2012

Fernando Orosco v. Clinton City : Brief of Appellant

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 APPELLANT

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a summary judgment dismissing Plaintiff's claims on the basis that Plaintiff's claims were barred by the provisions of Utah Code Ann. § 63G-7-402. This Court has jurisdiction over this transferred appeal pursuant to Utah Code Annotated §78A-4-103(2)(j) (2012). The Utah Supreme Court's had jurisdiction over the appeal pursuant to §78A-3-102(3)(j) (2009).

ISSUES ON APPEAL AND STANDARD OF REVIEW

Point I

THE TRIAL COURT ERRED WHEN IT DID NOT VIEW THE FACTS PRESENTED IN THE COMPLAINT AND THE INSURANCE CLAIM LETTER IN THE LIGHT MOST FAVORABLE TO PLAINTIFF.

STANDARD OF REVIEW: When reviewing summary judgment, the Court "review[s] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Houghton v. Dep't of Health, 2002 UT 101, ¶ 2, 57 P.3d 1067 (internal quotation omitted).

PRESERVATION: Plaintiff set out the continuing nature of the trespass in Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment (R. at 67). The continuing nature of the trespass is plain from the statements in Mr. Orosco's affidavit, the Insurance Claim for Water Damage and the Complaint. Orosco Affidavit (R. at 63); *see also* Insurance Claim for Water Damage (R. at 55-57) (water entering home in spring 2006, spring 2007, and August 2008); Complaint at ¶ 18 (R. at 3).

Point II

THE TRIAL COURT ERRED WHEN IT DETERMINED THAT PLAINTIFF'S CLAIMS ARE WHOLLY BARRED BY THE LIMITATION PERIOD PROVIDED BY UTAH CODE ANN. § 63G-7-402.

STANDARD OF REVIEW: "In reviewing a trial court's grant of summary judgment, [appellate courts] give no deference to [the trial court's] conclusions of law." Dick Simon Trucking, Inc. v. Utah State Tax Com'n, 2004 UT 11, ¶ 3, 84 P.3d 1197 (citations omitted). The grant of summary judgment is reviewed for correctness. Id. "Likewise, a district court's interpretation of a statutory provision is a question of law that [appellate courts] review for correctness." Id. The applicability of a statute of limitations is a question of law which is reviewed for correctness. Russell Packard Dev., Inc. v. Carson, 2005 UT 14, ¶ 18, 108 P.3d 741. When reviewing summary judgment, the Court "review[s] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Houghton v. Dep't of Health, 2002 UT 101, ¶ 2, 57 P.3d 1067 (internal quotation omitted).

PRESERVATION: Petitioner argued in Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment that the continuing tort doctrine precluded a grant of summary judgment and therefore preserved this issue for appeal (*see* R. at 67-69).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 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).

Utah Code Ann. § 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.

Utah Code Ann. § 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.

Utah Code Ann. § 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.

Utah Rule of Civil Procedure 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without

substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

Mr. Orosco has sued Clinton City. In his complaint he alleged that water repeatedly entered his basement and that Clinton City water lines were the source of the water and sought damages on theories of negligence and nuisance (R. at 2-3). Plaintiff has been experiencing intermittent flooding in his basement since 2004 (R. at 2, 54, 61). He long suspected that Clinton City's culinary water system was the source of the water but only had limited proof as to the source of the water (*see* R. at 62-63). The City, through its agents, unsuccessfully sought a leak and finding none denied that the water was from its water lines (*see* R. at 56-57, 61). Plaintiff finally obtained sufficient evidence to allege that the water was from the City (R. at 63) and served a demand letter to the city on approximately May 10, 2010, by delivering the letter to the agent identified in Clinton City code (R. at 3). Receiving no satisfactory response, Plaintiff filed the complaint in this matter on December 28, 2010 (R. at 1).

