

2002

# Melody Little v. Davis County : Brief of Appellant

Utah Court of Appeals

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

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MELODY LITTLE,

Plaintiff/Appellant,

vs.

DAVIS COUNTY,

Defendant/Appellee.

Case No. 20021039-CA

Priority No. 11

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BRIEF OF APPELLANT MELODY LITTLE

---

Appeal From the Second District Court, Farmington Department  
Judge Michael G. Allphin Presiding

---

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MELODY LITTLE,

Plaintiff/Appellant,

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## Table of Contents

Statement of Jurisdiction .....	1
Statement of Issues .....	1
Standard of Review .....	1
Statutory Provisions .....	1
Statement of the Case .....	1
Statement of Facts .....	2
Summary of the Argument .....	3
ARGUMENT .....	4
I.    DIRECTING AND DELIVERING A NOTICE OF CLAIM TO THE DAVIS COUNTY CLERK’S OFFICE FULFILLS THE STATUTORY REQUIREMENTS. ....	4
II.   DAVIS COUNTY FAILED TO PROPERLY RAISE THE QUESTION WHETHER NOTICE ADEQUATELY RECITED DAMAGES, MAKING DISMISSAL ON THAT BASIS INAPPROPRIATE. ....	8
III.  THE NOTICE OF CLAIM DAMAGES RECITATION ALLOWED DAVIS COUNTY THE OPPORTUNITY TO INVESTIGATE AND SETTLE THE MATTER. ....	8
CONCLUSION .....	10
Utah Code Ann. § 63-30-11 .....	ADDENDUM A
Utah Code Ann. § 68-3-2 .....	ADDENDUM B
District Court Order/Ruling .....	ADDENDUM C
Deposition Excerpt .....	ADDENDUM D

## Table of Authorities

### FEDERAL CASES

<i>Johnson v. City of Bountiful</i> , 996 F.Supp. 1100, 1103 (D. Utah 1998) .....	10
---	----

### STATE CASES

<i>Brown v. Utah Transit Auth.</i> , 40 P.3d 638 (Utah 2002) .....	7
<i>Greene v. Utah Transit Auth.</i> , 2001 UT 109, 37 P.3d 1156 .....	7
<i>Hall v. Utah State Dep't. of Corrections</i> , 2001 UT 34, ¶ 26, 24 P.3d 958 .....	7
<i>Niblock v. Salt Lake City</i> , 100 Utah 573, 111 P.2d 800, 805 (1941) .....	5, 6
<i>Nuñez v. Albo</i> , 2002 UT App 247, ¶ 25, 53 P.3d 2 .....	5
<i>Spencer v. Salt Lake City</i> , 17 Utah 2d 362, 364-65, 412 P.2d 449, 450 (1966) .....	4, 9
<i>State v. Phathamavong</i> , 860 P.2d 1001, 1004 (Utah Ct. App.1993) .....	8
<i>U.P.C., Inc. v. R.O.A. General, Inc.</i> , 990 P.2d 945, 953 (Utah Ct. App.1999) .....	8
<i>Wheeler v. McPherson</i> , 2002 UT 16, ¶ 9, 40 P.3d 632 .....	1, 7

### STATE STATUTES

Utah Code Ann. § 63-30-1 .....	6
Utah Code Ann. § 63-30-11 .....	1-3
Utah Code Ann. § 63-30-13 .....	1-3
Utah Code Ann. § 63-30-4(1)(b) .....	6
Utah Code Ann. § 68-3-2 .....	1, 6
Utah Code § 78-2-2(2)(j) .....	1

Utah Const. Art. VIII, § 3 .....	1
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### Statement of Jurisdiction

This Court has jurisdiction pursuant to Utah Const. Art. VIII, § 3 and Utah Code § 78-2-2(2)(j) (West 2002).

### Statement of Issues

Whether formally serving an individual represented as authorized to accept service on behalf of the Davis County Clerk complies with the Governmental Immunity Act's notice of claim requirement?

### Standard of Review

Under *Wheeler v. McPherson*, 2002 UT 16, ¶ 9, 40 P.3d 632, this Court reviews a “district court's dismissal of a case based on governmental immunity [as] a determination of law that we afford no deference.”

### Statutory Provisions

Utah Code Ann. § 63-30-11 (West 2003) ..... Addendum A

Utah Code Ann. § 68-3-2 (West 2003) ..... Addendum B

### Statement of the Case

Appellant Melody Little brought a claim against Davis County for injuries she sustained at the historic Davis County courthouse in August of 2001. Davis County, on April 4, 2002, filed a Motion for Summary Judgment arguing, *inter alia*, that Melody failed to deliver a notice of claim to the Davis County Clerk and thereby deprived the trial court of jurisdiction under Utah Code Ann. § 63-30-11, 13. (R. 30-32, Def. Mem.

