2012

Fernando Orosco v. Clinton City : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

FERNANDO OROSCO, Plaintiff / Appellant, vs. CLINTON CITY, Defendant / Appellee.	Trial Court No. 100700782 Appellate Court No. 20120013-CA

BRIEF OF APPELLEE

Appeal from an Order of Summary Judgment, Second Judicial District Court
The Honorable David R. Hamilton

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LIST OF ALL PARTIES

The following are the parties to this matter:

Fernando Orosco - *Plaintiff / Appellant*

Clinton City - *Defendant / Appellee*

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BRIEF OF APPELLEE

Appellee Clinton City (the City) respectfully submits this brief in opposition to Fernando Orosco's (Mr. Orosco) appeal from summary judgment. The District Court correctly dismissed Mr. Orosco's claims when it held that even under the continuing torts doctrine the claims were barred by the one-year statute of limitation found in section 63G-7-402 of the Utah Code (Governmental Immunity Act, notice of claim provision). The District Court's Ruling and the Findings and Order of Summary Judgment are attached as an Addendum to Mr. Orosco's Appellate Brief. This Court should affirm.

JURISDICTION

Jurisdiction is proper in this Court pursuant to section 78A-4-103(2)(j) of the Utah Code. This appeal has been transferred from the Utah Supreme Court.

DETERMINATIVE STATUTES

Utah Code § 63G-7-401. Claim for injury -- Notice -- Contents -- Service -- Legal disability -- Appointment of guardian ad litem.

> (1) (a) Except as provided in Subsection (1)(b), a claim arises when the statute of limitations that would apply if the claim were against a private person begins to run.
> (b) The statute of limitations does not begin to run until a claimant knew, or with the exercise of reasonable diligence should have known:
> (i) that the claimant had a claim against the governmental entity or its employee; and
> (ii) the identity of the governmental entity or the name of the employee.
> (c) The burden to prove the exercise of reasonable diligence is upon the claimant.
> (2) Any person having a claim 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;
(iii) the damages incurred by the claimant so far as they are known; and
(iv) if the claim is being pursued against a governmental employee individually as provided in Subsection 63G-7-202(3)(c), the name of the employee.
(b) The notice of claim shall be:
(i) signed by the person making the claim or that person's agent, attorney, parent, or legal guardian; and
(ii) directed and delivered by hand or by mail according to the requirements of Section 68-3-8.5 to the office of:
(A) the city or town clerk, when the claim is against an incorporated city or town;
(B) the county clerk, when the claim is against a county;
(C) the superintendent or business administrator of the board, when the claim is against a school district or board of education;
(D) the presiding officer or secretary/clerk of the board, when the claim is against a local district or special service district;
(E) the attorney general, when the claim is against the state;
(F) a member of the governing board, the executive director, or executive secretary, when the claim is against any other public board, commission, or body; or
(G) the agent authorized by a governmental entity to receive the notice of claim by the governmental entity under Subsection (5)(e).
(4) (a) If an injury that may reasonably be expected to result in a claim against a governmental entity is sustained by a claimant who is under the age of majority or mentally incompetent, that governmental entity may file a request with the court for the appointment of a guardian ad litem for the potential claimant.
(b) If a guardian ad litem is appointed, the time for filing a claim under Section 63G-7-402 begins when the order appointing the guardian is issued.
(5) (a) Each governmental entity subject to suit under this chapter shall file a statement with the Division of Corporations and Commercial Code within the Department of Commerce containing:
(i) the name and address of the governmental entity;
(ii) the office or agent designated to receive a notice of claim; and
(iii) the address at which it is to be directed and delivered.
(b) Each governmental entity shall update its statement as necessary to ensure that the information is accurate.
(c) The Division of Corporations and Commercial Code shall develop a form for governmental entities to complete that provides the information required by Subsection (5)(a).
(d) (i) A newly incorporated municipality shall file the statement required by Subsection (5)(a) promptly after the lieutenant governor issues a certificate of

incorporation under Section 67-1a-6.5.

