

2006

Daniel Suazo v. Salt Lake City Corp. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DANIEL SUAZO,)	
)	
Plaintiff-Appellee.)	REPLY BRIEF
)	OF APPELLANT
)	SALT LAKE CITY CORP.
vs.)	
)	
SALT LAKE CITY CORP.,)	
)	
Defendant-Appellant.)	
)	

ON INTERLOCUTORY APPEAL FROM AN ORDER OF
THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH.
CASE NO. 050922293

HONORABLE J. DENNIS FREDERICK

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

	Page
<u>ARGUMENT</u>	1
<u>A. Utah courts require strict compliance with the notice requirements of the Immunity Act. Reasonable compliance is NOT the standard.</u>	3
<u>B. This Court should decline Suazo’s invitation to legislate from the bench.</u>	6
<u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

CASES

<u>Bischel v. Merritt</u> , 907 P.2d 275 (Utah App. 1995)	5
<u>Davis v. Central Utah Counseling Center</u> , 2001 UT 109, 37 P.3d 1156	3, 4, 5
<u>Greene v. Utah Transit Authority</u> , 37 P.3d 1156, 1159 (Utah 2001)	3, 4, 5

STATUTES

Utah Code Ann. § 63-30d-401(3)(b)(ii)	6
Utah Code Ann. § 63-30d-401(7)	2
Utah Code Ann. § 68-3-8.5(2)(a)	6, 7

RULES

Rule 5(b)(1)(B), Utah Rules of Civil Procedure	7
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ARGUMENT

In his opposing brief, Suazo urges this Court to adopt a “reasonableness” standard for compliance with the Immunity Act, a standard that has been consistently rejected by Utah’s appellate courts. He further urges this Court to legislate from the bench by inserting an “overlap” provision allowing a “reasonable amount of time to accommodate amendments to the [Division of Corporations and Commercial Code Governmental Immunity] Database.” *Suazo Brief*, pp. 6-7. Both arguments should be rejected.

A.

Utah courts require strict compliance with the notice requirements of the Immunity Act. Reasonable compliance is NOT the standard.

Suazo concedes that the notice of claim provisions of the Immunity Act are “clear on [their] face. There is no ambiguity in the language of the statute.” *Id.* at p. 3. He further admits that he mailed his Notice of Claim to Jeff Rowley **three days after** the Database was amended to designate Kendrick Cowley as the City’s authorized agent. *Id.* at p. 4.

Suazo further admits that his failure to serve Mr. Cowley with his Notice of Claim was erroneous, and that his error “may not have been caused entirely by SIC’s error.” *Id.* at p. 8. He attempts to excuse his failure to strictly comply with the Immunity Act by arguing that he

“reasonably” complied, and that “but for SLC’s error, the notice would have been delivered to the appropriate agent.” *Id. at p. 5*. This argument fails for several reasons.

First, it is well-settled law in Utah that **strict compliance** with the Immunity Act’s notice requirements is a jurisdictional prerequisite to filing suit. Because the strict compliance standard is adequately discussed in the City’s opening brief, it will not be repeated here.

Second, there is no evidence in the record to support Suazo’s contention that his “confusion or error” was “due to SLC’s filing error.” *Id. at p. 4*. While the City clearly believed that the Database incorrectly listed Jeff Rowley as the City’s designated agent, and asked the DCCC to immediately correct it, there is no record evidence suggesting that it was due to any filing error on the part of the City. It is just as possible that the DCCC erred.

Most importantly, however, it is irrelevant whether the City erred in listing Mr. Rowley as its designated agent. Had Suazo served Mr. Rowley with his notice of claim on or before November 17, 2004, he clearly would have complied with the unambiguous notice requirements of the Immunity Act. Utah Code Ann. § 63-30d-401(7) provides Suazo’s argument no support, because it applies **only** where the governmental entity **fails** to “file

or update” the required statement. Here, there can be no dispute that the City filed the required statement, and updated that statement when the need arose.

Third, Suazo’s reliance on Bischel is misplaced. “At the time Bischel was decided, the Immunity Act contained a glaring ambiguity . . . [t]his significant gap in the statute was corrected in 1998. As a result, we rejected the Bischel court’s rationale in Greene v. Utah Transit Authority, 2001 UT 109, ¶ 12, 37 P.3d 1156 . . .” Davis v. Central Utah Counseling Center, 2006 UT 52, ¶ 25, 147 P.3d 390. Suazo concedes that no such ambiguity exists here. The Greene court stated, “[w]here, as here, the statute is clear, readily available, and easily accessible by counsel, there is no reason to require anything less than strict compliance.” Greene, 2001 UT 109 at ¶ 14.

Finally, Suazo’s contention that he reasonably relied on the information posted on the DCCC’s Database avails him nothing. The Davis v. Central Utah Counseling Center decision is directly on point and controlling authority. There, the plaintiffs presented evidence that their attorney relied on representations made by employees of the defendant Counseling Center (“CACC”) and the Utah Division of Mental Health that the CACC was a member of the state’s mental health system. Davis, 2006 UT 52 at ¶¶ 3-4. The attorney also relied on information obtained from the

Utah Department of Human Services' website, which listed the CUCC among its "Mental Health offices." *Id.*

As a result, the Davis plaintiffs failed to provide CUCC with the notice required by the Immunity Act, and the trial court granted summary judgment in favor of CUCC for lack of subject matter jurisdiction. On appeal, plaintiffs asked the Utah Supreme Court to consider the confusing circumstances of their situation and recognize an exception to the strict compliance rule. The Court declined to do so.

