

1992

Gordon E. Johnson v. Carolyn Smith, Bear River
Social Services, Mary Miller, Douglas Miller,
Michael L. Miller and Jon J. Bunderson : Brief of
Appellee

Utah Court of Appeals

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Gordon E. Johnson; In Pro Pe.

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92-0115-CA

IN THE UTAH COURT OF APPEALS

GORDON E. JOHNSON, :
Plaintiff/Appellant, : Case No. 920115-CA
v. : Priority No. 16
CAROLYN SMITH, BEAR RIVER :
SOCIAL SERVICES, MARY MILLER, :
DOUGLAS MILLER, MICHAEL L. :
MILLER and JON J. BUNDERSON, :
Defendants/Appellees, :

BRIEF OF APPELLEES CAROLYN SMITH
AND BEAR RIVER SOCIAL SERVICES

- - - - -

APPEAL FROM A FINAL JUDGMENT OF DISMISSAL, IN
THE FIRST JUDICIAL DISTRICT COURT IN AND FOR
BOX ELDER COUNTY, STATE OF UTAH, THE HONORABLE
FRANKLIN L. GUNNELL, PRESIDING.

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FILED

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COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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SOCIAL SERVICES, MARY MILLER,	:	
DOUGLAS MILLER, MICHAEL L.	:	
MILLER and JON J. BUNDERSON,	:	
Defendants/Appellees,	:	

BRIEF OF APPELLEES CAROLYN SMITH AND
BEAR RIVER SOCIAL SERVICES

- - - - -

STATEMENT OF JURISDICTION

This Court has jurisdiction of this matter under Utah Code Ann. § 78-2a-3(2)(j) (effective January 1, 1992) (Supp. 1991).

STATEMENT OF THE ISSUES PRESENTED

1. Whether Johnson's claims against Carolyn Smith, a state employee, and Bear River Social Services, a state agency, are barred because he failed to give timely notice of his claims as required by section 63-30-12 of the Utah Governmental Immunity Act.

This is a question of law, on which the decision below is reviewed by this Court for correctness, giving "no deference to the trial court's view of the law." Ron Case Roofing & Asphalt v. Bloomquist, 773 P.2d 1382, 1385 (Utah 1989).

2. Whether Bear River Social Services is immune from liability under section 63-30-3 of the Utah Governmental Immunity Act for a claim for injuries allegedly caused by the disclosure of a death threat to the police.

This is a question of law, on which the decision below is reviewed by this Court for correctness, giving "no deference to the trial court's view of the law." Ron Case Roofing & Asphalt v. Bloomquist, 773 P.2d 1382, 1385 (Utah 1989).

3. Whether Carolyn Smith was immune from liability for Johnson's claims under 63-30-4(4) of the Utah Governmental Immunity Act where Johnson failed to allege that she acted with fraud or malice.

This is a question of law, on which the decision below is reviewed by this Court for correctness, giving "no deference to the trial court's view of the law." Ron Case Roofing & Asphalt v. Bloomquist, 773 P.2d 1382, 1385 (Utah 1989).

DETERMINATIVE PROVISIONS

Utah Code Ann. §§ 63-30-3 (1989 Repl. Vol 7A); 63-30-4(4) (1989 Repl. Vol 7A); 63-30-10 (effective until July 1, 1990) (1989 Repl. Vol 7A); 63-30-11(4)(a) (1989 Repl. Vol 7A); and 63-30-12 (1989 Repl. Vol 7A).

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from an order of dismissal and judgment dated September 30, 1991 of the First Judicial District Court in and for Box Elder County, the Honorable F. L. Gunnell presiding.

Course of the Proceedings

On July 6, 1990, Johnson filed a complaint against Carolyn Smith, Bear River Social Services, Mary Miller, Douglas Miller, Michael L. Miller and Jon J. Bunderson purporting to state

various claims. On September 21, 1990, Smith filed a motion to dismiss, which was granted by the court as to Smith and Bear River Social Services by order dated July 5, 1991. A final order dismissing all of Johnson's claims against all defendants was entered by the court on September 30, 1991.

