

2002

# Melody Little, Plaintiff/Appellant, vs. Davis County, Defendant/Appellee : Reply Brief

Utah Court of Appeals

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## Recommended Citation

Reply Brief, *Little v. Davis County*, No. 20021039 (Utah Court of Appeals, 2002).  
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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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REPLY BRIEF OF APPELLANT MELODY LITTLE

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

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**FILED**  
Utah Court of Appeals

JUL 07 2003

Paulette Stange  
Clerk of the Court

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## ARGUMENT

For the convenience of the Court, the argument in this Reply Brief mirrors that of Davis County's Response Brief.

### **I. MELODY'S NOTICE OF CLAIM SATISFIES ALL EXPRESS STATUTORY REQUIREMENTS FOR A NOTICE OF CLAIM.**

#### **A. Formally Serving An Employee Acting on Behalf of the Davis County Clerk Constitutes Directing and Delivering a Notice of Claim to the Clerk.**

Melody Little's opening brief argues that no statutory language or other authority imposes the requirement to name the Davis County Clerk on the Notice of Claim. In short, there cannot be 'strict compliance' with a non-existent requirement. Davis County does not provide the Court with authority demonstrating that a notice must be addressed to the County Clerk. Rather, the County focuses primarily on the argument that "Plaintiff relies on facts that are clearly in dispute." (Reply at p. 9). Davis County's position and recitation of facts address whether Pat Beckstead did or did not receive the notice of claim. However, Davis County has not appealed the trial court's ruling that genuine issues of fact remain regarding whether Pat Beckstead received notice of claim. (R. 309). None of the facts and argument made by Davis County bear on the issue before the Court: namely, whether formally serving an employee of the Davis County Clerk operates to satisfy the direction and delivery of a notice of claim.

Importantly, Utah statutory law dictates that delivery to and acceptance by Ms. Beckstead is the same as delivery to and acceptance by the Davis County Clerk.

(v) "Sheriff," "county attorney," "district attorney," "clerk," or other words used to denote an executive or ministerial officer, may include any deputy, or other person performing the duties of such officer, either generally or in special cases; and the words "county clerk" may be held to include "clerk of the district court."

Utah Code Ann. § 68-3-12(v) (West 2003)(emphasis added).<sup>1</sup>

Here, Pat Beckstead performed the duties of County Clerk Steve Rawlins when she accepted service on his behalf. Directing and delivering the notice of claim through Pat Beckstead effectively directs and delivers notice of claim to Mr. Rawlins. By formally serving Pat Beckstead, Melody strictly complied with the statutory requirement that notice of claim be directed and delivered to the County Clerk.

The County further argues that Melody's notice is 'facially deficient.' (Resp. Brief at p. 12). Of course, the failure to name the Davis County Clerk would make the notice 'facially deficient' if such a statutory prerequisite existed. However, the Notice given by Melody provides ample indication of an intent to sue Davis County. The very first line of the formally served paper states "NOTICE OF CLAIM." (R. 44). The notice further states that "[p]ursuant to law, Melody Little hereby gives notice of her intent to file a lawsuit against you." (Id.)(emphasis added). The you to which the notice refers is one of either Davis County, Davis County Attorney, State of Utah, or Utah Attorney

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<sup>1</sup> Admittedly, neither counsel for Melody Little, Davis County nor the trial court cited or discussed the statutory direction to consider Pat Beckstead the Davis County Clerk while performing duties on his behalf. See, Utah Code Ann. § 68-3-12(v) (2003). However, the law has long recognized that even though statutory authority is not cited to the trial court, it may nonetheless be considered on appeal. *Walker v. Lloyd*, 4 N.E.2d 306, 308 (Mass.1936)("fact that certain pertinent statutes of Vermont were not brought to the attention of the trial judge does not preclude this court from considering decisions and statutes"); *Wilson v. Martinez*, 307 P.2d 605, 605 (Wyo. 1957)(holding appellate court is "bound to notice" the "relevant law of this state."); *Peterson v. Paoli*, 44 So.2d 639, 640 (Fla.1950)(Taking judicial notice of applicable statute "even though such statute was overlooked in the proceedings in the court below." ). The simple failure by counsel for Little, counsel for Davis County and the trial court itself to cite relevant statutory authority cannot provide a basis on which to wholly ignore legislative enactments.

General. (Id.). In other words, Melody directed and delivered a Notice of Claim to the Davis County Clerk that which announced an intent to file suit against Davis County. Accordingly, there is no ‘facial deficiency’ present in the notice. Concluding that Melody Little failed to ‘direct and deliver’ a notice of claim perverts the notice requirement beyond any statutory language. Because Melody satisfied the statutory requirements for a notice of claim, the trial court’s determination should be overturned and Melody granted the opportunity to fully pursue her claim.

