and
2. Whether the trial court properly denied the plaintiff's motion to amend her complaint.

### CONTROLLING STATUTES AND RULES

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

Utah Code Ann. § 63-30-11 (1953 as amended)

Utah Rule of Civil Procedure 15(a)

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

### STATEMENT OF THE CASE

#### 1. NATURE AND DISPOSITION OF THE CASE.

On August 28, 1983, plaintiff Virginia Yearsley spent the day drinking with friends at Pine View Reservoir. At approximately 10:00 p.m., she and her friends were returning to her house in her friends' motor home when they were stopped by defendant Officer Jensen for suspicion of driving under the

influence of alcohol. Verbal sparring followed and Jensen called for backups. When the defendant backup officers arrived, they arrested plaintiff on a variety of charges. She resisted, struggled, but was finally handcuffed and put in a cruiser.

After she pled guilty to and was convicted of disorderly conduct, she filed a notice of claim against the defendants for assault, battery and trespass. The defendants filed a motion for summary judgment because her notice was filed too late, beyond the year deadline. To avoid dismissal, the plaintiff unsuccessfully argued that the torts were continuing and she was free to file her notice of claim after the year deadline had passed. She also moved to amend to allege wrongful arrest and malicious prosecution claims. The court held that she missed the filing deadline, that she could not state a claim on either theory, and entered summary judgment.

Plaintiff appealed the dismissal of the claims against the policemen, but did not appeal the dismissal of the three defendant governmental entities. She also appealed the denial of her motion to amend. This court transferred the case to the Utah Court of Appeals, which issued an Order of Affirmance on March 30, 1989. (Appendix "A"). A writ of certiorari was issued by this court.

2. STATEMENT OF FACTS.

(1) During the late evening hours of August 28, 1983, the defendant police officers were acting in the regular course of their duties when a fight broke out at the plaintiff's home between the plaintiff and the officers. (Appendix "B", Findings of Fact, ¶ 1). Plaintiff was arrested, handcuffed, placed in a police car, and taken to McKay Dee Hospital where she was examined for injuries. All this happened before midnight on August 28, 1983. (Appendix "B", Findings of Fact, ¶¶ 1, 2).

(2) After her hospital exam, the plaintiff was taken 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).

(3) Plaintiff pled guilty to and was convicted of disorderly conduct as a result of the altercation. (Appendix "B", Findings of Fact ¶ 6).

(4) On August 29, 1984, plaintiff filed a notice of claim against the 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).

(5) All the acts that the plaintiff complained of in her complaint occurred on August 28, 1983. (Appendix "B", Findings of Fact, ¶ 4).

(6) The trial court concluded that plaintiff's claims arising from the alleged assault and trespass and other conduct on August 28, 1983, were barred by plaintiff's failure to comply with 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).

(7) The trial court also denied plaintiff's request to amend her complaint to allege wrongful arrest because that claim was also 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).

(8) The court rejected plaintiff's request to amend to allege malicious prosecution since that cause of action was so different from the assault claim listed in her notice of claim that that notice did not cover the malicious prosecution claim. (Appendix "B", Conclusions of Law, ¶ 3).

(9) The Utah Court of Appeals affirmed the order and judgment of the trial court on the grounds that the plaintiff's notice of claim was untimely under Utah Code Ann. § 63-30-13 (1953 as amended). (Appendix "A").

#### SUMMARY OF ARGUMENT

Summary judgment was properly issued on plaintiff's assault and battery and trespass claims because these claims are not continuing torts, they arose on August 28, 1983 and, therefore, were barred because plaintiff failed to file a timely notice of claim.

Plaintiff's request to amend to allege wrongful arrest was properly denied for two reasons. First, she was arrested on August 28, 1983, and her claim was barred because she did not file a timely notice of claim. Second, she could not state a claim for wrongful arrest because she had pled guilty to one of the charges arising from the arrest and, thus, could not show that the arrest was without probable cause.

For two reasons, the trial court properly denied plaintiff's motion to amend to allege malicious prosecution. First, she had plead guilty to one of the charges for which she was prosecuted. Thus, she could not show that the prosecution resulted in her favor and could not state a claim for malicious prosecution. Second, her claim was barred because she failed to file any notice of claim for malicious prosecution under U.C.A. § 63-30-13 (1953 as amended).