Defendant Clinton City moved for summary judgment on the basis that the complaint was barred by Utah Code Ann. §§ 63G-7-402 and/or 78B-2-303 (R. at 43, 47, 50). Defendant's motion proceeded as though the facts in the Complaint were true and sought a finding that Mr. Orosco's claims were time barred (*see* R. at 46-47, relying on facts in complaint as factual basis). The motion relied exclusively upon the Complaint and a notarized letter signed by the Plaintiff (R. at 45-59). Plaintiff opposed the motion

(R. at 60-65, 66-71). The court granted Defendant's motion to dismiss on the basis of the documents and no hearing was requested or held on the matter (R. at 91, 94).

STATEMENT OF THE FACTS

The only facts upon which Plaintiff's motion for summary judgment were decided were the contents of Plaintiff's Complaint (*see* R. at 46-47 where Clinton City relies upon allegations in the Complaint as factual support for its motion), a notarized letter from Plaintiff to Clinton City's insurance company (R. at 54), and Fernando Orosco's affidavit (R. at 78). These documents were the only evidence before the Court when it ruled on the City's motion. Plaintiff pointed to his complaint (R. at 69) and provided the affidavit (R. at 60) in response to the Defendant's statement of facts.

1. In September 2004, water entered and damaged the basement of Mr. Orosco's home in Clinton City. (R. at 54, 61).
2. The water enters Mr. Orosco's home from the outside. (R. at 2, 63).
3. Water seeped into the home from time to time during the subsequent years, sometimes stopping for months at a time and then starting again (R. at 61-63).
4. Water entered Mr. Orosco's home in 2009 and 2010 (R. at 3, 63).
5. After several years of attempting to determine the source of the water, Mr. Orosco had testing performed and substantiated that the water was treated culinary water and the only reasonably likely source was Clinton City's culinary water system. (R. at 63, 2-3).

6. Dennis Cluff, manager of Clinton City's Water Department refused to address the matter because, he claimed, Mr. Orosco had no proof that the water was Clinton City potable water (R. at 56; *see also* R. at 3).
7. Although uncomfortable with the limited and circumstantial evidence against the City, Plaintiff finally determined that he could no longer delay filing suit and brought suit against Clintion City on December 28, 2010.

Although this information was not before the trial court, it is pertinent to note that in May of 2012, during the pendency of this appeal, Mr. Orosco observed Clinton City employees performing repairs on a "flush valve" near his home. Mr. Orosco discovered that the City opens the valve approximately once per year and that the valve was being replaced because it was malfunctioning. The opening of these valves is the likely source of the water entering Mr. Orosco's basement and explains the intermittent nature of the water. This information suggests that the City was periodically taking affirmative action to dump water into the ground near Plaintiff's home but denied liability for the damage and potentially withheld information about possible sources of the water during discovery in this matter.

SUMMARY OF ARGUMENTS

The trial court erred in concluding that the continuing tort rule did not apply to the facts of this case. Clinton City's motion conceded the facts of the complaint and demanded summary judgment on the basis that Mr. Orosco's notice of claim was filed more than one year after he discovered his injury. Mr. Orosco's response set out the continuing tort doctrine and directed the trial court's attention to the allegations of the complaint regarding the ongoing and continuing nature of the alleged negligence and nuisance (R. at 68-69). Mr. Orosco's response also indicated that injury had occurred during the relevant time period for the limitation period (R. at 63). Because Mr. Orosco's claims in the complaint set out the elements of negligence and nuisance during the one year period before his notice of claim (R. at 3, particularly ¶ 18) and the continuing tort doctrine applies to these claims, Mr. Orosco's complaint should not have been dismissed and this matter should be remanded for further proceedings.

ARGUMENT

POINT I

THE TRIAL COURT ERRED WHEN IT DID NOT VIEW THE FACTS PRESENTED IN THE COMPLAINT AND THE INSURANCE CLAIM LETTER IN THE LIGHT MOST FAVORABLE TO PLAINTIFF.

The motion for summary judgment relied for support on the allegations of Plaintiff's Complaint and a letter written by Plaintiff to Clinton City's insurance company ("the Insurance Claim"). In essence, the motion for summary judgment amounted to a motion to dismiss for failure to state a claim. Because the motion for summary judgment conceded the facts alleged in the complaint as true, the allegations of the complaint should be treated as established for the purposes of the summary judgment motion. *See* Brown v. Weis, 871 P.2d 552 (Utah App. 1994) (although defendant sought summary judgment, the parties treated the matter as a motion to dismiss and the Court of Appeals did the same); *see also* . Walker Drug Co. v. La Sal Oil Co., 902 P.2d 1229,1233 (Utah 1995) (opponent of motion for summary judgment not required to affirmatively make showing of facts not raised by movant).