Supp. S.J. at pp. 4-5)<sup>1</sup>. Appellant Melody Little responded that process server Ken Thomson formally served Pat Beckstead, a person held out as authorized to accept service on behalf of the Davis County Clerk, with a notice of claim naming Davis County. (R. 94-95, Pls. Mem. Opp. S.J. at p. 4-5). Davis County replied that (1) the notice was not ‘directed’ to the Davis County Clerk (R. 165, Def. Reply p. 2) and (2) did not state with sufficient specificity the damages claimed and therefor remained deficient under the statute. (Id.).

On November 15, 2002, the Second District Court, Davis County, Judge Michael G. Allphin presiding, ruled that the notice of claim was “not directed to the Davis County Clerk” and “was also deficient when it did not clearly set forth the damages incurred by the claimant so far as they are known.” (R. 309, Ruling On Defendants Motion to Dismiss at p. 4). Accordingly the court found the claims “barred for failure to comply with the notice requirements.” (R. 310 and Id. at 5).

#### Statement of Facts

On August 14, 2000, Melody Little went to the historic Davis County Courthouse to obtain her food handler’s permit. (R. 91, Pls. Mem. Opp. p. 1). While exiting the building, she tripped and fell over a raised portion of concrete, injuring her face and elbow. (R.1, Complaint at 1). Melody and her attorney drafted a notice of claim which

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<sup>1</sup> Note: The District Court’s pagination of the record appears to be somewhat disordered at the time of Appellant’s initial brief. Accordingly, cites are also given to the actual page numbers of the cited pleading.



specified damages as: a broken left arm, damaged teeth, pain and suffering, medical expenses and physical therapy expenses. (R. 44, Def. Mem. S.J. Exh. 1A). On October 25, 2000, process server Ken Thomson attempted to deliver a Notice of Claim to the Davis County Clerk. (R. 94, 123, Pls. Mem. Opp. p. 3 para 5 and Exh. D). Mr. Thomson found the Clerk unavailable and, as is his usual practice, asked if anyone in the office was authorized to accept service on behalf of the Clerk. (Id.). An employee in the office, Pat Beckstead, was represented as available to accept service on behalf of the Davis County Clerk. (Id.) LaMarr Holt, a Davis County employee, knew Pat Beckstead to be an employee of Davis County working within the Davis County Clerk's office. (R. 115, Pls. Mem. at Exh B, p 34). Pat Beckstead also served as the Davis County Clerk's Notary Public. (Record at Def Mem SJ Rawlings Affidavit). Mr. Thomson personally served the Notice of Claim on Pat Beckstead. (R. 125, Pls Mem Opp Exh D). Although Davis County Clerk Steve Rawlings claims the notice of claim was "never directed or delivered to me," two days after service the insurer for Davis County received and processed the notice of claim. (R. 44, Def. Mem. Supp. S.J. at Exh. 1A).

#### Summary of the Argument

Mr. Thomson's directing and delivering the notice of claim to the Davis County Clerk fulfilled all statutory requirements. No statutory language imposes the duty to name the county clerk. Construing the statute to require naming the county clerk not only lacks a basis in the statute's language, but imposes a technical requirement that

specified damages as: a broken left arm, damaged teeth, pain and suffering, medical expenses and physical therapy expenses. (R. 44, Def. Mem. S.J. Exh. 1A). On October 25, 2000, process server Ken Thomson attempted to deliver a Notice of Claim to the Davis County Clerk. (R. 94, 123, Pls. Mem. Opp. p. 3 para 5 and Exh. D). Mr. Thomson found the Clerk unavailable and, as is his usual practice, asked if anyone in the office was authorized to accept service on behalf of the Clerk. (Id.). An employee in the office, Pat Beckstead, was represented as available to accept service on behalf of the Davis County Clerk. (Id.) LaMarr Holt, a Davis County employee, knew Pat Beckstead to be an employee of Davis County working within the Davis County Clerk's office. (R. 115, Pls. Mem. at Exh B, p 34). Pat Beckstead also served as the Davis County Clerk's Notary Public. (Record at Def Mem SJ Rawlings Affidavit). Mr. Thomson personally served the Notice of Claim on Pat Beckstead. (R. 125, Pls Mem Opp Exh D). Although Davis County Clerk Steve Rawlings claims the notice of claim was "never directed or delivered to me," two days after service the insurer for Davis County received and processed the notice of claim. (R. 44, Def. Mem. Supp. S.J. at Exh. 1A).