Disposition Below

On September 30, 1991, the court entered an order dismissing Johnson's complaint against all defendants and entering a judgment of \$1,826.91 for Bunderson against Johnson for attorneys fees and costs.

Statement of Facts

On July 6, 1990, Gordon E. Johnson filed a complaint alleging that Carolyn Smith, a secretary at Bear River Social Services, "breached a confidential relationship" when on about June 28, 1988, she "turned plaintiff's Reapplication For Assistance [a medicaid application form] over to the police." R. 1-10. The application form contained a handwritten note stating, "On July 20, 1988, I will be in jail for killing an attorney, judge & doctor." R. 5. Johnson alleged that the disclosure of the note caused him to be convicted of assault on a public official, a class B misdemeanor under Utah Code Ann. § 76-8-313 (1988). R. 7.¹

On September 21, 1990, Smith filed a motion to dismiss the complaint on the ground that (1) Johnson's claims were barred by section 63-30-11 of the Utah Governmental Immunity Act requiring

¹Johnson attached to his complaint a copy of the first page of an unpublished memorandum decision of this Court affirming his conviction.

that notice of a claim against a governmental agency or employee be filed with the attorney general and the agency within one year after the claim arises, and (2) Johnson did not allege that Smith had acted with fraud or malice and therefore she was protected from personal liability by section 63-30-4(4) of the Utah Governmental Immunity Act. R. 47-63.

In response to that motion, Johnson claimed that (1) he gave notice of his claim by sending a copy of the complaint to Smith by telefacsimile within a month after the termination of his probation in November 1989, (2) the notice period was tolled by his mental incompetence and because he had been on probation, and (3) he could amend his complaint to add the word "malicious." R. 64, 213-14.

On July 5, 1991, the court entered an order granting Smith's motion and dismissing the action against both Smith and Bear River Social Services. R. 209-10. On September 16, 1991, the court issued a memorandum decision affirming its dismissal of Smith and Bear River Social Services. A final order of dismissal of all claims against all defendants was entered on September 30, 1991.

SUMMARY OF ARGUMENTS

Johnson's claims against both Bear River Social Services, a state agency, and Smith, its employee, are barred for failure to file a notice of claim in accordance with section 63-30-12 of the Utah Governmental Immunity Act. Johnson's claim that he gave notice to Smith fails to satisfy the requirements of section 63-30-12 because (1) no notice was filed with the Attorney General as

expressly required by that section and (2) the notice was admittedly given over one year Johnson's claims arose. The time for filing notice was not tolled by Johnson's probation or mental incompetence where Johnson failed to apply to the court for an extension of time in which to file his notice as required by section 63-30-11(4) of the Act. Moreover, Johnson's claimed mental problems did not relate to the time period in question and did not meet the standard for a finding of "incompetency" for purposes of tolling the statute of limitations. Johnson's probation did not constitute ground for an extension in any event.

In addition, Bear River Social Services is immune from Johnson's state tort law claim. Section 63-30-3 of the Act contains a broad grant of immunity to all governmental entities, and none of the waivers of that immunity contained other provisions of the Act apply here. Section 63-30-10, which waives immunity for negligence claims, is inapplicable because Johnson's injuries allegedly arose from the intentional reporting of a death threat to the police, rather than merely negligent conduct.

Smith is immune from liability under section 63-30-4(4) of the Act absent fraud or malice. Johnson did not allege either fraud or malice in his complaint. Moreover, Johnson never filed an amended complaint, although he could have amended his complaint as a matter of right under Rule 15(a) of the Utah Rules of Civil Procedure.

The trial court's order dismissing Johnson's claims against Smith and Bear River Social Services should be affirmed.

ARGUMENT

POINT I

PLAINTIFF'S CLAIMS AGAINST SMITH AND BEAR RIVER SOCIAL SERVICES ARE BARRED FOR FAILURE TO FILE A NOTICE OF CLAIM AS REQUIRED BY THE UTAH GOVERNMENTAL IMMUNITY ACT

Section 63-30-12 of the Utah Governmental Immunity Act, Utah Code Ann. §§ 63-30-1 et seq. (1989 Repl. Vol 7A), provides as follows:

A claim against the state, 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 Attorney General and the agency concerned 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.