The trial court made no factual finding which goes to Mr. Orosco's ability to pursue claims for damages as to the year before the notice of claim upon which the complaint relied. Rather, the trial court made findings as to various dates and facts which have no bearing upon the viability of Mr. Orosco's continuing tort claims (R. at 95).

Even if this were not the case, a review of the evidence before the trial court viewed in the light most favorable to Mr. Orosco requires factual findings which support his claim that the limitation period does not wholly bar his claims against the city.

None of the findings go to the merits of Mr. Orosco's claims—not even to the merits of the claims subject to the proof of claim statute. Under Utah Code Ann. § 63G-7-402, any claim against Clinton City "is barred unless notice of claim is filed ... within one year after the claim arises...." In this case, there were two claims: negligence and nuisance. The prima facie elements of a claim for negligence are "(1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) that the breach of the duty was the proximate cause of the plaintiff's injury, and (4) that the plaintiff in fact suffered injuries or damages." Webb v. University of Utah, 2005 UT 80, ¶ 9, 125 P.3d 906 (internal quotation marks omitted). Nuisance is not so easily defined, but has been described "as a substantial and unreasonable nontrespassory interference with the private use and enjoyment of another's land." Turnbaugh for Benefit of Heirs of Turnbaugh v. Anderson, 793 P.2d 939, 942 (Utah App. 1990), *quoting* Sanford v. University of Utah, 26 Utah 2d 285, 488 P.2d 741, 744 (1971); Hendricks v. Stalnaker, 380 S.E.2d 198, 200 (W.Va.1989); Restatement (Second) of Torts § 821D (1979). An action for a private nuisance may rest on conduct that is intentional and unreasonable, negligent or reckless...." Sanford, 488 P.2d at 745; Restatement (Second) of Torts § 822.

The trial court made no findings regarding Clinton City's duty, breach of duty, causation or damages (*see* R. at 94-96). Likewise, the trial court made no findings regarding the nuisance claims (id.). Such findings might include that water was not from Clinton City water lines, or that Plaintiff did not suffer damages during the year before he served the May 10, 2010 notice of claim. Based on the evidence before the Court, no such findings could have been made. *See* Memorandum in Support of Defendant's Motion for Summary Judgment (R. at 46-47) (facts asserted in support of summary judgment: (1) Plaintiff claims damage to his home, (2) Plaintiff filed a claim for water damages with insurer on February 10, 2009, (3) the claim for water damages identifies various damages which had accrued in February of 2009, (4) Plaintiff claimed that he filed a notice of claim on May 10, 2010, and (5) the Complaint was filed on December 28, 2010). None of the facts set out by Clinton City, the movant below, go toward the theories that Clinton City was not causing damages or that no damages occurred during the one year before May 10, 2010.

Because these necessary findings were not made, the Court erred in concluding that Plaintiff's claim fails under the continuing trespass doctrine as argued in Point II.

POINT II

THE TRIAL COURT ERRED WHEN IT DETERMINED THAT PLAINTIFF'S CLAIMS ARE WHOLLY BARRED BY THE LIMITATION PERIOD PROVIDED BY UTAH CODE ANN. § 63G-7-402.

Usually, "the statute of limitations begins to run when the cause of action accrues." Bingham v. Roosevelt City Corporation, 2010 UT 37, ¶ 56, 235 P.3d 730 (quotation omitted). The continuing tort doctrine is an exception to this general rule and tolls the statute of limitations "while the tortious conduct continues unabated." Bingham v. Roosevelt City Corporation, 2010 UT 37, ¶ 56, 235 P.3d 730. Bingham established that the continuing tort doctrine applies to negligence actions. Bingham, 2010 UT 37, ¶¶ 56-57, 59. The doctrine also applies to nuisance actions. Bingham at ¶ 56, *citing* Walker Drug Co. v. La Sal Oil Co., 902 P.2d 1229, 1233.