(ii) A newly incorporated local district shall file the statement required by Subsection (5)(a) at the time that the written notice is filed with the lieutenant governor under Section 17B-1-215.

(e) A governmental entity may, in its statement, identify an agent authorized by the entity to accept notices of claim on its behalf.

(6) The Division of Corporations and Commercial Code shall:

(a) maintain an index of the statements required by this section arranged both alphabetically by entity and by county of operation; and

(b) make the indices available to the public both electronically and via hard copy.

(7) A governmental entity may not challenge the validity of a notice of claim on the grounds that it was not directed and delivered to the proper office or agent if the error is caused by the governmental entity's failure to file or update the statement required by Subsection (5).

63G-7-402. Time for filing notice of claim.

A claim against a governmental entity, or against an 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, is barred unless notice of claim is filed with the person and according to the requirements of Section 63G-7-401 within one year after the claim arises regardless of whether or not the function giving rise to the claim is characterized as governmental.

63G-7-403. Notice of claim -- Approval or denial by governmental entity or insurance carrier within 60 days -- Remedies for denial of claim.

(1) (a) Within 60 days of the filing of a notice of claim, the governmental entity or its insurance carrier shall inform the claimant in writing that the claim has either been approved or denied.

(b) A claim is considered to be denied if, at the end of the 60-day period, the governmental entity or its insurance carrier has failed to approve or deny the claim.

(2) (a) If the claim is denied, a claimant may institute an action in the district court against the governmental entity or an employee of the entity.

(b) The claimant shall begin the action within one year after denial of the claim or within one year after the denial period specified in this chapter has expired, regardless of whether or not the function giving rise to the claim is characterized as governmental.

78B-2-303. One year -- Actions on claims against county, city, or town.

Actions on claims against a county, city, or incorporated town, which have been rejected by the county executive, city commissioners, city council, or board of trustees shall be brought within one year after the first rejection.

STATEMENT OF THE CASE

In this case, Mr. Orosco claims that beginning in September 2004 Clinton City allowed water it owns or controls to enter his basement and damage his property (R. at 2). Mr. Orosco has alleged two claims against the City—negligence and nuisance—both based on the same set of facts (R. at 3-5). Mr. Orosco alleges that he filed a notice of claim with the City in May 2010, which the City does not dispute.

At the lower court, the City filed a motion for summary judgment based on Mr. Orosco's failure to comply with the notice of claim provisions of the Governmental Immunity Act of Utah (the Act) and the one-year statute of limitation governing suits against municipalities (Utah Code § 78B-2-303) (R. at 43). The City argued and maintains that Mr. Orosco was aware of his claim at the very latest in February 2009, which was when he sent a detailed letter to the City's insurer describing his claim for water damages; therefore he should have filed his notice of claim with the City by February 2010, not May 2010 (R. 47-50) (for the February 2009 letter, *see* R. at 53-59).

In the alternative, the City argued that the February 2009 letter was a notice of claim and therefore Mr. Orosco had one year and sixty days (based on U.C.A. §§ 78B-2-303 and 63G-7-403) to file suit—until April 2010 (R. at 50-51). The complaint was filed on December 28, 2010 (R. at 1).

Mr. Orosco opposed the motion for summary judgment arguing that any limitations period was tolled by the continuing torts doctrine and that the February 2009 letter was not a notice of claim (R. at 67-68). He failed, however, to dispute the City's facts or set forth his own facts in his opposing memorandum. He merely commented on how two of the City's facts should be interpreted (R. at 46, 66-67, 84-85). Although Mr. Orosco filed an affidavit (R. at 60-65), he failed to include any additional facts in his memorandum opposing summary judgment and made no citation to the affidavit or other supporting materials as required by Rule 7 of the Utah Rules of Civil Procedure (R. 66-70).