Bear River Social Services is a division of the Utah Department of Social Services, a state agency. As alleged in Johnson's complaint, Smith is a secretary at Bear River Social Services. Thus, the notice requirement of section 63-30-12 applies to Johnson's claims of "breach of confidentiality" against Smith and Bear River Social Services.²

²In his brief, Johnson cites 42 U.S.C. § 1983, but it is unclear what argument he intends to make based on that provision. Appellant's Brief at 7. The notice of claim requirement of the Utah Governmental Immunity Act does not apply to section 1983 claims. Edwards v. Hare, 682 F. Supp. 1528 (D. Utah 1988). However, although Johnson also cited section 1983 below, he never pled, or sought leave to amend to plead, such a claim in this case. Rather, Johnson's complaint cited Peterson v. Idaho First National Bank, 367 P.2d 284 (Idaho 1961), a case which addressed the state common law tort of invasion of privacy. R. 1.

Johnson claims that he provided the required notice by sending a copy of the complaint to Smith by facsimile in November 1989. This alleged notice was defective for at least two reasons: first, it was not filed with the Attorney General and, second, it was not filed within a year after the claim arose.

Section 63-30-12 expressly requires that notice be sent to both the agency and the Attorney General. Therefore, even if the facsimile to Smith could be considered notice properly filed with the agency, Johnson failed to file a notice with the Attorney General and his action against both Smith and Bear River Social Services is therefore barred.

The Utah Supreme Court has strictly construed the requirements of section 63-30-12 and the parallel provision at section 63-30-13 for notice of claims against political subdivisions. For example, in Yearsley v. Jensen, 798 P.2d 1127, 1129 (Utah 1990), the Court upheld the denial of the plaintiff's motion for leave to amend her complaint for trespass and assault to add claims for false arrest and malicious prosecution after the one year deadline. The plaintiff had filed a notice of claim which referred generally to "the actions of certain police officers" on a specified date and alleged that the officers "physically beat" the plaintiff. The Court held that the proposed amendment would have done "violence" to the requirement of section 63-30-11(3)(a)(ii) that the notice of claim set forth "the nature of the claim asserted." Id.

Similarly, in Scarborough v. Granite School Dist., 531 P.2d 480, 482 (Utah 1975), the Court held that oral notice to the school principal and the principal's written report to the school district did not satisfy the notice of claim requirement of section 63-30-13, stating, "We have consistently held that where a cause of action is based upon a statute, full compliance with its requirements is a condition precedent to the right to maintain a suit." Id. See also Sears v. Southworth, 563 P.2d 192, 194 (Utah 1977); Edwards v. Iron County, 531 P.2d 476, 477 (Utah 1975); Varoz v. Sevey, 29 Utah 2d 158, 506 P.2d 435, 436 (Utah 1973) ("Actual knowledge of the circumstances which resulted in the death of the plaintiff's mother by officials of the county does not dispense with the necessity of filing a timely claim.")

Here, the statute expressly requires the notice of claim to be filed with the Attorney General in addition to the agency. Johnson failed to file any such notice and therefore the trial court's dismissal of his complaint must be affirmed.³

Johnson's alleged notice to Smith is also fatally defective because it was untimely. Recognizing this defect, Johnson contends that the time period for filing a notice of claim was tolled because: (1) he was on probation between October 1988 and October 1989 and believed that initiating the lawsuit would

³In Roosendaal Construction & Mining Corp., 28 Utah 2d 396, 398-99, 503 P.2d 446, 448 (1972), the Utah Supreme Court held that a complaint was fatally defective for failure to allege compliance with section 63-30-12. As a condition precedent to filing suit, Scarborough v. Granite School Dist., 531 P.2d 480, 482 (Utah 1975), the filing of the notice of claim must be affirmatively alleged. See U. R. Civ. P. 9(c).

have violated the terms of his probation, and (2) he was mentally incompetent.