POINT I

PLAINTIFF'S ASSAULT AND BATTERY AND TRESPASS  
CLAIMS WERE PROPERLY DISMISSED BECAUSE SHE  
FAILED TO FILE A TIMELY NOTICE OF CLAIM.

**A. All Plaintiff's Causes of Action Arose a Year and a Day Before She Filed a Notice of Claim.**

This is a simple case of failure to file a timely notice of claim pursuant to the Governmental Immunity Act. Utah Code Ann. § 63-30-1, et seq. (1953 as amended). 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. Madsen v. Borthick, 658 P.2d 672 (Utah 1983). 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)). "[F]ull compliance with [the Act's] requirements is a condition precedent to the right to maintain a suit." Cornwall, 571 P.2d at 926 (quoting Granite School District, 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.

The Act provides that a notice of claim shall be filed "within one year after the claim arises." U.C.A. § 63-30-13 (1953 as amended). If it is not, the claim is barred. Id.

Section 63-30-11 provides that "[a] claim arises when the statute of limitations that would apply if the claim were against a private person begins to run." U.C.A. § 63-30-11(c) (1953, as amended).

The plaintiff's assault, battery, and trespass claims all arose on August 28, 1983. The plaintiff's cause of action for assault arose when one of the officers attempted to unlawfully use force or to inflict bodily harm on the plaintiff, causing the plaintiff to become apprehensive. Coleman v. Employment Security Dept., 25 Wash. App. 405, 607 P.2d 1231 (Wash. App. Div. I 1980).

Her cause of action for battery arose when an officer first touched her. Cassidy v. Findlay, 568 P.2d 142 (Mont. 1977) (assault and battery arises when injury inflicted); Restatement of Torts (Second) § 13. It is undisputed that she was threatened and touched at her home on the evening of August 28, 1983. (Appendix "B", Findings of Fact, ¶¶ 1,2.) (Appellant's Brief, p. 9).

Here, Mrs. Yearsley does not allege that she was assaulted on the 29th, but only on the 28th. It is undisputed that she fought with the police only on the 28th. Her assault and battery action arose then. She did not file her notice of claim until a year and a day after her cause of action arose. Thus, her claim is barred. U.C.A., § 63-30-13 (1953 as amended).

For the same reason her trespass action is also barred because it also arose on August 28, 1983, when the defendant officers stepped onto the plaintiff's property. Restatement of Torts (Second) § 158. W. Prosser and W. Keaton, Law of Torts, § 13, p. 83, n.55 (5th Ed. 1984). The appellant apparently concedes that this claim is barred because she does not raise it on her appeal.

B. Trespass, Assault and Battery and Wrongful Arrest Are Not Continuing Torts.

To avoid dismissal due to her failure to file a timely notice of claim, she alleges that assault and battery, trespass, and the wrongful arrest claim she wants to make, are continuing torts. She argues that in her instance these torts continued into the early morning hours of August 29, 1983, so she can treat that day as the day her causes of action arose for purposes of the one year deadline for filing her notice of claim.

Her novel continuing tort theory has no basis in fact or law. Her cited authority does not even concern assault or battery or unlawful arrest or trespass, but rather involve nuisances and breaches of easements. 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 authority, "[c]ontinuing 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 acts 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 court explained that, "[t]he classic example of a continuing nuisance is an ongoing or repeated disturbance, such as the one before us that is 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. She was not the victim of "ongoing or repeated disturbance" because she was not repeatedly arrested or repeatedly assaulted. Baker, 705 P.2d at 870. Her arrest and assault began and ended within a few minutes on August 28th, 1983. Assault, battery, trespass and false arrest are simply not continuing torts. Plaintiff has cited no authority that they are, and none exists. The trial court properly considered the totality of the circumstances in granting summary judgment.