The Davis Court expressly stated that "[b]arring statutory ambiguity, we have consistently declined to relax the requirements of the Immunity Act." *Id.* at ¶ 44. The Court noted its decision in Greene, where it refused to create an exception to the strict compliance standard where a state claims adjuster allegedly misdirected the plaintiff as to where to send the required notice. Greene, 2001 UT 109, ¶ 17. Although the Greene Court expressed concern about the allegations of "intentionally misleading behavior," *id.* at ¶ 19, it nevertheless affirmed dismissal, stating:

Even assuming [the claims adjuster] made the statements [the plaintiff] alleges he made, his delivery instructions cannot override the requirements set by the legislature. Because [the plaintiff] failed to strictly comply with the Immunity Act, the district court lacked subject matter jurisdiction over her claim.

Id. at ¶ 17.

The Davis Court expressed its understanding that claimants may face “byzantine and confusing bureaucracy when dealing with governmental entities,” and that “government employees and officials may even intentionally mislead plaintiffs in some cases, as was alleged in Greene.” Davis, 2006 UT 52 at ¶ 46. However, jurisdiction “does not hinge on the difficulty of that task or the earnestness of plaintiffs’ efforts. Jurisdiction instead springs when a claimant has effected full compliance with the Immunity Act. Barring statutory ambiguity, ‘we will not disturb explicit legislative requirements’ and abrogate the government’s sovereign immunity.” Id., *quoting Greene*, 2001 UT 109 at ¶ 15.

Because it is conceded that no statutory ambiguity exists in this matter, there is no reason for this Court to require anything less than strict compliance with the Immunity Act. Suazo voluntarily chose the method of delivery of his notice of claim. In this instance, he chose to serve the City’s designated agent, which is, by statute, subject to change at any time, rather than the City Recorder, which does not change (except by legislative action). Pursuant to the Immunity Act’s unambiguous provisions, the Database clearly identified Ken Cowley as the City’s designated agent as of November 17, 2004. The Database was available to the public for viewing

without restriction either via internet, telephone, or personal consultation with the DCCC.

Knowing that governmental entities may update (i.e. change) the information contained in the Database, due diligence dictated that he simply check the Database before placing the notice of claim in the mail on November 20, 2004. By mailing his notice of claim to Jeff Rowley, who was NOT the City's designated agent on November 20, 2004, Suazo failed to strictly comply with the notice of claim requirements of the Immunity Act, and thus the trial court lacked subject matter jurisdiction over his claims against the City.

B.

This Court should decline Suazo's invitation to legislate from the bench.

It is somewhat difficult to understand Suazo's contention that an "overlap of time" provision should be read into the Immunity Act based on the time delay in delivering mailed notices of claim, or where a mailed notice of claim is forwarded to a designated agent's correct address. See *Suazo Brief*, pp. 6-7. Pursuant to Utah Code Ann. § 63-30d-401(3)(b)(ii) and § 68-3-8.5(2), a notice of claim is considered to be "filed or made and received by the state or political subdivisions on the date shown by the post office cancellation mark stamped upon the envelope or other appropriate

wrapper containing it.” U.C.A. § 68-3-8.5(2)(a). Rule 5 of the Utah Rules of Civil Procedure also provides that service of notices and pleadings by mail is complete upon mailing. Rule 5(b)(1)(B), URCP. Therefore, the time delay from mailing to receipt of a notice of claim is irrelevant to the issue of whether a notice of claim has been properly filed.

Suazo offers speculative and unfounded assertions that a governmental entity may “deliberately change[] the designated agent every few days, hoping that it will catch claimants unawares.” *Suazo Brief*, p. 6. There is no scintilla of evidence suggesting that the City has done this, nor is there any need for this Court to address those speculative concerns. If this kind of activity becomes an issue in the future, it is up to the legislature to cure this potential “weakness” in the statutory scheme, not the courts’.

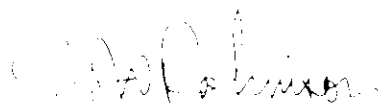
The legislature is fully capable of providing for an “overlap of time” in the notice of claim provisions of the Immunity Act if it deems such a provision necessary. It is not within the purview of this Court to legislate from the bench, inserting statutory provisions where none currently exist. Suazo’s invitation to legislate should be directed to our legislature, not to this court, and should be denied.

CONCLUSION

Suazo's attempts to convince this Court to adopt a "reasonableness" standard in place of long-standing and consistent precedent requiring strict compliance with the Immunity Act requirements should be denied. This Court should further decline Suazo's invitation to legislate from the bench. Because the notice of claim provisions of the Immunity Act are admittedly clear and unambiguous, and Suazo has conceded that he failed to strictly comply with those requirements, the trial court should have granted the City's Motion to Dismiss for lack of subject matter jurisdiction.

Based on the foregoing, Defendant-Appellant Salt Lake City Corporation respectfully requests that this Court REVERSE the district court's denial of the City's Motion to Dismiss, and REMAND this case to the district court with instructions to DISMISS Plaintiff-Appellee Suazo's Complaint against the City with prejudice for lack of subject matter jurisdiction.

Dated this 8th day of March, 2007.


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CERTIFICATE OF DELIVERY

I hereby certify that on the 2nd day of March, 2007, I caused to be mailed, first class postage pre-paid, two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT SALT LAKE CITY CORPORATION to the following:

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9