

out deciding the issue, for purposes of this appeal, that defendant has a right to be present at sidebar discussions with potential jurors during the jury selection process and conclude that defendant waived the right in this case.

¶ 34 We agree with the reasoning of the Wyoming Supreme Court in *Campbell v. State*, 999 P.2d 649 (Wyo.2000). In *Campbell*, the Wyoming Supreme Court determined that a defendant, who failed to object or assert her right to be present and whose attorney did attend the sidebar conferences and did not object to the court's failure to record the conferences, waived her right to be present during sidebar voir dire of potential jurors. *Id.* at 660–662. This case is strikingly similar to *Campbell*. Defense counsel for Mr. Hubbard did not assert defendant's right to be present at sidebar, nor did he object to defendant's absence at sidebar; and defense counsel, the court, the prosecutor, and the potential jurors discussed matters at sidebar off the record. As the United States Supreme Court stated in *Gagnon*, a trial court "need not get an express 'on the record' waiver from the defendant for every trial conference which a defendant may have a right to attend." *Gagnon*, 470 U.S. at 528, 105 S.Ct. 1482. A defendant knowing of a discussion must assert whatever right he may have to be present. *Id.* We noted in *Glenny* that "the right [to be present at trial] is not absolute and may be waived by word or act of the person claiming it," 656 P.2d at 992, and under these particular circumstances, we conclude that defendant waived his right to be present at the sidebar discussions. Because we find no error, the trial court could not have committed plain error.

CONCLUSION

¶ 35 We hold that (1) the trial court did not exceed its permitted range of discretion in not allowing an expert witness to testify regarding the fallibility of eyewitness identifi-

counsel held in response to the juror's concerns about sketches the defendant had made of the jurors. *Id.* at 527, 105 S.Ct. 1482. The selection of particular jurors, on the other hand, arguably has a reasonably substantial relation to the ful-

cation, (2) the trial court did not err in denying the motion to suppress testimony about the pretrial photo identifications because the identification testimony regarding the photo array was not violative of the due process clauses of the United States and Utah Constitutions, and (3) the defendant waived any right he may have had to be present while the trial court conducted voir dire of prospective jurors at sidebar. As a result, the jury verdict is affirmed.

¶ 36 Affirmed.

¶ 37 Chief Justice DURHAM, Associate Chief Justice DURRANT, Justice HOWE, and Justice RUSSON concur in Justice WILKINS' opinion.



2002 UT 46

**Dale WHEELER, Plaintiff
and Appellant,**

v.

**Mark R. McPHERSON, an individual,
and Kane County Sheriff's Depart-
ment, Defendants and Appellees.**

No. 20010237.

Supreme Court of Utah.

April 30, 2002.

Motorist brought personal injury action against county and its employee who drove the other car involved in the accident. The Sixth District Court, Kanab Department, David Mower, J., dismissed the action for lack of subject matter jurisdiction. Motorist appealed. The Supreme Court, Wilkins, J., held that motorist's failure to strictly comply with Governmental Immunity Act's notice of

ness of a defendant's opportunity to defend against a charge, and a defendant's right to a fair and just hearing could be thwarted by his or her absence.

claim requirements relieved the court of jurisdiction over the personal injury action.

Affirmed.

Counties ⇌213

District court lacked subject matter jurisdiction over claim for damages by motorist injured in car accident involving county employee, where motorist failed to strictly comply with Governmental Immunity Act and did not file notice of claim with the correct county official. U.C.A.1953, 63-30-11(3)(b).

Ronald E. Dalby, Salt Lake City, for plaintiff.

Peter Stirba and Aimee K. Martinez, Salt Lake City, for defendants.

WILKINS, Justice:

¶ 1 Plaintiff Dale Wheeler appeals from an order dismissing his complaint against Mark R. McPherson and the Kane County Sheriff's Department. The district court dismissed plaintiff's complaint for lack of subject matter jurisdiction because plaintiff failed to comply with the notice of claim requirements of the Utah Governmental Immunity Act. We affirm.

¶ 2 This case arises from the same car accident mentioned in the recently-decided companion case, *Wheeler v. McPherson*, 2002 UT 16, 40 P.3d 632. On September 27, 1998, in Kane County, Utah, a vehicle driven by Mark McPherson, who plaintiff alleges was acting within the scope of his employment as an employee of Kane County, collided with a vehicle driven by plaintiff.

¶ 3 In this case, plaintiff sued McPherson and the Kane County Sheriff's Department, alleging negligence. Prior to filing his complaint, plaintiff allegedly sent two letters, one dated August 3, 1999, and another dated September 24, 1999, entitled "Notice of Claim" to each of the three Kane County

Commissioners. Plaintiff also asserts he sent a copy of each letter to Kane County's insurer, the Utah Association of Counties Insurance Mutual. These letters were addressed to the Kane County Commissioners and sent by certified mail to the Kane County offices and received by Karla Johnson, clerk auditor of Kane County, who signed for the certified notices.¹

¶ 4 Defendants moved to dismiss, claiming plaintiff failed to strictly comply with the notice of claim requirement of the Governmental Immunity Act, Utah Code Ann. § 63-30-11(3)(b)(ii)(B) (1998). The district court granted the motion and dismissed plaintiff's complaint for lack of subject matter jurisdiction. Plaintiff appeals, claiming the letters addressed and mailed to the Kane County Commissioners constitute adequate filing of a notice of claim under the Utah Governmental Immunity Act, and that Kane County should be estopped from raising its notice of claim defense. The parties, after acknowledging in correspondence with the court that the issues presented in this case were argued in *Wheeler v. McPherson*, 2002 UT 16, 40 P.3d 632, stipulated to submitting the case on the briefs.

¶ 5 The law enunciated in the companion case of *Wheeler v. McPherson*, 2002 UT 16, 40 P.3d 632, is dispositive of the issues in this case. Neither party has demonstrated how the legal issues in this case differ from those presented and decided in that case. Accordingly, for the reasons explained in *Wheeler v. McPherson*, 2002 UT 16, 40 P.3d 632, the judgment of the trial court in the instant case is affirmed.

¶ 6 Chief Justice DURHAM, Associate Chief Justice DURRANT, Justice HOWE, and Justice RUSSON concur in Justice WILKINS' opinion.



1. Plaintiff attached photocopies of these letters to his appellate brief, but the record does not contain copies of these letters. The only record evidence that any such letters were delivered is found in the allegations of the complaint, the body of defendants' memorandum in support of the motion to dismiss, the body of plaintiff's

memorandum in opposition to the motion to dismiss, and the district court's order dismissing the complaint. To the contrary, clearly included in the record is the affidavit of Karla Johnson, Kane County Clerk, indicating that no notice of claim was delivered and directed to the Kane County Clerk as of September 27, 1999.