Assuming for the sake of argument that these are continuing torts, her notice of claim was still untimely. The Act provides that a plaintiff must file a notice of claim within a year of when a claim arises, and, "[a] claim arises when the statute of

limitations that would apply if the claim were against a private person begins to run." U.C.A. §§ 63-30-11, 13 (1953, as amended). Thus, even if the torts were continuing, a claim for them arose when the torts began, not later as they continued. U.C.A. § 63-30-11 (1953 as amended). She was required to file a notice within a year of when they arose, but she did not. U.C.A. § 63-30-13 (1953 as amended). Accordingly, the trial court and the court of appeals were correct when they held that the plaintiff's assault and battery, trespass and arrest claims were barred because the plaintiff failed to file a timely notice of claim.

#### POINT II

UNDER U.R.C.P., RULE 15(A), THE TRIAL COURT PROPERLY DENIED THE PLAINTIFF'S MOTION TO AMEND TO ALLEGE UNLAWFUL ARREST AND MALICIOUS PROSECUTION CLAIMS.

Plaintiff correctly points out that generally leave to amend is liberally allowed in the interest of justice. Chadwick v. Nielsen, 763 P.2d 817 (Utah App. 1988). She charges that the trial court abused its discretion by refusing her leave to amend to allege malicious prosecution and wrongful arrest. Plaintiff, however, fails to recognize that the court was not deciding whether a new recognizable claim ought to be tried in light of time restraints or fairness to the opposition. That was not the kind of issue before the court. Rather, it properly tested the

merits of the plaintiff's proposed claims and held that they were not recognizable because she could not state a claim for malicious prosecution or wrongful arrest, and denied her motion because the amendments would be futile.

Courts commonly refuse requests to amend "where the proposed amendment fails to allege facts which would support a valid theory of liability or where the party moving to amend has not shown that the proposed amendment has substantial merit."

Verhein v. South Bend Lathe, Inc., 598 F.2d 1061, 1063 (7th Cir. 1979) (per curiam). Foman v. Davis, 371 U.S. 178, 9 L.Ed. 2d 222, 83 S.Ct. 227 (1962).<sup>1</sup> Courts are encouraged to determine whether proposed amendments state a claim. Otherwise, the amendment would be allowed, and the defendant would be forced to file a Rule 12(b)(6) motion on the basis that the amended complaint failed to state a claim. There is no need for this

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<sup>1</sup>As the Utah Rules of Civil Procedure are fashioned after the federal rules, Utah courts may properly rely on federal rules authorities. Pate v. Marathon Steel Corp., 692 P.2d 765 n.1 (Utah 1984); Heritage Bank & Trust v. Landon, 770 P.2d 1009, 1010 n.2 (Utah App. 1989).

In each of the following cases the appellate court affirmed the trial court's denial of a motion to amend where it would be futile to permit the amendment because the proposed cause of action failed to state a claim. Marks v. Centran Corp., 747 F.2d 1536 (6th Cir. 1984) cert. denied 471 U.S. 1125; Emory v. Texas State Board of Medical Examiners, 748 F.2d 1023 (5th Cir. 1984); Martin v. Associated Truck Lines, 801 F.2d 246 (6th Cir. 1986); Federal Insurance Company v. Gates Lear Jet Corp., 823 F.2d 383 (10th Cir. 1987); California Architectural Building Products v. Franciscan Ceramics, Inc., 818 F.2d 1466 (9th Cir. 1987).

duplicitous and wasteful procedure. Consequently, courts, upon motion, simply review the amendment under Rule 12(b)(6) at the Rule 15(a) stage. This practice is also consistent with Rule 1 of the Utah Rules of Civil Procedure that requires the Rules be interpreted and applied "to secure the just, speedy and inexpensive determination of every action." U.R.C.P. Rule 1(a). Foman v. Davis, 371 U.S. 178, 9 L.Ed. 2d, 222, 83 S.Ct. 227 (1962).

Here the trial court followed the admonition of Rule 1 and the practice of the cited courts when it tested plaintiff's proposed amended complaint against the standards of U.R.C.P. Rule 12(b)(6). See Lowe v. Sorenson Research Co., Inc., 779 P.2d 668 (Utah 1989). The court determined that any complaint by the plaintiff for unlawful arrest or malicious prosecution could not state a claim upon which relief could be granted, and consequently properly denied the plaintiff's Rule 15(a) motion.