In Bingham, neighboring well users sued because Roosevelt City was lowering the water table and preventing them from getting water. The district court granted summary judgment to Roosevelt City in part on the basis that the statute of limitation barred the plaintiffs' claims because the first signs of the injury were apparent in the early 1990s—more than ten years before the filing of the complaint in 2004. 2010 UT 37 at ¶¶ 6, 54. On appeal, the Utah Supreme Court reversed the district court's determination that the negligence claim was barred by the statute of limitations because "the pumping may be discontinued at any time and the alleged damage will be abated." 2010 UT 37 at ¶ 59.

In Walker Drug, the Utah Supreme Court applied the continuing tort doctrine to an action in nuisance and trespass. The trial court granted summary judgment and the Utah Supreme Court reversed this determination on appeal, reasoning that because the court was unable to "determine as a matter of law whether the alleged contamination is permanent or continuing, a question of fact exists which precludes summary judgment on statute of limitations grounds." Walker Drug Co., Inc. v. La Sal Oil Co., 902 P.2d 1229, 1232 (Utah 1995). The Court also indicated that the plaintiff in Walker Drug had no obligation to show damages within the statutory period because the defendant "failed to present evidence that [Plaintiff] did not sustain any damage...." Id. at 1233; *compare* UTAH R. CIV. P. 56(e)("When a motion for summary judgment is ... supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits... must set forth specific facts showing that there is a genuine issue for trial.").

In Breiggar Properties, L.C., v. H.E. Davis & Sons, Inc., 2002 UT 53, ¶ 11, 52 P.3d 1133 (Utah 2002), the Utah Supreme Court held that dumping dirt one time did not constitute a continuing trespass because the trespass was a single discrete act. In assessing the facts in Breiggar, the Utah Supreme Court discussed Taygeta Corp. v. Varian Associates, Inc., 763 N.E.2d 1053, 436 Mass. 217 (2002). This Massachusetts case involved causing subsurface contamination. The court ruled that the statute of

limitations did not bar recovery even though no affirmative act had been done in several decades because the presence of additional contaminants above ground which continued to seep into the ground and increase the harm constituted a continuing trespass. In Utah, 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." Utah Courts have applied the principle to wells and held that each time the well was pumped constituted continuing negligence which could be discontinued at any time and thereby abate the alleged damage. Bingham v. Roosevelt City Corporation, 2010 UT 37, ¶ 59, 235 P.3d 730.

Normally, a notice of claim must be served on a government entity within one year of the occurrence. Utah Code Ann § 63G-7-402. A normal tort claim is barred if no notice is served—even if an attempt to serve notice is made. *See e.g.* Cedar Prof Plaza v. Cedar City Corp., 131 P.3d 275 (Utah App. 2006). In the situation where a city commits a continuing tort, this rule does not apply and a notice of claim may be served and a suit may be brought until the negligence or nuisance is abated. *See* Bingham v. Roosevelt City Corporation, 2010 UT 37, ¶ 59, 235 P.3d 730. Where a city does not respond to a notice of claim, a Plaintiff must file his claim within one year and 60 days from filing the notice of claim. Utah Code Ann § 63G-7-403.

Like in Bingham, the Plaintiff here has been injured by ongoing conduct and alleged that Clinton City's water system has been leaking into his basement from time to

time since 2004. Complaint at ¶¶ 7,14-16, 18. This is easily distinguished from the single dumping incident in Breiggar where the same dirt sat in one place through the limitation period. Breiggar at ¶ 11. Clinton City's agents affirmatively represented that Clinton is not the source of the water in the face of evidence regarding the chlorine and fluorine in the water (*see* R. at 56). Mr. Orosco's theory before the trial court was that Clinton City is negligently maintaining its water lines and allowing water to enter the ground, travel through the ground, and damage Mr. Orosco's property (R. at 3-4). If Mr. Orosco's claims are true, Clinton City could repair its water lines or otherwise cease its negligent actions at any time and "the negligence or nuisance would be abated" and the flooding would cease in Mr. Orosco's basement. *See* Bingham v. Roosevelt City Corporation, 2010 UT 37, ¶ 59, 235 P.3d 730. Because Clinton City could cease its negligent action at any time and abate the alleged damage, the continuing tort doctrine applies under the controlling precedent of Bingham. *See* 2010 UT 37 at ¶ 59.