Johnson did not allege either of these grounds for tolling the notice of claim period in his complaint. R. 1-10. As discussed in Point III below, Johnson had ample opportunity to amend his complaint to insert these allegations but failed to do so. Under these circumstances, the trial court's dismissal of Johnson's complaint was proper.

Even considering Johnson's claims that he was on probation and was mentally incompetent, however, they are insufficient as a matter of law to toll the time period for filing a notice of claim. Utah Code Ann. § 63-30-11(4)(a) (1989 Repl. Vol. 7A) sets forth the only basis on which the time for filing a notice of claim may be extended. It provides:

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.⁴

Johnson makes no claim that he applied to the court for an extension of time to file the notice of claim. Moreover, even if he had so applied, his probation would not have been ground for an extension under section 63-30-11(4)(a).

Johnson cites Utah Code Ann. § 78-12-36 as support for his contention that the time for filing his notice of claim was tolled by his mental incompetence. That section provides:

⁴This section was amended effective April 29, 1991 to delete the words "or imprisoned."

If a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued, either under the age of majority or mentally incompetent and without a legal guardian, the time of the disability is not a part of the time limited for the commencement of the action.

By its own express terms, section 78-12-36 applies only to the time limited "for the commencement of the action." Thus, even if section 78-12-36 applied to Johnson's claim against the state and its employee, it would operate only to extend the time for commencing a lawsuit, not for the condition precedent of filing a notice of claim.

In Scott v. School Board of Granite School District, 568 P.2d 746 (Utah 1977), the Utah Supreme Court held that section 78-12-36 did toll the notice of claim requirement for minority. However, that holding was based primarily on a finding of a "general legislative intent to protect the causes of minors" and a prior version of section 63-30-11. In 1978, the legislature amended section 63-30-11 to include the specific provisions of subsection 4 for the extension of the time for filing the notice of claim by application to the court. Scott was thus overruled. See Blum v. Stone, 752 P.2d 898, 900 (Utah 1988).⁵

⁵In O'Neal v. Division of Family Services, 821 P.2d 1139 (Utah 1992), the Court addressed the incompetency provision of section 78-12-36 in the context of both the statute of limitations and the notice of claim requirement. The Court did not, however, address the issue of whether that provision applied to the notice of claim requirement in light of the requirement under section 63-30-11 that the claimant apply to the court for an extension of time based on incompetency.

In Scott, the Court also stated that to not toll the notice of claim requirement for minority would be a "denial of due process

Finally, the facts alleged by Johnson in support of his claim of mental incompetency are insufficient to toll the statute.⁶ Johnson's contention was supported only by unauthenticated copies of two letters from a physician, both of which predated the incident that formed the basis of Johnson's complaint. R. 65, 102. The letters referred only vaguely to a "history of psychiatric problems" and a "history of schizophrenia." Id. Thus, Johnson's claimed "incompetency" did not even relate to the time period in question. Moreover, it fell far short of the standard of incompetency for purposes of tolling a statute of limitations. See O'Neal v. Division of Family Services, 821 P.2d 1139, 1142-43 (Utah 1991); Whatcott v. Whatcott, 790 P.2d 578, 581 (Utah App. 1990).

Johnson failed to file notice of his claims against Smith and Bear River Social Services with the Attorney General. His claims are therefore barred. Johnson's claims are also barred because the notice he allegedly sent to Smith was admittedly untimely and the time period for filing such notice was not tolled either by his probation or his incompetency. The trial court's

and equal protection." 568 P.2d at 748. This constitutional concern is allayed under the current version of section 63-30-11 because, as already pointed out, the time for filing the notice of claim may be extended by application to the court. In any event, however, Johnson has not challenged the constitutionality of the notice of claim requirement as applied to a mentally incompetent person. Therefore, this Court should not address that issue here.