A. Plaintiff Could Not State a Claim for Wrongful Arrest.

Two reasons support the court's denial of the plaintiff's motion to amend to allege a wrongful arrest: Failure to file a timely notice of claim, and failure to show lack of probable

cause for the arrest because she had pled guilty and been convicted of one of the charges arising from the arrest<sup>2</sup>.

The court concluded on the undisputed facts that the plaintiff was arrested on August 28, 1983 and that her August 29, 1984 notice of claim was untimely under U.C.A. § 63-30-13 (1953 as amended). It is undisputed that before midnight on the 28th the plaintiff was handcuffed, and taken into custody and placed in a police car. At that point she was arrested. (See ¶ 1 of the Findings of Fact, Appendix B.) Tolman v. K-Mart Enterprises of Utah, 569 P.2d 1127 (Utah 1977)<sup>3</sup>.

Utah law holds that the tort of false arrest arises the instant there is "wrongful imposition of control over [one's] freedom of movement." Tolman, 569 P.2d at 1128. In Tolman plaintiff was arrested for shoplifting. He sued for false imprisonment and argued that his cause of action did not arise when he was taken into custody, but instead when he was acquitted of the charges. The court disagreed:

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<sup>2</sup>This court may affirm the trial court's decision on any proper ground despite the trial court's having assigned another reason for its decision. Buehner Block Co. v. UWC Associates, 752 P.2d 892, 895 (Utah 1988).

<sup>3</sup>A person is under arrest when he is deprived of his liberty by an officer who intends to arrest him. State v. Solis, 8 Wash. App. 484, 685 P.2d 672 (1984). According to the Restatement of Torts (Second) § 112, "[a]n arrest is the taking of another into custody for the actual purported purpose of bringing the other before a court, or of otherwise securing the administration of the law."

[the] general rule is that a statute limiting the time in which an action may be brought begins to run when cause of action arises. In this instance, that was the time of the claimed false imprisonment, which occurred as it is recited above on November 16, 1974."

560 P.2d at 1128.

Thus, under Tolman, plaintiff's cause of action for false arrest arose on August 28, 1983 she was handcuffed; it was then that she was denied her freedom of movement. State v. Solis, supra. As recited above, she failed to file her notice of claim until August 29, 1984, one day after the end of the one-year limitation period. Since her false arrest claim failed as a matter of law, she was properly denied leave to amend under Rule 15(a).

Her false arrest action also failed because she could not meet the element of the claim that the arrest be without probable cause. Rabalais v. Blanche, 524 So. 2d 772 (La. App. 3d Cir. 1988). If the plaintiff claiming false arrest was convicted of one of the offenses for which she was arrested, then as a matter of law there was probable cause to affect the arrest. Id. In Rabalais v. Blanche, the plaintiff brought an action against its employer for malicious prosecution and false arrest. The plaintiff had pled guilty to misdemeanor theft. The court granted summary judgment on the false arrest claim holding that "clearly, there was probable cause to detain and question

appellant in light of the fact that a guilty plea was entered in this case." 524 So. 2d at 773.

Here it is undisputed that the plaintiff pled guilty to and was convicted of disorderly conduct. (Appendix "B" Findings of Fact ¶ 6). As a matter of law, therefore, she could not prove that she was arrested without probable cause. Her claim fails. The court properly concluded that "the plaintiff could not recover under the facts alleged." Lowe v. Sorenson Research Co., 779 P.2d 668, 668 (Utah 1989).

B. Plaintiff Could Not State a Claim for Malicious Prosecution.

The tort of malicious prosecution has four elements: "(1) A criminal proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the accused; (3) absence of probable cause for the proceeding; [and] (4) 'malice', or a primary purpose other than that of bringing an offender to justice." Amica Mutual Insurance Company v. Schettler, 768 P.2d 950, 959 (Utah App. 1989) (citing Callioux v. Progressive Insurance Company, 745 P.2d 838, 843 (Utah App. 1987) (citing W. Prosser and W. Keaton, Law of Torts, § 119 (5th Ed. 1984))). "The failure to establish any one of the four elements is fatal to the cause of action." Id.