The trial court made no finding that water was not from Clinton City water lines. The trial court made no finding that Plaintiff did not suffer damages during the year before he served the May 10, 2010 notice of claim. Based on the evidence before the Court, no such findings could have been made. *See* Memorandum in Support of Defendant's Motion for Summary Judgment (R. at 46-47) (facts asserted in support of summary judgment: (1) Plaintiff claims damage to his home, (2) Plaintiff filed a claim for

water damages with insurer on February 10, 2009, (3) the claim for water damages identifies various damages which had accrued in February of 2009, (4) Plaintiff claimed that he filed a notice of claim on May 10, 2010, and (5) the Complaint was filed on December 28, 2010). None of these facts alleged go toward the theories that Clinton City was not causing damages or that no damages occurred during the one year before May 10, 2010.

The trial court concluded that even under the continuing tort doctrine, "the latest point at which a claim could have arisen in this matter was February 2009...." Plaintiff seeks to martial evidence in support of this conclusion, but the findings and the presented evidence wholly fail to support this combined factual and legal conclusion. The trial court appears to have relied upon the information in Mr. Orosco's possession and concluded that he should have brought suit sooner.[1] This conclusion does not square well with the holding of Bingham and should be reversed.

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[1] Although its analysis was limited, the trial court's approach to the matter would be consistent with a conclusion that the discovery rule did not toll the limitation period for a single negligent act because Mr. Orosco obviously knew of his injury and its source when he prepared the Insurance Claim on February 4, 2009. *See e.g.* Russell/Packard Development, Inc. v. Carson, 2003 UT App 316, ¶¶ 12-13, 78 P.3d 616. If the complaint alleged a single negligent act combined with Mr. Orosco's knowledge in 2009, the trial court's judgment would be unassailable. Because the trial court's approach ignored the effect of the continuing tort doctrine, the trial court erred when it dismissed Mr. Orosco's complaint.

The evidence before the trial court did not contain evidence which would bar a claim for damages as to the year to which the notice of claim applies—the time between May 10, 2009 and May 10, 2010. Rather, the evidence before the trial court included the following:

1. Water entered Plaintiff's basement each year from 2004 through the filing of the Complaint in 2010 (R. at 61-63, particularly ¶¶ 6, 8, 17, 22, 30, 35, 40). *See also* Insurance Claim (R. at 55-56) (2006, 2007), Complaint (R. at 3)(each year from 2005 through 2010).
2. Uncontradicted statements that the entry of water at these times had caused damages to Mr. Orosco. Complaint (R. at 3).
3. The water entering Mr. Orosco's basement was treated drinking water containing fluoride and chlorine (R. at 62, 58-59).
4. The only culinary system close enough to cause this damage to Plaintiff's home belongs to Clinton City (R. at 2, 63).
5. An allegation that Clinton City had failed to properly maintain its water lines (R. at 3).

In the light most favorable to Mr. Orosco, these facts lead to a reasonable inference that water is leaking from Clinton City's water lines and causing injury to Mr. Orosco—including the time between May 10, 2009 and May 10, 2010. There are obvious

measures of damages which were not addressed by Clinton City in its motion, for example, loss in use measured by fair rental value.

A city has a duty to adjoining land owners to maintain the water lines in its control. *See* Egelhoff v. Ogden City, 71 Utah 511, 267 P. 1011 (1928). Water has been escaping Clinton City's water lines, including during the claim period, and this is a breach of Clinton City's duty. This water entered Mr. Orosco's land and his home and caused him injury during the year before he served his notice of claim. Mr. Orosco's damages include loss of the ability to use his basement and the time and effort expended to remove water from his basement. The facts before the trial court show that some of these incidents occurred in the year before the filing of the Complaint. These facts and allegations make a prima facie case for trial on this matter. Absent evidence which overcomes the reasonable inference that the large amount of water is escaping from Clinton City's water lines and entering Mr. Orosco's home, the trial court could not properly conclude that Mr. Orosco suffered no damages or otherwise had no compensable damages between May 10, 2009 and May 10, 2010. *See* Walker Drug Co., Inc. v. La Sal Oil Co., 902 P.2d 1229, 1233 (Utah 1995) (party opposing summary judgment need not provide affirmative facts where allegations of complaint are not contradicted by movant). Under Walker, the trial court could not throw a burden on Plaintiff to affirmatively show specific injury during the limitation period where Clinton