#### Summary of the Argument

Mr. Thomson's directing and delivering the notice of claim to the Davis County Clerk fulfilled all statutory requirements. No statutory language imposes the duty to name the county clerk. Construing the statute to require naming the county clerk not only lacks a basis in the statute's language, but imposes a technical requirement that

frustrates the waiver of governmental immunity and deprives legitimately injured parties of their right to compensation. Moreover, no specific dollar amount in damages need be stated in order to satisfy the notice of claim requirements. The statute simply requires recitation of damages “so far as they are known.” Utah Code Ann. § 63-30-11(3)(a)(iii) (West 2003). Ms. Little first filed a notice of claim just two months after the incident. While this afforded Davis County the immediate opportunity to remedy the condition, it foreclosed setting forth a definite amount in damages. Of course, “it is the duty of the court to look to substance rather than to technicality in order that plaintiff may have a fair adjudication of her claim.” *Spencer v. Salt Lake City*, 17 Utah 2d 362, 364-65, 412 P.2d 449, 450 (1966). Because no statutory language supports the technical requirements imposed by the trial court, the dismissal of Melody’s claim should not be allowed to stand as precedent.

### ARGUMENT

#### I. DIRECTING AND DELIVERING A NOTICE OF CLAIM TO THE DAVIS COUNTY CLERK’S OFFICE FULFILLS THE STATUTORY REQUIREMENTS.

Directing and delivering a notice of claim to the Davis County Clerk satisfies statutory requirements. Under Utah Code Ann. § 63-30-11(3)(b)(ii)(B) (West 2003) a notice of claim must be “directed and delivered to: the county clerk when the claim is against the county.” Here, process server Ken Thomson attempted to formally serve a notice of claim on the Davis County Clerk, Steve Rawlings. Finding Mr. Rawlings

unavailable, Ken Thomson sought someone who could receive service on his behalf. Pat Beckstead was represented as authorized to accept service on behalf of the Davis County Clerk. Ken Thomson then directed and delivered the notice of claim to the Davis County Clerk through Pat Beckstead.

Providing a notice of claim affords “the responsible public authorities an opportunity to pursue a proper and timely investigation of the merits of a claim and to arrive at a timely settlement, if appropriate, thereby avoiding the expenditure of public revenue for costly and unnecessary litigation.” *Nuñez v. Albo*, 2002 UT App 247, ¶ 25, 53 P.3d 2. Even though Davis County alleges the notice to be improperly ‘directed and delivered,’ the notice nonetheless found its way to McLarens, an international loss adjuster located in Murray, two days after formal service. (R. at 44, Def. Mem. Supp. S.J. at Exh. 1A). The reasonable inference to draw from the facts is that the proper authority, the Davis County Clerk, received the notice of claim and then forwarded it to the insurance adjustors for further handling. Davis County held the opportunity to conduct an investigation and avoid the expenditure of public revenue, but instead chose to construct a defense based on a hypertechnical construction of the statute purportedly requiring that the Davis County Clerk be named.

However, courts should not expand sovereign immunity beyond the language of the statute. While criticizing the doctrine of sovereign immunity, Justice Wolfe long ago noted that while “the matter of lifting immunity is, perhaps, properly the matter of

legislation... it behooves the courts judicially not to extend the doctrine.” *Niblock v. Salt Lake City*, 100 Utah 573, 111 P.2d 800, 805 (1941)(Wolfe, J. concurring). No question exists that Utah appellate courts require ‘strict compliance’ with the Governmental Immunity Act. However, nothing in the statutory language requires that the Davis County Clerk be named. The statute simply necessitates ‘directing and delivering’ and nothing more. *See*, Utah Code Ann. § 63-30-11(3)(b)(ii)(B) (West 2003).

Construing the Act to require that a notice of claim name the entity to which it is directed and delivered not only lacks a basis in statutory language, but also violates the statutory directive to construe waivers of governmental immunity liberally. Statutes in derogation of the common law must be construed to effect their purpose, not thwart the end sought by the legislature. Statutes in derogation of the common law “are to be liberally construed with a view to effect the objects of the statutes and to promote justice.” Utah Code Ann. § 68-3-2 (West 2003). Prior to passage of the Governmental Immunity Act, Utah Code Ann. § 63-30-1 *et. seq.*, the government remained immune from suit for damages under the premise that the King can do no wrong. “It is generally recognized throughout this country and in England that in the absence of a statute a municipality is not liable for the negligent acts of its servants while they are engaged in performing a governmental function or duty.” *Niblock*, 111 P.2d at 801. By passage of the Governmental Immunity Act, “consent to be sued is granted, and liability of the entity shall be determined as if the entity were a private person.” Utah Code Ann. § 63-30-

4(1)(b) (West 2003).

Ken Thomson directed the notice of claim to the Davis County Clerk, Steve Rawlings. Finding Mr. Rawlings unavailable, he delivered the notice to Pat Beckstead, a notary within the Davis County Clerk's office and a person represented as authorized to accept service. Because Ken Thomson directed the notice to the county clerk and delivered it to Pat Beckstead, the trial court erred when it concluded that the failure to *name* the Davis County Clerk equated a failure to properly direct the notice to the required authority. Such a reading lacks a basis in the statutory language and simply serves to expand sovereign immunity, directly frustrating the purpose of waiving immunity so that those injured by government negligence may be compensated.

