

SUPREME COURT, STATE OF COLORADO

Case No. 81 SC 354

CERTIORARI TO THE COLORADO COURT OF APPEALS, NO. 80CA0848

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PETITION OF AMICUS CURIAE COLORADO MUNICIPAL LEAGUE FOR  
REHEARING OR MODIFICATION OF OPINION

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THE STATE OF COLORADO, and the COLORADO STATE PATROL, a  
Division of the Department of Highways,

Petitioners,

vs.

LEIGH ANN YOUNG,

Respondent.

Opinion by the Honorable Justice Jean Dubofsky  
En Banc

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Susan K. Griffiths, #2328  
Tami A. Tanoue, #12952  
Attorneys for the Colorado  
Municipal League  
1155 Sherman St., Suite 210  
Denver, Colorado 80203  
Telephone: (303) 831-6411

In State of Colorado v. Young, a majority of the Court holds that the 90-day notice period in §24-10-109(1), C.R.S. 1973, does not begin to run until after a claimant has had a reasonable opportunity "to discover the basic and material facts underlying a claim...." This holding is broader than necessary to decide the case. It inserts tremendous uncertainty and confusion into the notice requirement and its application to the detriment of potential claimants, municipalities and their employees, municipal taxpayers, and the public generally, as described more fully in the Colorado Municipal League's ("League's") motion for leave to appear as amicus curiae.

Because of the unnecessary adverse effects of the decision, as described in the League's motion, and for the reasons set forth below, the League urges the Court to rehear this case or modify the opinion by reducing its scope and clarifying its application.

I. The Court's equitable construction of the statutory notice requirement is broader than necessary to decide the case. At least two narrower constructions of the statute are possible and more applicable to the facts before the Court.

The facts of the case required the Court to construe the statutory notice requirement in §24-10-109, C.R.S. 1973. In doing so, the Court placed an equitable construction on the statute far broader than required by those facts.

At least two narrower constructions of the statute are possible. Both constructions focus on the key fact of this case -- that the wrong complained of, i.e., the alleged misfiling of the traffic ticket, limited the claimant's ability to determine which public entity was responsible for her injury. Identification of the governmental entity which may have caused the injury is essential for compliance with the notice requirement of §24-10-109.

The two alternative constructions are to: (1) recognize an additional equitable exception to the notice requirement where the identity of the public entity is obscured by the wrongful act of the entity; or (2) recognize that implicit in the statutory notice requirement is a reasonable opportunity for the claimant to discover which public entity may have caused the injury and therefore should receive the notice.

(a) Equitable construction.

Historically, Colorado appellate courts have recognized various equitable exceptions from strict application of statutory notice requirements. Generally, these exceptions apply where strict compliance with the notice requirement is unfair because of some action of the governmental entity or its employees, or where strict compliance would be impossible. See, e.g., City of Colorado Springs v. Colburn, 102 Colo. 483, 81 P.2d 397 (1983) (court recognized equitable and "humane" rule excusing notice, under proper circumstances, for reasons of mental and physical incapacity); Wilson v. City and County of Denver, 168 Colo. 43, 449 P.2d 822 (1969) (where city attorney's actions are "basically unfair" and the purpose of the notice statute is accomplished, the city may be estopped from questioning the propriety of the notice); Gray v. Regional Transportation District, 43 Colo.App. 107, 602 P.2d 879 (1979) (governmental entity may be equitably estopped from asserting the bar of §24-10-109 to prevent manifest injustice); Brady v. City and County of Denver, 181 Colo. 218, 508 P.2d 1254 (1973) (in indemnity action, notice statute will not be construed so as to impose an unfair burden or impossible task on the alleged tortfeasor); Roderick v. City of Colorado Springs, 193 Colo. 104, 563 P.2d 3 (1977) (municipality may waive right to compliance with the notice requirement under appropriate circumstances, or estoppel may be applied); and, Antonopoulos v. Town of Telluride, 187 Colo. 392, 532 P.2d 346 (1975) (persons under disability are relieved from compliance with statutory notice requirement during period of disability).