City did not attempt to show the absence of injury between May 10, 2009 and May 10, 2010. Id.

Evidence barring Mr. Orosco's claims *might* include proof that the leak was from a neighbor's water lines, that there was no leaking from Clinton City's water lines during the limitation period, or that Plaintiff suffered no damages during the limitation period. Unless the court was able to find no dispute as to an essential element of Mr. Orosco's claims for the time between May 10, 2009 and May 10, 2010, a dismissal based on the limitation period is improper. The trial court erred when it concluded that the continuing tort doctrine does not apply to the facts described.

Summary judgment was granted exclusively on the basis that Mr. Orosco's notice of claim was untimely. Because the Plaintiff alleges a nuisance and negligence which are both subject to the continuing tort doctrine and raised this issue in response to Clinton City's motion for summary judgment, granting summary judgment against Mr. Orosco was improper. With all reasonable inferences drawn in favor of Mr. Orosco, the Insurance Claim and Complaint clearly support a cause of action for nuisance and/or negligence. Although damages may be limited to a single year—based on determinations the trial court will need to make after remand—Mr. Orosco's claims against Clinton City are viable and must be allowed to proceed.

In this case, Clinton City demanded summary judgment on the bases that (1) plaintiff was aware of his damages by February 10, 2009, and failed to file a notice of claim with Clinton City within one year and (2) a notice of claim was filed with the City on February 10, 2009 (by giving it to Clinton City's insurance company) and the Complaint was filed more than one year after the notice of claim was deemed denied 60 days after filed. The Complaint sounded in continuing negligence and continuing nuisance. To obtain summary judgment, Clinton City bore the burden to present evidence that any alleged negligence or nuisance terminated more than one year before Mr. Orosco filed his notice of claim on May 10, 2010—or at least to show the court that discovery demonstrated that there was no evidence of Clinton City's negligence. *See* Walker Drug, 902 P.2d at 1232-33 (Utah 1995). The problem with approaching this question on summary judgment becomes immediately apparent: there is no dispute about the presence of the water and whether the water was from Clinton City's pipes or not is a question of fact not susceptible to summary judgment on the basis of the evidence in the record.

Clinton City did not present any evidence to show that any alleged negligence or nuisance terminated more than one year before this date. Mr. Orosco "cannot be penalized for failing to present evidence in opposition" when the allegation of continuing negligence and continuing nuisance was not addressed by the motion for summary

judgment. *See e.g.* Walker Drug, 902 P.2d at 1233 (Utah 1995). Looked at another way, Plaintiff did not make a motion "supported as provided in [Rule 56]" and Plaintiff therefore had no obligation to "set forth specific facts showing that [these other matters constituted] a genuine issue for trial." Because Plaintiff properly alleged and the evidence presented with the summary judgment demonstrated the elements of a negligence action, the Utah Supreme Court's interpretation of the continuing tort doctrine and the provisions of Utah Code Ann § 63G-7-403 require that this matter be remanded to the trial court for further proceedings.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that the Court remand the matter to the trial court with instructions that further proceedings be held to determine Plaintiff's claims of negligence and nuisance.

Dated this 7 day of June, 2012.

FROERER AHLSTROM, PLLC

By: _____
Zane S. Froerer
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2012, I sent a true and correct copy of the foregoing **BRIEF OF APPELLANT** by the indicated method and to the following individual:

David Church
BLAISDELL & CHURCH, PC
5995 South Redwood Road
(Two copies)

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Facsimile
- ☐ Federal Express

Utah Court of Appeals
450 South State
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Salt Lake City, UT 84114-0230
(Original and seven copies)

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Facsimile
- ☐ Federal Express

Heather Nelson

CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because it contains 6,119 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

Dated this 7 day of June, 2012.