Moreover, none of the authorities relied upon by either Davis County or the trial court impose a requirement that the Notice of Claim name the office to which it is directed and delivered. In *Wheeler v. McPherson*, the claimant made the mistake of directing and delivering notice of claim to the county commissioners. *Wheeler v. McPherson*, 2002 UT 16, ¶ 16, 40 P.3d 632. The statute requires directing and delivering the notice to the county clerk. Accordingly, the notice in *Wheeler* failed by virtue of being directed and delivered to the wrong authority, namely the county commission and not the county clerk. Similarly, in *Greene v. Utah Transit Authority*, 2001 UT 109, 37 P.3d 1156, *and, Brown v. Utah Transit Auth.*, 40 P.3d 638 (Utah 2002), the claimant failed to deliver the notice to the UTA president or secretary of the

board. Rather, the claimants delivered notice to the claims department/adjustor. Finally, in *Hall v. Utah State Dep't. of Corrections*, 2001 UT 34, ¶ 26, 24 P.3d 958, the claimant conceded failure to comply with the notice requirements when he did not deliver a notice in advance of filing suit. In each of these cases, the claimant wholly failed to direct or deliver a notice of claim to the appropriate office. Because Melody Little directed and delivered a claim, via formal service of process, the trial court erroneously dismissed the claim.

II. DAVIS COUNTY FAILED TO PROPERLY RAISE THE QUESTION WHETHER NOTICE ADEQUATELY RECITED DAMAGES, MAKING DISMISSAL ON THAT BASIS INAPPROPRIATE.

Davis County failed to raise the argument that damages need be ‘definitively’ set forth in its initial Memorandum in Support of Summary Judgment. Where the issue is not raised until the reply memorandum, appellate courts refuse to consider the matter on appeal. “We can summarily dispose of [the] argument regarding unconscionability and lack of consideration. This argument was not before the trial court until [the] Reply Memorandum in support of its motion to revise.” *U.P.C., Inc. v. R.O.A. General, Inc.*, 990 P.2d 945, 953 (Utah Ct. App.1999). “Since defendant first raised the issue in his reply memorandum, it was not properly before the trial court and we will not consider it for the first time on appeal.” *State v. Phathamavong*, 860 P.2d 1001, 1004 (Utah Ct. App.1993). Davis County did not raise an argument regarding sufficiency of the claim for damages. Accordingly, this issue cannot now be considered as grounds to sustain

dismissal.

III. THE NOTICE OF CLAIM DAMAGES RECITATION.ALLOWED  
DAVIS COUNTY THE OPPORTUNITY TO INVESTIGATE AND  
SETTLE THE MATTER.

Even if Davis County properly preserved its argument, the trial court nonetheless erred in dismissing Melody's claim for failure to state the damages incurred. Damages need only be sufficiently set forth so that a determination as to liability exposure can be made. The statute simply requires enumerating the damages "so far as they are known." Utah Code Ann. § 63-30-11(3)(a)(iii) (West 2003). By raising the damages issue for the first time in its reply brief, Davis County prevented Ms. Little from presenting evidence that her injuries had not yet fully resolved even as of the date the reply brief was filed. While Ms. Little continued treatment no definite amount could be stated for monetary damages.

A notice of claim need only set forth "the essential facts as soon as reasonably possible after the injury so that it will have ample opportunity to make a proper investigation." *Spencer v. Salt Lake City*, 17 Utah 2d 362, 364, 412 P.2d 449, 450 (1966). Davis County alleges that failure to note the amount of damages rendered her notice of claim deficient. (R. 165, Def. Reply Supp. S.J. p. 2). The trial court held that "Plaintiff made no definite statement as to damages, other than to state 'amounts to be proved at trial.'" (R. 309, Court Ruling p. 4). However, Melody's notice recited a broken arm, damaged teeth, pain and suffering, and physical therapy as damages



incurred. (R. 44, Def. Mem. Supp. S.J. at Exh. 1A). Similarly in *Spencer*, the claim generally stated the nature of the alleged defect and the injury. *Id.* The court held that where the damages statement gives authorities opportunity to investigate “it is the duty of the court to look to substance rather than to technicality in order that plaintiff may have a fair adjudication of her claim.” *Id.* 364-65. The injuries and damages in Melody’s notice gave Davis County ample opportunity to make a proper investigation. Allowing dismissal for failure to state an amount in damages elevates nonessential technicalities over the right to seek redress for substantive harm.