RELEVANT FACTS

The district court correctly found there were no material facts in dispute and granted summary judgment in favor of the City (R. at 91-96). It based its decision on the following undisputed facts:

1. Beginning in September 2004, water allegedly owned or controlled by the City entered into Mr. Orosco's basement on separate occasions (R. at 2, 46, 95).
2. On February 10, 2009, Mr. Orosco delivered a letter to the City's insurer titled "Insurance Claim for Water Damage," claiming that the City was at fault (R. at 46, 53-59, 95).
3. Mr. Orosco alleged in the complaint that he filed a notice of claim with the City on May 10, 2010 (R. at 19, 47, 91, 95).

4. Because Mr. Orosco knew the details of his claim in February 2009, he should have filed a proper notice of claim with the City by February 2010, even under the continuing torts doctrine, but he failed to do so (R. 91, 95).
5. May 2010 is well beyond the year allowed under section 63G-7-402 of the Utah Code; therefore Mr. Orosco's claims are barred (R. 91, 95).

Mr. Orosco now appeals, arguing that the District Court failed to construe the facts in his favor and erred when it held that his claims were wholly barred by section 63G-7-402 (*See* Appellant's Brief at 5-6).

SUMMARY OF ARGUMENTS

This Court should affirm the Findings and Order of the District Court and hold that the latest point at which a claim could have arisen even under the continuing torts doctrine was February 2009 and that pursuant to Utah Code § 63G-7-402 Mr. Orosco's claims are barred because he failed to serve a timely notice of claim upon the City.

There are no material facts in dispute preventing summary judgment. Mr. Orosco failed to dispute the City's facts in the lower court and the facts, even construed in the light most favorable to Mr. Orosco, do not show the existence of a continuing, ongoing tort; rather, they show separate, permanent torts. Thus, the continuing torts doctrine does not apply and Mr. Orosco's claims are barred.

If the Court finds Mr. Orosco's claims are not wholly barred, recovery should be limited to damages he received within the year preceding the filing of the notice of claim. Moreover, Mr. Orosco makes no allegation of new damages for the year preceding May 2010; therefore, he is not entitled to any recovery.

Finally, this Court should hold that the purposes of the statutes of limitations governing suits against a city will only be served if Mr. Orosco's claims are barred and summary judgment is granted in favor of Clinton City. Mr. Orosco waited too long after his claims arose (beginning in September 2004) to file suit. This Court should affirm summary judgment in favor of Clinton City.

ARGUMENT

I. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE MR. OROSCO'S MAY 2010 NOTICE OF CLAIM WAS FILED MORE THAN A YEAR AFTER THE CLAIM AROSE

Clinton City is a municipal corporation that can be sued only in accordance with the provisions of the Governmental Immunity Act. The Act provides that a claim against a governmental entity is barred unless it is brought "within one year after the claim arises..." Utah Code Ann. § 63G-7-402. This provision operates as a one-year statute of limitations. *See Warren v. Provo City Corp.*, 838 P.2d 1125, 1128 (Utah 1992).

It is undisputed that Mr. Orosco filed a notice of claim with the City on May 10, 2010, as he alleges in the complaint. The notice of claim, however, was filed more than a year after his claim arose, which properly resulted in summary judgment at the trial court level.

a. Mr. Orosco's claims arose at the latest in February 2009.

Claims against a governmental entity arise "when the statute of limitations that would apply if the claim were against a private person begins to run." Utah Code Ann. § 63G-7-401. "Generally, a statute of limitations is triggered upon the happening of the last event necessary to complete the cause of action." *Cedar Prof. Plaza v. Cedar City Corp.*,

131 P.3d 275, 279 (Utah App. 2006) (quotation and citation omitted). Mere ignorance of the existence of a cause of action will neither prevent the running of a statute of limitations nor excuse a plaintiff's failure to file a claim within the relevant statutory period. *Id.*

Where negligence is alleged against a governmental entity, this Court has explained that a party is not entitled to wait until he knows all of the facts to establish a claim; rather, it is enough that he is aware that the governmental entity's action or inaction has resulted in some kind of harm to his interests. *Id.* The one year period within which he is required to file a notice of claim is not tolled merely because subsequently learned information allowed him to "refine [his] negligence claim." *Id. See also Jepson v. State Dept. of Corrections*, 846 P.2d 485, 488 (Utah App. 1993) (stating that a negligence cause of action begins to run on the date of the accident if the plaintiff sustained injury to support a cause of action, irrespective of whether "the full extent of the damages has been ascertained").