FROERER AHLSTROM, PLLC

By: _____
Zane S. Froerer

Attorneys for Appellant

ADDENDUM

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH

FERNANDO OROSCO, PLAINTIFF, VS. CLINTON CITY, DEFENDANT.	**RULING** Case No.:100700782 Judge: DAVID R. HAMILTON

THIS MATTER IS BEFORE THE COURT on Defendant's Motion for Summary Judgment, filed September 19, 2011. Plaintiff's Memorandum in Opposition was filed on October 7, 2011 and was accompanied by a supporting affidavit. Defendant filed a reply on October 18, 2011. Having considered the documentation and argument submitted by both parties, the Court herein issues its ruling.

Pursuant to Section 63G-7-402 of the Governmental Immunity Act of Utah, a claim against a governmental entity 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."[1] The Court concludes that even under the continuing torts doctrine the latest point at which a claim could have arisen in this case is February 2009. Plaintiff did not file a notice of claim until May 2010, which is well beyond the year allowed under Section 63G-7-402.

[1] UTAH CODE ANN. § 63G-7-402 (2011).

Plaintiff's claim, therefore, is barred by applicable statute. Accordingly, the Court GRANTS Defendant's motion for summary judgment.

The Court instructs counsel for Defendant to prepare Findings and an Order consistent with this Ruling.

DATED this 8 day of November, 2011

BY THE COURT

David R. Hamilton
District Court Judge

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing RULING, postage prepaid, to the following:

David L. Church
5995 South Redwood Road
Salt Lake City, Utah 84123

Zane S. Froerer
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SIGNED and DATED this 15th day of November, 2011.

Clerk of the Court

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IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH

FERNANDO OROSCO, Plaintiff, v. CLINTON CITY, Defendant.	**FINDINGS AND ORDER OF SUMMARY JUDGMENT (Defendant's Motion for Summary Judgment)** Case No. 100700782 Judge David R. Hamilton

Defendant Clinton City, represented by David L. Church of Blaisdell & Church, P.C., filed its Motion for Summary Judgment in this matter on September 19, 2011. Plaintiff, represented by Zane S. Froerer of Froerer, Ahlstrom, PLLC, filed a Memorandum in Opposition accompanied by a supporting affidavit on October 7, 2011. Defendant filed a reply on October 18, 2011. The Court, having considered the documentation and argument submitted by both parties, makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT

1. Plaintiff claims that beginning in September 2004 Clinton City damaged a house owned by Plaintiff by negligently allowing City-owned or controlled water to come into Plaintiff's basement.

2. The Plaintiff filed an insurance claim for damages with the City's insurer on or about February 10, 2009, titled Insurance Claim for Water Damage.

3. Plaintiff alleged in the Complaint that he properly filed a notice of claim with the City on May 10, 2010.

4. The Complaint in this matter was filed on December 28, 2010.

CONCLUSIONS OF LAW

1. Pursuant to Section 63G-7-402 of the Governmental Immunity Act of Utah, a claim against a governmental entity is "barred unless notice of claim is filed with a 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."

2. Construing the facts in a light most favorable to Plaintiff, the latest point at which a claim could have arisen in this matter was February 2009, even under the continuing torts doctrine. Plaintiff waited until May 2010 to properly file a notice of claim, which is well beyond the year allowed under Section 63G-7-402 of the Utah Code.

3. Plaintiff's claims are barred by Utah Code 63G-7-402.

4. There is no genuine issue of material fact in dispute, and Defendant Clinton City is entitled to summary judgment as a matter of law on all of the claims in the Complaint.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant's Motion for Summary Judgment is GRANTED.

Dated this 5 day of Dec., 2011.

BY THE COURT:

Honorable David R. Hamilton
District Court Judge

MAILING CERTIFICATE

I hereby certify that on this 21 day of Nov., 2011 I mailed a copy of the foregoing FINDINGS AND ORDER on Defendant's Motion for Summary Judgment, postage prepaid, to the following:

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