Moreover, Melody’s notice cannot be compared to that in the case relied on by the trial court, *Johnson v. City of Bountiful*, 996 F.Supp. 1100, 1103 (D. Utah 1998). In *Johnson*, the claimant’s letter did not “state a claim or any intention to do so” and did not state “damages incurred or provide any other information about their extent or nature.” *Id.* Further, Ms. Little continued to undergo treatment for some time after submission of the notice of claim and, in fact, her injuries had not fully resolved at the time defense counsel took her deposition in March 2002.<sup>2</sup> Not only does the purported requirement to set forth an ‘amount’ for damages find no basis in the statute, it would impose an insurmountable barrier for claimants whose injuries resolved at some point after the statute of limitations ran on filing a notice of claim. Because Ms. Little’s claim set forth

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<sup>2</sup> According to Melody’s deposition, taken on March 28, 2002, she was still undergoing treatment for her broken elbow and the doctors had not yet decided what to do. (See, Deposition Excerpt of Melody Little, attached as Addendum “D”).

the damages sufficiently to give Davis County an opportunity to investigate, the trial court erred in finding the notice of claim deficient.

### CONCLUSION

The trial court erred in finding the failure to name Davis County Clerk fatal to Melody's notice of claim. There cannot be a more concrete showing that a claimant 'directed and delivered' a notice of claim than by formal service of papers. Practically speaking, if no directing and delivering occurred by Mr. Thomson's actions, it becomes hard to imagine the case where defendant would not escape liability simply by pointing to some inconsequential item on a notice of claim. Accordingly, Appellant requests that this Court find the formal service of papers satisfies the notice of claim requirement.

Davis County wholly failed to raise their argument regarding damages until filing of their reply memorandum. Because Davis County waited to raise the argument, the dismissal on that basis should be reversed. Additionally, Melody's claim in this case stated several specific injuries and harms, allowing Davis County the opportunity to investigate and resolve the matter without needless litigation. No prerequisite exists that a claimant place an exact or estimated dollar amount on their damages. The grounds for dismissing Melody's claim effectively read into the statute requirements not supported by the language of the Governmental Immunity Act. Accordingly, because Melody's notice of claim satisfies the express language, the district court's dismissal should be reversed and Melody given an opportunity to pursue her claim.

DATED: May 1, 2003

A handwritten signature in black ink, appearing to read 'Peter W. Summerill', written over a horizontal line.

Peter W. Summerill

## CERTIFICATE OF MAILING

I hereby certify that on May 1, 2003, I

Mailed \_\_

Faxed \_\_

Hand-delivered \_\_

a true and correct copy of the foregoing to:

Linette Hutton

Winder & Haslam, P.C.

175 West 200 South, Suite 4000

P.O. Box 2668

Salt Lake City, Ut. 84110-2668

A handwritten signature in cursive script, appearing to read "Pamela Allen", written over a horizontal line.

Secretary

## Addendum A

**C**

UTAH CODE, 1953  
TITLE 63. STATE AFFAIRS IN GENERAL  
CHAPTER 30. GOVERNMENTAL IMMUNITY ACT

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Current through the 2002 5th Special Session

63-30-11 Claim for injury --Notice --Contents --Service --Legal disability --Appointment  
of guardian ad litem.

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

(2) Any person having a claim for injury against a governmental entity, or against 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; and

(iii) the damages incurred by the claimant so far as they are known.

(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 to:

(A) the city or town recorder, 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 president or secretary of the board, when the claim is against a special  
district;

(E) the attorney general, when the claim is against the State of Utah; or

(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.

(4) (a) If the claimant is under the age of majority, or mentally incompetent and  
without a legal guardian 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.

(d) (i) If an injury that may reasonably be expected to result in a claim against a governmental entity is sustained by a potential claimant described in Subsection (4)(a), that government entity may file a request with the court for the appointment of a guardian ad litem for the potential claimant.

(ii) If a guardian ad litem is appointed under this Subsection (4)(d), the time for filing a claim under Sections 63-30-12 and 63-30-13 begins when the order appointing the guardian is issued.

History: L. 1965, ch. 139, § 11; 1978, ch. 27, § 5; 1983, ch. 131, § 1; 1987, ch. 75, § 4; 1991, ch. 76, § 6; 1998, ch. 164, § 1; 2000, ch. 157, § 1.

#### NOTES, REFERENCES, AND ANNOTATIONS

Amendment Notes. --The 1998 amendment, effective May 4, 1998, substituted "the employee's" for "his" in Subsection (2); deleted "the responsible governmental entity according to the requirements of Section 63-30-12 or 63-30-13" from Subsection (3)(b)(ii); added Subsections (3)(b)(ii)(A) to (3)(b)(ii)(F); and made stylistic changes throughout the section.

The 2000 amendment, effective July 1, 2001, added Subsection (4)(d).

#### NOTES TO DECISIONS

#### ANALYSIS

Constitutionality.

Application.

Assignment of municipal debt.

Clear statement of claims required.

Conditions for right to recover.

Damages not specified.

Defendant's capacity.

Failure to file claim.

Notice.

Sufficiency of notice.

-- Nature of claim asserted.

-- Parties.

-- Statement of facts.

Waiver of objections by city.

Cited.

Constitutionality.