Particularly relevant is Justice Butler's concurring opinion in City and County of Denver v. Taylor, 88 Colo. 89, 292 P. 594, 597-598 (1930), in which he discusses generally the purposes of equitable exceptions to notice requirements. A principal purpose is to ensure that the wrongful act of the public entity or its employee does not prevent the claimant from complying with the statutory requirement.

The specific facts of this case do not fit neatly into a specific equitable exception already recognized by the Court. If true, however, the facts might be found to fit within the general purpose of equitable exceptions, mentioned above, and warrant special recognition: did the allegedly wrongful act of the public entity or its employee prevent the claimant from determining who is responsible for her injury and thus from complying with the statutory notice requirement? Similar to other equitable exceptions to notice requirements, the applicability of this exception in any case would be a question of fact.

- (b) Reasonable opportunity to discover which public entity should receive the notice.

The Court also could construe the statute, based on the language of §24-10-109(1), in a manner which does not require the recognition of additional equitable exceptions to the notice requirement. Specifically, the Court could recognize that the language of §24-10-109(1) establishes two pre-conditions to filing the notice: (1) discovery of the injury; and, (2) discovery of which public entity, or which public entity's employee, may have caused the injury and thus which public entity should receive the notice:

"(1) Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment shall file a written notice as provided in this section within 90 days after the date of the discovery of the injury...." (Emphasis added.)

While the 90 day period begins to run from the date of the discovery of the injury, implicit in the statute is a requirement that the claimant have a reasonable opportunity to determine which public entity must receive the notice. Again, this would present a question of fact.

II. A narrower construction of the statutory notice requirement is more consistent with the purposes of the Governmental Immunity Act.

Neither of the above-suggested constructions would hinder the purposes of the notice requirement. In most cases, the identity of the public entity which should be notified is apparent or readily ascertainable or is confined to a few entities, each of which could be notified of the injury. Recognition of these suggested constructions will not delay notice to or the receipt of necessary information by a public entity. Each will, however, prevent unfairness to claimants in appropriate circumstances.

The statutory requirement was not designed to provide notice to public entities of all the possible legal bases for claims an individual may have or the elements of those claims. Municipalities don't necessarily need to know promptly whether a particular claim will be based on theories of negligence, outrageous conduct, inverse condemnation, or antitrust. To achieve the purposes of the notice requirement, municipalities do need to know promptly who was injured, when, where, and how the injury allegedly occurred, the employees involved, if known, and the potential scope of the injury and claim against public funds.

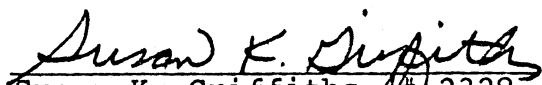
Similarly, claimants don't need to know prior to filing a notice all of their possible legal bases for a claim or each of the facts underlying the claim since filing the notice has no adverse impact on a claimant. Filing the notice does not require that any suit be filed -- it only preserves a right to sue in the future.

III. If the Court does not narrow its construction of the notice requirement, it should clarify the application of its opinion.

Respectfully, the language of the Court's opinion inserts tremendous uncertainty into the notice requirement. Inherent in the decision is the uncertainty in each claim of the date by which the claimant will have had a reasonable opportunity to discover the basic and material facts underlying the claim and from which the notice period begins to run. Other questions come to mind. What are the "basic and material facts" underlying a claim? Do they include, to refer to other phrases used in the opinion, the "elements of a claim", the "legal basis" of a claim, the "material facts essential to show the elements of a cause of action", or the "essential elements of a possible cause of action"? Must this information appear in the notice of a claim filed with the governmental entity? Does the "reasonable opportunity ... to discover the basic and material facts underlying a claim" constitute a question of fact for the jury or one of law for the court? How will the recognition of new legal bases for claims affect persons injured in the past?

Awaiting clarification of these issues by future court opinions may be painful and costly to claimants, public entities and their employees, taxpayers and the public. The League urges the Court to rehear the case or modify its opinion to provide reasonable protection to claimants while still promoting the purposes of the notice requirement.

Respectfully submitted,

  
Susan K. Griffiths, #2328  
Tami A. Tanoue, #12952  
Attorneys for the Colorado  
Municipal League  
1155 Sherman St., Suite 210  
Denver, Colorado 80203  
Telephone: (303) 831-6411