Mr. Orosco was aware of the City's alleged action or inaction that resulted in some kind of harm to him in September 2004 and at the very latest in February 2009. In February 2009, he delivered a letter to City's insurer, titled "Insurance Claim for Water Damages," wherein he stated "[t]his claim is for the Clinton City insurance companies and whom ever [*sic*] else, it may concern." (R. at 54). He outlined his claim as follows:

> I am claiming damages for all of the flooring that has been ruined and replaced in the bottom floor of my house since the first episode in 2004. All of the time that myself and my family, have not been able to use the bottom floor of my house since 2004. All of the physical and mental anguish and stress, that this has caused my family since 2004. All of the structural

> damage, being done to the integrity of the foundation of my house since 2004. All of the value, that my house lost, in the appraisal of 2006, because of the condition of the bottom floor of my house. All of the time and labor that my self and my family spent, cleaning up water, in the bottom floor of my house, since 2004. All of the expenses that my self and my family have incurred since 2004, and any and all expenses, that we will incur, in the future due to this water, coming into my house.

(R. at 2-3, 58-59).

The February 2009 letter identifies separate occasions when water allegedly leaked into Mr. Orosco's basement or sink holes formed (R. at 54 to 59). He states when each incident occurred, when he contacted the City, and what the City did in response. The incidents were sporadic and at times a year apart. It is unknown whether the incidents were related. The cause of each incident is unknown. Each time an incident occurred and Mr. Orosco was injured, a new cause of action arose and he should have filed a notice of claim within a year of the incident.

b. Mr. Orosco had until February 2010 to file a notice of claim.

Because Mr. Orosco was aware of his claims at the latest in February 2009, he should have filed a notice of claim with the City in February 2010. He chose instead to wait until May 2010—more than a year after his claims arose. He had all the necessary information to file a claim in February 2009. The notice of claim requirement is to be strictly followed and enforced. *See Wheeler v. McPherson*, 2002 UT 16, ¶ 11, 40 P.3d 632. Therefore, his claims are barred. This Court should affirm summary judgment in favor of the City.

II. THE CONTINUING TORTS DOCTRINE DOES NOT APPLY BECAUSE MR. OROSCO HAS ALLEGED SEPARATE INCIDENTS

Mr. Orosco contends that the trial court ignored the effect of the continuing torts doctrine when it granted summary judgment in favor of Clinton City, and therefore erred. The trial court, however, specifically stated in its Ruling and Findings and Order that even under the continuing torts doctrine, the latest point at which Mr. Orosco's claims could have arisen was February 2009 (R. at 91, 95). It based its conclusion of law on when Mr. Orosco delivered his letter to the City's insurer outlining his claims for water damage (R. at 91, 95).

Generally, statutes of limitations begin to run "when the cause of action accrues." *Bingham v. Roosevelt City Corp.*, 2010 UT 37, ¶ 56, 235 P.3d 730, 745 (Utah 2010). The continuing torts doctrine is an exception to this general rule, tolling the statute of limitations if the tortious conduct continues unabated. *Id.* The *Bingham* court extended the continuing torts doctrine to negligence actions. *Id.* The facts of Mr. Orosco's case, however, do not merit application of the continuing torts doctrine like in *Bingham.*

In *Bingham,* Roosevelt City diverted water away from an aquifer lowering the surrounding water table and making the soil less saturated for local landowners. The court found that the city's pumping of the wells was "continuing" and "ongoing" and that it could be abated. *Id.* at 746. It found that "each time the city pumps the wells, the harm is aggravated." *Id.* The court stated that the plaintiffs' harm was "the aggregate result of years of the City's pumping water," and recognized that the city "unreasonably" disregarded the potential harm to nearby landowners. *Id.* Moreover, the court recognized

that the City could abate the harm at any time by discontinuing the pumping, but that it had not done so. *Id.* It concluded that the city's actions were therefore continuing and not permanent. *Id.* (an act is "permanent" when "the act or acts [] have ceased to occur," and is "continuing" when "multiple acts [] have occurred, and continue to occur").