## Addendum B



**C**

UTAH CODE, 1953  
TITLE 68. STATUTES  
CHAPTER 3. CONSTRUCTION

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Current through the 2002 5th Special Session

68-3-2 Statutes in derogation of common law liberally construed --Rules of equity prevail.

The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail.

History: R.S. 1898 & C.L. 1907, § 2489; C.L. 1917, § 5839; R.S. 1933 & C. 1943, 88-2-2.

NOTES, REFERENCES, AND ANNOTATIONS

Cross-References. --One form of civil action; law and equity administered in same action, Rule 2, U.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Application to particular areas of law.  
In general.  
Questions of first impression.  
Remedial statutes.  
Rules of equity prevail.  
-- Forfeitures.  
Statutes of foreign states.  
Cited.

Application to particular areas of law.

See *Remington Rand, Inc. v. O'Neil*, 6 Utah 2d 182, 309 P.2d 368 (1957) (garnishment proceedings); *In re Garr's Estate*, 31 Utah 57, 86 P. 757 (1906) (inheritance laws); *Niblock v. Salt Lake City*, 100 Utah 573, 111 P.2d 800 (1941) (liability of city); *Utah Ass'n of Life Underwriters v. Mountain States Life Ins. Co.*, 58 Utah 579, 200 P. 673 (1921) (life insurance); *Schuyler v. Southern Pac. Co.*, 37 Utah 581, 109 P. 458 (1910) (penal statutes); *Barber Asphalt Corp. v. Industrial Comm'n*, 103 Utah 371, 135 P.2d 266 (1943) (worker's compensation).

In general.

## Addendum C

**FILED**

NOV 15 2002

IN THE SECOND DISTRICT COURT OF DAVIS COUNTY  
STATE OF UTAH  
**SECOND DISTRICT COURT**

MELODY LITTLE,

Plaintiff,

v.

DAVIS COUNTY,

Defendants,

**RULING ON DEFENDANT'S  
MOTION TO DISMISS AND/OR  
FOR SUMMARY JUDGMENT**

Case No. 010700399 TO

Judge Michael G. Allphin

The above-entitled matter having come before the Court on Defendants' Motion to Dismiss and/or for Summary Judgment; and the Court having reviewed the Motion; and being fully advised in the premises, makes the following ruling.

**BACKGROUND**

The matter before the Court concerns an injury which occurred on the sidewalk along the side of the old Davis County Courthouse building on August 14, 2000. Plaintiff filed a Complaint against the Defendant on August 15, 2001, claiming that Defendant and its agents and employees were negligent in failing to grind down a raised lip of concrete and were liable for damages. On April 8, 2002, Defendant filed a Motion to Dismiss and/or for Summary Judgment with Supporting Memorandum. Therein, Defendant argues; 1) As a matter of law, Plaintiff's claims are barred for failure to comply with the notice requirements of the Utah Governmental Immunity Act, Utah Code Ann. §§ 63-30-11, and 2) That Plaintiff's claims should also be dismissed as there was no defect or condition on the sidewalk for which Defendant may be found liable to Plaintiff. Plaintiff filed its Memorandum in Opposition to Davis County's Motion for

Summary Judgment on June 12, 2002. Defendant filed its Reply Memorandum in Support of Defendant's Motion to Dismiss and/or for Summary Judgment on June 24, 2002. On September 16, 2002, Defendant filed a Notice to Submit for Decision.

### **ANALYSIS**

A motion to dismiss, pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, is a question of law for the Court, wherein the Court is required to determine if the Complaint is sufficient on its face. In making that determination, the Court must assume that the factual allegations in the Complaint are true and must draw all reasonable inferences in the light most favorable to the Plaintiff. Munteer v. Utah Power & Light Co., 823 P.2d 1055 (Utah 1991).

The purpose of summary judgment is to avoid unnecessary trial by allowing the parties to submit the matter on the pleadings where there is no genuine issue to present to the fact finder. In accordance with this purpose, specific facts are required to show whether there is a genuine issue for trial. Reagan Outdoor Adv., Inc. v. Lundgren, 692 P.2d 776 (Utah 1984). In considering a motion for summary judgment, the Court must examine the evidence in "a light most favorable to the party opposing summary judgment." Hunt v. Hunt, 785 P.2d 414, 415 (Utah 1990).

Having reviewed the parties' filings, the Court addresses the following issues; 1) Whether Plaintiff complied with the notice requirements of the Utah Governmental Immunity Act, Utah Code Ann. §§ 63-30-11, and 2) Whether there was a defect or condition on the sidewalk for which Defendant may be found liable to Plaintiff.

The Court first examines whether Plaintiff complied with the notice requirements of the Utah Governmental Immunity Act, Utah Code Ann. §§ 63-30-11. The Utah Governmental Immunity Act reads in part:

- (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:
  - (i) signed by the person making the claim or that person's agent, attorney, parent, or legal guardian; and
  - (ii) directed and delivered to:
    - ...(B) the county clerk, when the claim is against a county;....