**B. The Notice Set Forth Damages As Far As Known and Sufficiently to Allow Davis County to Investigate.**

According to Davis County “Plaintiff testified she had completed treatment on her teeth and arm in September 2000, but continued with physical therapy until February 2001.” (Resp. Brief at p. 12). The Notice of Claim was sent in October of 2000. (R. 44). By Davis County’s own recitation of facts, the injuries had not resolved to a point where an ‘amount’ could be placed on damages because physical therapy continued for four months following the accident. Even assuming that a specific dollar amount must be set forth in the notice of claim, under Davis County’s time line no definite amount could be determined in October of 2000 because the physical therapy continued into February of 2001.

However, no statutory language requires that a specific dollar value be placed in a notice of claim. Rather, the notice need only set forth the “damages incurred by the claimant so far as they are known.” Utah Code Ann. § 63-30-11(3)(iii) (West 2003). Moreover, Melody submitted her claim a mere two months after the accident. The immediate notice gave Davis County not only the opportunity to repair and correct the condition, thereby preventing other injuries, but



made it impossible to set forth a specific amount in damages so shortly after the accident.

Melody's notice of claim set forth the damages; a broken arm, damaged teeth and pain and suffering, in a timely manner and sufficiently to comply with the statute.

**II. DAVIS COUNTY DEPRIVED LITTLE OF THE OPPORTUNITY TO RESPOND BY RAISING A FACTUAL ARGUMENT FOR THE FIRST TIME IN ITS REPLY BRIEF.**

Davis County misconstrues Little's argument on this point. Davis County claims that "Plaintiff argues the County 'waived' its right" to argue the notice of claim failed to satisfy the damages requirement. (Resp. Brief at p. 12). However, nowhere in the briefing did Little claim that Davis County 'waived' the right to this argument altogether. Satisfaction of the notice of claim requirement is obviously a jurisdictional issue which cannot be waived. Rather, Davis County's belated raising of a factual argument in its Reply Memorandum deprived Little of the opportunity to respond with facts to the contrary, especially where neither party had requested oral argument. Notably, this position differs from that of Little's citation to Utah Code Ann. § 68-3-12's directive to consider Pat Beckstead as if she were the Davis County Clerk while performing his duties. In that instance, the factual argument was raised all along that Pat Beckstead held herself out as able to accept service. Affidavits and counter-affidavits were presented to the court on the issue. Only the legal authority itself was overlooked by all counsel involved, as well as the trial court.

When Davis County raised, for the first time in its Reply Memorandum, that the damages had not been sufficiently set forth, the maneuver deprived not only Little the opportunity to respond, but also prevented the trial court from making a complete record on the issue. Obviously Davis County may raise the argument on remand, but the opportunity to respond and

fully develop the factual record on the issue cannot be deprived simply by holding the argument until a reply brief is filed. Accordingly, Little asks that this Court reject the argument that damages were not sufficiently enumerated because no amount was included as a basis for summary judgment and/or dismissal. Rather, if *any* question remains on the issue of whether damages were sufficiently set forth, the matter should be subject to remand, not affirmance.

### CONCLUSION

Davis County cites no authority for the proposition that the Notice of Claim must name or be addressed to the Davis County Clerk. Nor does Davis County quote any language imposing such a requirement. The same is true for the requirement that a Notice designate a specific amount in damages. In effect, Davis County attempts to force 'strict compliance' with requirements that simply do not exist in the statute. Following the County's logic, every time a claimant failed to comply with a requirement dreamt up by the responsible governmental entity that entity could escape liability. Such a narrow reading of the Governmental Immunity Act ignores the warning not to judicially extend sovereign immunity. The County's reading also ignores a statutory direction to read statutes liberally with the goal of effecting their purpose, in this case affording a party injured by governmental negligence the opportunity to seek redress. Because no statutory basis exists for the 'requirements' urged by the County, dismissal should be reversed and Melody given the opportunity to seek redress for her injuries.

DATED: July 4, 2003

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

Peter W. Summerill

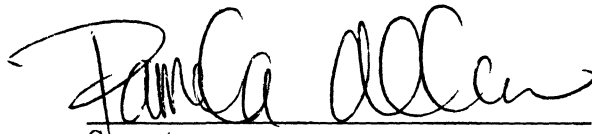
**CERTIFICATE OF MAILING**

I hereby certify that on July 7<sup>th</sup> 2003, I

Mailed ☒  
Faxed ☐  
Hand-delivered ☐

**a true and correct copy of the foregoing to:**

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\_\_\_\_\_  
Secretary