A guilty plea to one of the charges brought against a plaintiff in a malicious prosecution case prevents the plaintiff from proving that the proceeding terminated in favor of the

accused. Killian v. Fuller, 162 Mich. App. 210, 412 N.W.2d 698 (1987); Heilgeist v. Chasser, 98 Wis. 2d 97, 295 N.W.2d 26 (Wis. App. 1980); Rabalais v. Blanche, 524 So. 2d 772 (La. App. 3d Cir. 1988). In each of these cases, the accused pled guilty or was convicted of one of the charges for which she was prosecuted. Each court held that the plaintiff's malicious prosecution claim failed as a matter of law.

The same rule and result apply here. It is undisputed that the plaintiff pled guilty to and was convicted of disorderly conduct arising out of the incident on August 28, 1983. Consequently her claim was barred. The court had no choice but to deny her Rule 15(a) motion to amend her complaint to allege malicious prosecution.

In addition, the plaintiff's failed to file a notice of claim of her malicious prosecution claim. Her notice of claim against the policemen and their cities was for injuries occurring when the defendants "physically beat the claimant in the course of an arrest of a third party." It mentions nothing about a claim for malicious prosecution. Therefore, the notice violated U.C.A. § 63-30-11 that requires a notice of claim to "set forth . . . the nature of the claim asserted." U.C.A. 63-30-11 (1953 as amended). Plaintiff's notice mentions nothing about malicious prosecution, but only speaks of a beating. Thus, even if she could have stated a claim for malicious prosecution, her claim is

nevertheless barred for failure to file a notice of claim pursuant to U.C.A. 63-30-11 (1953, as amended). Cornwall v. Larsen, supra. The court's refusal to allow her to amend to state what would have been a futile malicious prosecution claim was therefore proper under U.R.C.P. Rule 15(a). Foman v. Davis, supra.

#### CONCLUSION

For the reasons stated above, the court should affirm the Utah Court of Appeals decision.

DATED this 6th day of December, 1989.

SNOW, CHRISTENSEN & MARTINEAU

By Andrew M. Morse  
Andrew M. Morse  
Attorneys for Respondents  
Washington Terrace City and  
Officer Jensen

SNOW, CHRISTENSEN & MARTINEAU

By Joy L. Sanders  
Joy L. Sanders  
Attorneys for Respondants South  
Ogden City and Officer  
Wallerstein

CHRISTENSEN, JENSEN & POWELL

By Robert K. Hilder  
Robert K. Hilder  
Attorneys for Respondents  
Riverdale City, Officer Steve  
Smith and Riverdale Police  
Department

AMM443

IN THE UTAH COURT OF APPEALS

-----cc0cc-----

Virginia Yearsley, )  
Plaintiff and Appellant, )  
v. )  
Officer Dean Jensen, Officer )  
Steven Wallerstein, and )  
Officer Steven Smith, )  
Defendants and Respondents. )

ORDER OF AFFIRMANCE

Case No. 880145-CA

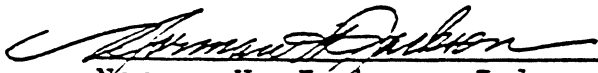
Before Judges Jackson, Greenwood, and Newey (Retired Juvenile Judge  
Sitting by Special Assignment) (On Rule 31 Hearing).

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The order and judgment of the trial court is affirmed because  
the notice of claim made against defendants, pursuant to Utah Code  
Ann. § 63-30-13 (1986), was not timely filed.

Dated this 30th day of March, 1989.

FOR THE COURT:

  
Norman H. Jackson, Judge

Newey, Judge dissenting:

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.

APPENDIX "B"

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IN THE SECOND JUDICIAL DISTRICT COURT FOR WEBER COUNTY

STATE OF UTAH

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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

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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

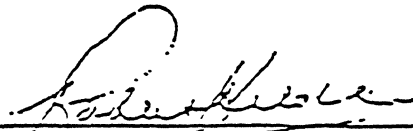
11/5/87  
Date

SNOW, CHRISTENSEN & MARTINEAU

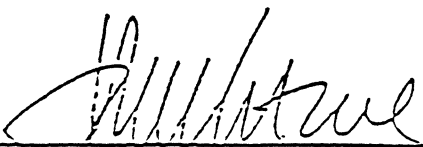
By Andrew M. Morse  
Andrew M. Morse  
Attorneys for Defendant  
Jensen

11-6-87  
Date

SNOW, CHRISTENSEN & MARTINEAU

By   
Dale J. Lambert  
Attorneys for Defendant  
Smith

6 Nov. 87  
Date

  
John F. Cairne  
Attorney for Plaintiff

11-10-87  
Date

SCMJLS194

APPENDIX "C"

Utah Code Ann. § 63-30-11 (1953, as amended).