On October 25, 2000, a process server named Ken Thomson delivered a document entitled "Notice of Claim" to the Davis County Memorial Courthouse. There is a factual dispute as to whether the Notice of Claim was left at the front desk or was delivered to Pat Beckstead, a Davis County employee, with the understanding that Pat Beckstead would receive service on behalf of Steve Rawlins, the Davis County Clerk. The Affidavit of Ken Thomson dated April 18, 2002 indicates that delivery was made to Pat Beckstead, although the signed Affidavit of Service by Ken Thomson dated September 14, 2001 lists personal delivery to Steve Rawlins, the Davis County Clerk, and does not check the "LEAVING SAID COPY WITH" box on the Affidavit and does not list the name of Pat Beckstead as receiving delivery for Steve Rawlins. Defendant's Affidavits would dispute this delivery, but as stated above, in considering a motion for summary judgment, the Court must examine the evidence in "a light most favorable to the party opposing summary judgment." Hunt v. Hunt, 785 P.2d 414, 415 (Utah 1990). The Notice of Claim was addressed to Davis County, the Davis County Attorney, the State of Utah, and the Utah Attorney General, but not specifically directed to the Davis County Clerk. At this point, Plaintiff has

failed to meet the statutory requirements for the Notice of Claim, by not directing the Notice of Claim to the county clerk. There is a factual question regarding the actual delivery of the Notice of Claim, but regardless, the Notice of Claim was facially deficient. Utah courts have been strict in applying the requirements for a Notice of Claim, "[a]pplying this rule of strict compliance, we have repeatedly denied recourse to parties that have even slightly diverged from the exactness required by the Immunity Act." Wheeler v. McPherson, 40 P.3d 632, 635 (Utah 2002). The Notice of Claim may or may not have been delivered to Steve Rawlins office, but it was not directed to the Davis County Clerk, Steve Rawlins.

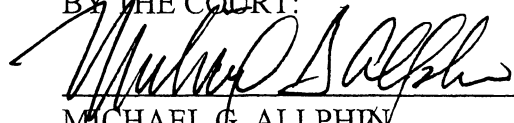
The Notice of Claim was also deficient when it did not clearly set forth "the damages incurred by the claimant so far as they are known." Utah Code Ann. § 63-30-11 (3)(a)(iii). The Notice of Claim listed the physical damage to Plaintiff and stated that "Plaintiff has also sustained pain and suffering, medical expenses, and physical therapy expenses to her damage in amounts to be proved at trial." The Notice of Claim was dated October 17, 2000, two months and three days after the August 14<sup>th</sup> fall, however Plaintiff made no definite statement as to damages, other than to state "amounts to be proved at trial." Plaintiff had two months to discover the damage amounts for immediate injuries, but failed to set forth "the damages incurred by the claimant so far as they are known." The Notice of Claim is deficient for purposes of the Utah Governmental Immunity Act and interpretive case law. "[N]or does the letter state the amount of damages incurred or provide any other information about their extent or nature. There is simply nothing upon which even a sympathetic tribunal, as this Court is given the facts of this case, could base a finding of substantial compliance." Johnson v. City of Bountiful, 996 F.Supp. 1100, 1103 (D. Utah 1998).

Having found that Plaintiff's claims are barred for failure to comply with the notice requirements of the Utah Governmental Immunity Act, Utah Code Ann. §§ 63-30-11, the Court finds no reason to proceed in its analysis of the remaining issue in relation to the Motion to Dismiss and/or for Summary Judgment before the Court.

For the foregoing reasons, the Court grants Defendant's Motion to Dismiss and/or for Summary Judgment.

Dated November 14<sup>th</sup>, 2002.

BY THE COURT:

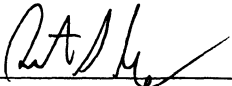
  
MICHAEL G. ALLPHIN  
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Ruling on November  
15, 2002, postage prepaid, to the following:

James R. Hasenyager  
Peter W. Summerill  
HASENYAGER & SUMMERILL  
1004 Twenty-Fourth Street  
Ogden, UT 84401

Linette B. Hutton  
WINDER & HASLAM, P.C.  
175 West 200 South, Suite 4000  
PO Box 2668  
Salt Lake City, UT 84110-2668

  
\_\_\_\_\_  
Robert S. Payne  
Law Clerk to the Honorable Michael G. Allphin



## Addendum D

IN THE SECOND JUDICIAL DISTRICT,  
IN AND FOR THE STATE OF UTAH, DAVIS COUNTY, FARMINGTON

--ooOoo--

_____	)	
MELODY LITTLE,	)	
	)	Deposition of:
Plaintiff,	)	MELODY LITTLE
	)	
vs.	)	Date: May 14, 2002
	)	
DAVIS COUNTY,	)	Civil No. 010700399
	)	
Defendant.	)	
_____	)	

--ooOoo--

Deposition of MELODY LITTLE, taken on behalf of the Defendant, at WINDER & HASLAM, 175 West 200 South, Suite 4000, Salt Lake City, Utah, commencing on May 14, 2002, before KAPRICE GUNN, a Certified Shorthand Reporter and Notary Public within and for the State of Utah, pursuant to Notice.