In the case at hand, the act or acts alleged are permanent, not continuing. Mr. Orosco's allegations suggest separate incidents of water seeping into his basement once or twice a year. The cause of each of the incidents is unknown. Whether the incidents are related is also unknown.

The City has not unreasonably disregarded potential harm to Mr. Orosco as was the case in *Bingham*. Furthermore, there is no evidence that the City can abate the harm at any time, but chooses not to do so. If the City's actions were continuing, like in *Bingham*, Mr. Orosco's basement would be overflowing with water, or there would be some kind of ongoing, aggregate harm, increasing over time. Instead, Mr. Orosco has alleged, separate, permanent incidents, similar to a water line break. Mr. Orosco has alleged incidents that have not continued unabated.

This Court should find that the facts of this case distinguish it from *Bingham* and that the continuing torts doctrine does not apply. Moreover, Mr. Orosco's claims are based merely on the existence of the city culinary water system in the abstract, and the *Bingham* court suggested this kind of claim does not justify application of the continuing torts doctrine. *See Id.* at 746 (stating that "[i]t is not the existence of the wells in the abstract or the way they were drilled or designed that was allegedly negligent.").

It should also be noted that Mr. Orosco in his Appellate Brief Statement of Facts attempts to set forth new facts which are not properly before this Court. He alleges that the City has repaired a "flush valve" which is "the likely source of the water entering [his] basement." These facts are unfounded. They were not considered by the trial court in the summary judgment motion and should not influence this Court's decision to affirm summary judgment in favor of the City.

III. MR. OROSCO'S RECOVERY, IF ANY, IS LIMITED TO ONE YEAR BEFORE MAY 2010

Even if Mr. Orosco is correct in arguing that his complaint alleges a continuing tort, he is barred from recovering anything caused by actions of the City that occurred prior to May 2009.

The Utah Supreme Court has held that recovery is limited to within one year prior to the filing of the notice of claim. In *Bingham v. Roosevelt City Corp.*, it made clear that while a tort may be continuing, the right to recover damages is still limited to those incurred within the applicable limitations period. The court cited the following from *Walker Drug Co. v. La Sal Oil Co. (Walker I),* 902 P.2d 1229, 1232 (Utah 1995):

> In the case of a continuing trespass or nuisance, the person may bring successive actions for damages until the nuisance [or trespass] is abated, even though an action based on the original wrong may be barred, but recovery is limited to actual injury suffered within the three years prior to commencement of each action.

2010 UT 37, 235 P.3d 730, Fn. 95 (Utah 2010) (quoting *Walker I*, 902 P.2d at 1232) (emphasis added); *see also Breiggar Properties, L.C. v. H.E. Davis & Sons, Inc.*, 2002

UT 53, ¶ 8, 52 P.3d 1133. The *Bingham* plaintiffs conceded that their recovery would be limited by that rule—Mr. Orosco should do likewise.

Although the *Walker* case, cited by the *Bingham* court, did not involve a governmental entity and the applicable limitations period was three years, the same principle applies here. The applicable limitations period for Mr. Orosco's claims is one year prior to the filing of the notice of claim. *See* Utah Code §§ 63G-7-401 and 402. Mr. Orosco filed the notice of claim, as alleged in the complaint in May 2010. Therefore, he is barred from recovering anything caused by actions of the City prior to May 2009.

IV. MR. OROSCO IS NOT ENTITLED TO RECOVER BECAUSE HE HAS NOT ALLEGED ANY NEW DAMAGES SINCE FEBRUARY 2009

The one year statute of limitation effectively bars any recovery for Mr. Orosco because all of the damages alleged in his May 2010 notice of claim and in the complaint were alleged in the letter he sent to the City's insurer in February 2009. He does not allege any new damages to himself or his property during the year prior to May 2010. Although he has alleged subsequent incidents since 2009, those are matters to be taken up in separate actions, and are subject to the notice of claim for each new incident. Because he did not allege any new damages in his May 2010 notice of claim or the complaint, he is barred from recovering on all of his claims.