**Claim for injury -- Notice -- Contents -- Service --  
Legal Disability**

(1) A claim arises when the statute of limitations that would apply if the claim were against a private person begins to run.

(2) Any person having a claim for injury against a governmental entity, or against an employee for an act or omission occurring during the performance of his 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.

(b) The notice of claim shall be signed by the person making the claim or that person's agent, attorney, parent, or legal guardian, and shall be directed and delivered to the responsible governmental entity according to the requirements of Section 63-30-12 or 63-30-13.

- (4) (a) If the claimant is under the age of majority, mentally incompetent and without a legal guardian, or imprisoned at the time the claim arises, the claimant may apply to the court to extend the time for service of notice of claim.

- (b) (i) After hearing and notice to the governmental entity, the court may extend the time for service of notice of claim.
- (ii) The court may not grant an extension that exceeds the applicable statute of limitations.

(c) In determining whether or not to grant an extension, the court shall consider whether the delay in serving the notice of claim will substantially prejudice the governmental entity in maintaining its defense on the merits.

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

**Claim against political subdivision or its employee -- Time for filing notice.**

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 Section 63-30-11, regardless of whether or not the function giving rise to the claim is characterized as governmental.

#### **Utah Rules of Civil Procedure**

##### **Rule 15. Amended and supplemental pleadings.**

(a) **Amendments.** 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 the action has not been placed upon the trial calendar, he may so amend it at any 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. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

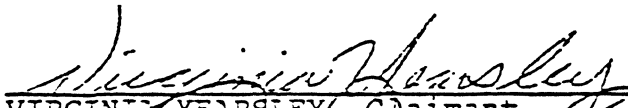
APPENDIX "D"

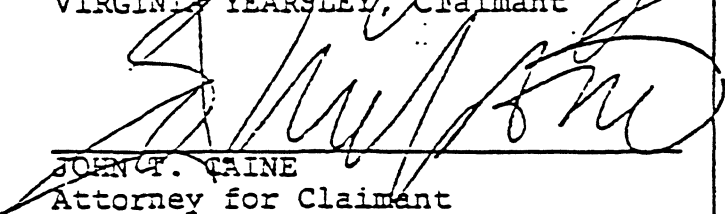
NOTICE OF CLAIM AGAINST  
GOVERNMENTAL ENTITIES

Pursuant to Section 63-30-12, Utah Code Annotated, as amended, 1980, comes now Virginia Yearsley, and hereby gives notice of her intention to pursue an action against the City of Washington Terrace, the City of Riverdale, ~~and the City of South Ogden~~ for the actions of certain police officers which injured her on August 29, 1983.

WHEREFORE, claimant requests \$100,000 for physical and emotional distress, in that the police officers from the City of Washington Terrace, the City of Riverdale and the City of South Ogden physically beat the claimant in the course of an arrest of a third party.

DATED this 17 day of June, 1984.

  
VIRGINIA YEARSLEY, Claimant

  
JOHN T. TAINE  
Attorney for Claimant

CERTIFICATE OF SERVICE

Pursuant to Rule 21(d), Rules of the Utah Supreme Court, I hereby certify that four (4) true and correct copies of the foregoing Respondents' Brief on Appeal was mailed, first class, postage prepaid to the following:

John T. Caine  
Richards, Caine & Allan  
2568 Washington Boulevard  
Ogden, UT 84401

Robert K. Hilder  
Christensen, Jensen & Powell, P.C.  
175 South West Temple, Suite 510  
Salt Lake City, UT 84101

Joy L. Sanders  
Snow, Christensen & Martineau  
Post Office Box 45000  
Salt Lake City, UT 84145

DATED this 6<sup>th</sup> day of December, 1989.

SNOW, CHRISTENSEN & MARTINEAU

By Andrew M. Morse  
Andrew M. Morse  
Attorney for Appellants  
Washington Terrace City and  
Officer Jensen