1 Q. Did physical therapy also --  
 2 A. I saw the -- I have seen the prescription  
 3 from Dr. McClellan.  
 4 Q. Okay.  
 5 A. I gave them the prescription.  
 6 Q. Okay.  
 7 A. But I have not seen these medical papers,  
 8 no.  
 9 Q. Would Aspen Ridge also have filed directly  
 10 on your medical insurance? Is that why you would not  
 11 have seen any bills from them?  
 12 A. Yes, they sent it into my insurance. I do  
 13 see bills from them, just not this.  
 14 Q. Okay. If you'll look on there, look at the  
 15 dates that are represented. It appears that the only  
 16 appointments that they -- at least are included in  
 17 that packet of information occurred in September.  
 18 A. That's what this says?  
 19 Q. That's what it appears to be.  
 20 If you continued to see him after September,  
 21 then it would appear we don't have a complete set of  
 22 records. So could you look into that and see if Aspen  
 23 Ridge can provide us --  
 24 A. Yes.  
 25 Q. -- a more complete set of records?

1 A. Sure.  
 2 Q. And you'll let your attorney know --  
 3 A. Yes.  
 4 Q. -- and he'll provide those to us as well?  
 5 A. Yes.  
 6 Q. Because they certainly don't show that you  
 7 went until February.  
 8 A. Yes, I did.  
 9 Q. Okay. Let's see. How did you do with your  
 10 physical therapy?  
 11 A. Not well. As you can tell, I still have a  
 12 very crooked arm.  
 13 Q. So are you still seeing him?  
 14 A. No, no. They tried me on a splint also at  
 15 the end, which was supposed to go home and I'd just  
 16 wear it at night, and it was supposed to -- and I  
 17 would tighten it and it straightens. And I sent that  
 18 back. I tried it for over a month. And it wasn't  
 19 that it was so painful, it's just that I couldn't  
 20 sleep at night and then my arm was very sore the next  
 21 day.  
 22 And in my job, a sore arm is not -- it was  
 23 just easier for me to go with a crooked arm. I sent  
 24 it back. And I found out later that my insurance --  
 25 they assumed my insurance covered it and did not cover

1 MP out of Minnesota, who sent me the splint. So I  
 2 gave it back to Aspen Ridge. They sent it back.  
 3 Okay. I lost my train of thought. Ask me  
 4 your question again.  
 5 Q. We would have to have Kaprice do that.  
 6 MR. SUMMERILL: I think it was how did  
 7 physical therapy go?  
 8 THE WITNESS: Oh, how did physical therapy  
 9 go?  
 10 MS. HUTTON: Wait a second.  
 11 (The requested testimony was read as follows:  
 12 "QUESTION: So are you still seeing him?")  
 13 THE WITNESS: No.  
 14 Q. (BY MS. HUTTON) So did you discontinue  
 15 physical therapy at their suggestion or because you  
 16 felt that you were finished?  
 17 A. I felt that I was finished.  
 18 Q. Okay.  
 19 A. I felt that they had tried just about  
 20 everything. It was very painful. Physical therapy  
 21 was very painful, and everything they tried, my arm  
 22 would still just pop back and still stiffen up and get  
 23 sore.  
 24 So I went back to Dr. McClellan and --  
 25 actually, let me think. Let me think. When one of my

1 children was seeing Dr. McClellan, I asked him -- I  
 2 says, Dr. McClellan, what should I do? He says, It's  
 3 my guess you'll have to get it rebroken. And he  
 4 suggested at that time an orthopedic surgeon. And I  
 5 didn't follow through with it. I mean, that's a lot  
 6 of pain and a lot of rehabilitation again that, with  
 7 my work, with things going on within my family, I  
 8 chose not to do at that time.  
 9 I have, though, gone back to Dr. Challburg  
 10 just recently.  
 11 Q. Dr. Challburg?  
 12 A. Challburg.  
 13 Q. How do you spell Challburg?  
 14 A. C-h-a-l-l-b-u-r-g. He is at the Morgan  
 15 Health Center. Dr. McClellan has moved on to Salt  
 16 Lake City, I believe.  
 17 Q. I see. I see.  
 18 A. Dr. Challburg recommended an MRI. He  
 19 doesn't know exactly, but is wondering if the tissue  
 20 or muscle or blah, blah, blah -- but he recommended --  
 21 they even want to set me up next week with an MRI with  
 22 an orthopedic surgeon.  
 23 Q. I noticed that Bruce McClellan,  
 24 Dr. McClellan, is listed as a general practitioner.  
 25 A. Yes.