V. THE PURPOSES OF THE GOVERNMENTAL IMMUNITY ACT WILL BE SERVED BY BARRING MR. OROSCO'S CLAIMS

Mr. Orosco is making claims against the City dating back to September 2004. If the District Court's decision is reversed, the purpose of the notice of claim requirement will be contravened, which is "to provide the governmental entity an opportunity to

correct the condition that caused the injury, evaluate the claim, and perhaps settle the matter without the expense of litigation." *Mecham v. Frazier*, 2008 UT 60, ¶ 17, 193 P.3d 630. This purpose is fulfilled by requiring strict compliance. *Houghton v. Department of Health*, 2005 UT 63, ¶ 20, 125 P.3d 860, 867 (Utah 2005). Moreover, statutes of limitations serve to prevent the unfair litigation of stale claims. *See Davis v. Provo City Corp.*, 2008 UT 59, ¶ 27, 193 P.3d 86.

Mr. Orosco should have filed a notice of claim years ago with the City instead of waiting until May 2010. The trial court correctly found that at the latest his claims arose in February 2009 and therefore his claims are barred.

VI. MR. OROSCO'S CLAIMS ARE ALSO BARRED BY UTAH CODE § 78B-2-203 IF THIS COURT DETERMINES THAT THE FEBRUARY 2009 LETTER CONSTITUTES A NOTICE OF CLAIM

In the alternative, if this Court determines that Mr. Orosco's February 2009 letter, titled "Insurance Claim for Water Damages," constitutes a notice of claim as required under Title 63G, Chapter 7 of the Utah Code, it should hold that his claims are barred by Utah Code Ann. § 78B-2-303 in conjunction with § 63G-7-403. This is purely a question of law, which can be decided by this Court.

Section 78B-2-303 provides that "[a]ctions on claims against a county, city, or incorporated town, which have been rejected y the county executive, city commissioners, city council or board of trustees, shall be brought within one year after the first rejection." Section 63G-7-403 provides that after a valid notice of claim is filed, the governmental entity or its insurance carrier has sixty days in which to approve or deny the claim. Utah Code § 63G-7-403(1)(a). If at the end of the sixty days the claim has not been approved

or denied, it is deemed to be denied. Once the claim is denied, a party has one year in which to initiate an action. Utah Code § 63G-7-403(2)(b).

The relevant dates in this matter are the date the first notice of claim against the City was filed, the date the notice of claim was deemed denied by the City and the date the complaint was filed with the court. The complaint was filed on December 28, 2010. It is alleged by the Plaintiff's complaint that they filed a notice of claim with the City on May 10, 2010 (Complaint ¶ 19). Mr. Orosco filed something very similar to a notice of claim with the City on February 10, 2009. That notice of claim was deemed denied sixty days from February 10, 2009 which would be April 12, 2009. Therefore the complaint should have been filed before April 12, 2010 to be timely. It was not filed until May 10, 2010. Under both Utah Code Ann. § 78B-2-303 and Utah Code Ann. § 63G-7-403(2)(b) Mr. Orosco's claims are barred for failure to file within the applicable statutes of limitations.

CONCLUSION

Based on the foregoing this Court should affirm the Order of the District Court and hold that Mr. Orosco's claims are barred for failure to file a notice of claim within one year of when his claims arose, even under the continuing torts doctrine; or in the alternative, hold that recovery is limited to within one year prior to May 2010 and that Mr. Orosco's failure to allege new damages in his notice of claim or complaint effectively bars any recovery.

Dated this 9th day of July, 2012.

David L. Church
Attorney for Clinton City

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing, along with an electronic copy, were mailed this 9th day of July, 2012 to the following:

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David L. Church

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1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because:

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Dated this 9th day of July, 2012.

David L. Church
Attorney for Clinton City