⁶In considering a motion to dismiss, the court need consider only the "well-pleaded facts" of the complaint and the inferences from those facts, and may disregard conclusory allegations. See, C. Wright, A. Miller & M. Kane, Federal Practice & Procedure, § 1357, pp. 311-320.

order dismissing Johnson's claims against Smith and Bear River Social Services should therefore be affirmed.

POINT II

BEAR RIVER SOCIAL SERVICES IS IMMUNE FROM
LIABILITY FOR A CLAIM BASED ON THE INTENTIONAL
ACT OF ITS EMPLOYEE

Section 63-30-3 (1989 Repl. Vol 9A)⁷ of the Utah Governmental Immunity Act sets forth a broad, all encompassing grant to governmental entities of immunity from suit:

Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function⁸

Thus, any suit against a governmental entity must be based on a waiver of immunity in some other provision of the Act. No such waiver applies to Johnson's claims here.

Section 63-30-10 (1989 Repl. Vol 7A) contains a waiver of immunity for the "negligent act or omission" of an employee, but it is inapplicable here. Johnson's claim of breach of confidentiality is based on the disclosure to the police of his "reapplication for

⁷This section was amended effective April 29, 1991. The amendments are not pertinent here.

⁸The term "governmental function" is defined broadly in section 63-30-2 as

any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.

assistance form." R. 1-10. Under the circumstances of this case as alleged by Johnson, that disclosure was clearly intentional. The medicaid form contained a handwritten threat to kill an attorney, judge and doctor and Smith disclosed the form to the police. R. 5. Thus, section 63-30-10 does not apply.

There being no waiver of governmental immunity applicable to Johnson's claims, the trial court's dismissal of Johnson's complaint against Bear River Social Services should be affirmed.

POINT III

JOHNSON'S CLAIM AGAINST SMITH IS BARRED ABSENT FRAUD OR MALICE

Section 63-30-4(4) (1989 Repl. Vol. 7A) of the Utah Governmental Immunity Act provides:

An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment or under color of authority, unless it is established tht the employee acted or failed to act due to fraud or malice.

As shown above, Bear River Social Services is immune from liability for Johnson's claims. Thus, under 63-30-4(4), Smith may not be sued for those claims in her representative capacity.

Neither may Smith be sued in a personal capacity absent fraud or malice. Here, Johnson did not allege either fraud or malice in his complaint. In response to Smith's motion to dismiss, Johnson argued that he could amend his complaint to insert the word "malicious." Since Smith and Bear River Social Services never

filed an answer to Johnson's complaint, under Rule 15(a) of the Utah Rules of Civil Procedure, Johnson could have amended his complaint as a matter of right. See Heritage Bank & Trust v. Landon, 770 P.2d 1009, 1010 (Utah App. 1989)(motion to dismiss is not a responsive pleading under U. R. Civ. P. 15(a)).⁹ Despite ample opportunity to do so, Johnson never filed an amended complaint alleging that Smith acted with fraud or malice.¹⁰

Johnson having failed to allege either fraud or malice, the trial court's dismissal of his complaint against Smith should be affirmed.

CONCLUSION

Johnson failed to file notice of his claims against Smith and Bear River Social Services in accordance with the Utah Governmental Immunity Act. Those claims are therefore barred. In addition, Bear River Social Services is immune from Johnson's claim of an intentional breach of confidentiality under the Act. Nor may Smith be held liable for such a claim absent any allegation of

⁹This is true even though other defendants filed answers to Johnson's complaint. See 6 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 1481 at p. 578-79. See also Heritage Bank & Trust v. Landon, 770 P.2d at 1011 (relying on federal authorities in construing U. R. Civ. P. 15(a)).

¹⁰Arguably, an amended complaint with only a conclusory allegation that Smith acted with fraud or malice would not have saved Johnson's claim. Again, in considering a motion to dismiss, the court need consider only the "well-pleaded facts" of the complaint and the inferences from those facts, and may disregard such conclusory allegations. See, C. Wright, A. Miller & M. Kane, Federal Practice & Procedure, § 1357, pp. 311-320. The specific facts of this case as pled by Johnson -- the disclosure of a death threat to the police -- negate any inference of fraud or malice.

fraud or malice. The trial court's order dismissing Johnson's claims should be affirmed.


RESPECTFULLY SUBMITTED this 12th day of March, 1992.

R. PAUL VAN DAM
Attorney General


DEBRA J. MOORE
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Gordon E. Johnson, pro se, 216 West 1st North, Brigham City, Utah 84302, this 12th day of March, 1992.



ADDENDA

ADDENDUM A

63-30-3. Immunity of governmental entities from suit.

Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental

entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

63-30-4. Act provisions not construed as admission or denial of liability — Effect of waiver of immunity — Exclusive remedy — Joinder of employee — Limitations on personal liability.

(1) Nothing contained in this chapter, unless specifically provided, shall be construed as an admission or denial of liability or responsibility insofar as governmental entities or their employees are concerned. If immunity from suit is waived by this chapter, consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person.

(2) Nothing in this chapter shall be construed as adversely affecting any immunity from suit which a governmental entity or employee may otherwise assert under state or federal law.

(3) The remedy against a governmental entity or its employee for an injury caused by an act or omission which occurs during the performance of such employee's duties, within the scope of employment, or under color of authority is, after the effective date of this act, exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless the employee acted or failed to act through fraud or malice.

(4) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice.

63-30-10. Waiver of immunity for injury caused by negligent act or omission of employee — Exceptions — Waiver for injury caused by violation of fourth amendment rights [Effective until July 1, 1990].

(1) Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury:

(a) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused; or

(b) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or civil rights; or

(c) arises out of the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization; or

(d) arises out of a failure to make an inspection or by reason of making an inadequate or negligent inspection of any property; or

(e) arises out of the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause; or

(f) arises out of a misrepresentation by the employee whether or not it is negligent or intentional; or

(g) arises out of or results from riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances; or

(h) arises out of or in connection with the collection of and assessment of taxes; or

(i) arises out of the activities of the Utah National Guard; or

(j) arises out of the incarceration of any person in any state prison, county, or city jail or other place of legal confinement; or

(k) arises from any natural condition on state lands or the result of any activity authorized by the Board of State Lands and Forestry;

(l) arises out of the activities of:

(i) providing emergency medical assistance;

(ii) fighting fire;

(iii) regulating, mitigating, or handling hazardous materials or hazardous waste; or

(iv) emergency evacuations; or

(m) arises out of research or implementation of cloud management or seeding for the clearing of fog.

(2) (a) Immunity from suit of all governmental entities is waived for injury proximately caused or arising out of a violation of protected fourth amendment rights as provided in Chapter 16, Title 78 which shall be the exclusive remedy for injuries to those protected rights.

(b) If Section 78-16-5 or Subsection 77-35-12(g) or any parts thereof are held invalid or unconstitutional, this Subsection (2) shall be void and governmental entities shall remain immune from suit for violations of fourth amendment rights.

**63-30-11. Claim for injury — Notice — Contents — S
— Legal disability.**

(1) A claim arises when the statute of limitations that would apply if a 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.

63-30-12. Claim against state or its employee — Time for filing notice.

A claim against the state, 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 attorney general and the agency concerned 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.

ADDENDUM B

BRIGHAM DISTRICT

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R. PAUL VAN DAM - #3312
Attorney General
EDWARD O. OGILVIE - #2452
Assistant Attorney General
Attorneys for Defendant
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1016

IN THE FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY
STATE OF UTAH

GORDON E. JOHNSON,	:	
Plaintiff,	:	
vs.	:	ORDER GRANTING MOTION TO DISMISS AS TO DEFENDANTS, CAROLYN SMITH, BEAR RIVER SOCIAL SERVICES
CAROLYN SMITH, BEAR RIVER	:	
SOCIAL SERVICES, MARY MILLER,	:	
DOUGLAS MILLER, MICHAEL L.	:	Civil No. 900000339
MILLER, and JON J. BUNDERSON,	:	
Defendants.	:	

BE IT KNOWN in this matter that Defendant, Carolyn Smith, Bear River Social Services, having filed a motion to dismiss; and having submitted affidavits and a memorandum in support thereof; and the Court having reviewed the motion and materials filed in support of said motion hereby finds as follows:

1. That Plaintiff failed to comply with the statutory Notice of Claim Requirement contained in Utah Code Ann. § 63-30-11 (1953), requiring that notice of claim be filed with the Attorney General and the Agency concerned within one year after the claim arose;

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2. That Defendant Carolyn Smith, acted within the scope and course of her employment as an employee of the State of Utah, Bear River Social Services, and may not be sued in her personal capacity, plaintiff having made no allegation, and the record containing no evidence to indicate the existence of possible fraud or malice as required by Utah Code Ann. § 63-30-4 (1953), a section of the Governmental Immunity Act.

WHEREFORE IT IS ORDERED, ADJUDGED AND DECREED that the Defendant, Carolyn E. Johnson's Motion to Dismiss is granted and Plaintiff's Complaint against Defendants Carolyn Smith, Bear River Social Services, is hereby dismissed with prejudice.

Dated this 5 day of July, 1991.

BY THE COURT:


F. L. GUNNELL
First District Court Judge

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy
of the foregoing ORDER GRANTING MOTION TO DISMISS AS TO
DEFENDANTS, CAROLYN SMITH, BEAR RIVER SOCIAL SERVICES, postage
prepaid, this 4 day of May, 1991, to the following:

Gordon E. Johnson
216 West 1st North
Brigham City, Utah 84302

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy
of the foregoing ORDER GRANTING MOTION TO DISMISS AS TO
DEPENDANTS, CAROLYN SMITH, BEAR RIVER SOCIAL SERVICES, postage
prepaid, this 6th day of May, 1991, to the following:

Gordon E. Johnson
216 West 1st North
Brigham City, Utah 84302

Michelle Hardy

BRIGHAM DISTRICT

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Dale J. Lambert, 1871
Karra J. Porter, 5223
CHRISTENSEN, JENSEN & POWELL, P.C.
Attorneys for Defendant Jon J. Bunderson
175 South West Temple, Suite 510
Salt Lake City, Utah 84101
Telephone: (801) 355-3431

IN THE FIRST JUDICIAL DISTRICT COURT FOR BOX ELDER COUNTY
STATE OF UTAH

GORDON E. JOHNSON,)	
)	
Plaintiff,)	
)	ORDER
v.)	
)	
CAROLYN SMITH, BEAR RIVER)	
SOCIAL SERVICES, MARY MILLER,)	
DOUGLAS MILLER, MICHAEL L.)	
MILLER, and JON J. BUNDERSON,)	Civil No. 900000339
)	
Defendants.)	

The Court, having reviewed the material on file in this matter,
and good cause appearing therefore, hereby

ORDERS, ADJUDGES AND DECREES that plaintiff's claims against all
defendants are dismissed with prejudice. Pursuant to Utah Code Ann.
§ 78-27-56, the Court finds plaintiff's claims against defendant Jon
Bunderson were without merit and not brought in good faith.
Accordingly, defendant Bunderson is awarded reasonable attorney fees
and costs incurred in defending plaintiff's claims against him. The
Court finds that \$1725.50 in fees and \$101.41 in costs have
reasonably been expended in defending Bunderson against plaintiff's

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claims, and hereby enters judgment in favor of Bunderson and against plaintiff in the amount of \$1826.91.

DATED this 30 day of September, 1991.

BY THE COURT:

J. L. Hunsell

CERTIFICATE OF SERVICE

This is to certify that on the 26th day of September, 1991, a true and correct copy of the foregoing ORDER OF DISMISSAL was mailed, postage prepaid to:

Gordon E. Johnson
216 West 100 North
Brigham City, Utah 84302
Pro se plaintiff

Michael L. Miller
20 South Main Street
P.O. Box 399
Brigham City, Utah 84302
Attorney for Defendant Mary Miller

Marileyn Smyth