

2010

# Claudia Orr and Eugene Orr v. Uintah County, State of Utah : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

CLAUDIA ORR and EUGENE ORR,	)	
individually, on behalf of their deceased	)	
son, KEVIN ORR, HOLLY ORR,	)	
individually and on behalf of the estate	)	Appellate Case No. 20100373
and heirs of KEVIN ORR,	)	
	)	
Plaintiffs and	)	
Appellants,	)	
	)	
v.	)	
	)	
UINTAH COUNTY, STATE OF	)	
UTAH,	)	
	)	
Defendant and	)	
Appellee.	)	

**BRIEF OF APPELLANTS**

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**LIST OF PARTIES TO THE ACTION**

CLAUDIA ORR and EUGENE ORR, individually, on behalf of their deceased son, KEVIN ORR, HOLLY ORR, individually and on behalf of the estate and heirs of KEVIN ORR.

UINTAH COUNTY, STATE OF UTAH.

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### **Statement of Jurisdiction**

The Supreme Court had jurisdiction of this matter pursuant to Utah Code Ann. 78A-3-102(j) and transferred this matter to the Court of Appeals pursuant to Utah Code Ann. 78A-3-102(4).

### **Suggestion of Partial Mootness**

Mrs. Orr has entered into a confidential settlement with Grayson and Pete Martin Drilling reserving her rights against Uintah County. Those defendants filed a Petition for Interlocutory Appeal from the decision of the trial court relative to Mrs. Orr's potential claims under the Governmental Workers Act, Utah Code Ann. 67-20-1 et seq. Those claims alleged that Grayson and Pete Martin Drilling were statutorily immune from suit pursuant to the Utah Governmental Immunity Act. Judge Anderson entered an order, holding that the Workers Act was in fact the applicable statute but that Grayson and PMD did not qualify for protection as they had not followed the proper procedure in gaining County Approval. Attached hereto as Exhibit A. The County did not join in that petition.

The denial of the Petition to Intervene was a final order against the County. See *Utah.R.App.P.* 3(a). Appeal lies from all final orders and judgments. There was nothing left for Judge Anderson to do with respect to the County's Claim of Intervention once he denied the motion. See *Anderson v. Wilshire Investments, L.L.C.*, 123 P.3d 393, 399 (Utah 2005). The finality of the Court Action is determined not by the label attached to the order but by the substance. *State v. Jackson*, 857 P.2d 267 (Utah 1993). Here the substance of Judge Anderson's

ruling was to deny the County's Motion to Intervene. This motion decided that the county had no rights of intervention and thus would not be a party to the underlying lawsuit. Judge Anderson decided all of the issues relating to the county. There was nothing left for him to do.

### **Issue Presented For Review**

Did the District Court err in holding that Mrs. Orr did not or could not prosecute a claim against Uintah County under the provisions of Utah Code Ann. 63G-8-202 (Immunity for Persons Performing Voluntary services Act)?

*Issue Preserved:* Plaintiffs' Memorandum in Opposition to Uintah County's Motion to Dismiss, attached hereto as Exhibit B.

### **Standard of Review**

Motions to Dismiss present questions of law. The Court of Appeals reviews questions of law without deference to the trial court.

"Because the propriety of a 12(b) (6) dismissal is a question of law, we give the trial court's ruling no deference and review it under a correctness standard. *St. Benedict's Dev. Co. v. St. Benedict's Hospital*, 811 P.2d 194, 196 (Utah 1991). When determining whether the Court properly granted a motion to dismiss, we accept the factual allegations in the complaint to be true and consider them and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff. *Huntsaker v. State*, 870 P.2d 893, 897-898 (Utah 1993).



### **Summary of Argument**

The District Court erred in dismissing Plaintiffs' case under Rule 12(b)(6). Plaintiffs filed suit against Uintah County for the negligent actions of its volunteers in causing or contributing to the death of their husband and son, Kevin Orr. Plaintiffs' claims against the County arise under the Immunity for Persons Performing Voluntary Services Act, Utah Stat. Ann. 63G-8-203. That statute provides that the County is liable for the negligent decisions or actions of person performing services for the County on a voluntary basis. The elements of the claim are (1) the actor was a volunteer for the County and (2) the actor was negligent and thereby (3) caused an injury.

When the complaint is viewed as a whole, it is adequate to support those allegations. The complaint should therefore have not been dismissed pursuant to Civil Rule 12(b) (6) as there were sufficient facts alleged to support Mrs. Orr's cause of action against the county.

### **Factual Background**

The Plaintiffs' husband and son, Uintah County Sheriff's Detective Kevin Orr, was killed in a helicopter crash while on a search and rescue mission near Jensen, Utah. Detective Orr was a passenger in a helicopter owned by Pete Martin Drilling, Inc. and piloted by Pete Martin Drilling employee, Brian Grayson. Pete Martin Drilling had offered the helicopter to the County for the search, and Mr. Grayson was volunteering his time to fly Detective Orr over the search site.

Neither Pete Martin Drilling nor Brian Grayson was compensated by the County for their service.

While flying over the Green River just south of the Jensen Bridge on Highway 40, Mr. Grayson collided with unmarked electrical lines owned by Moon Lake Electric. Detective Orr was killed in the resulting crash. Although Plaintiffs allege that Moon Lake Electric was negligent in failing to place orange markers on the power lines, Mr. Grayson also had responsibility for his negligence in flying into the lines.

Mrs. Orr and Detective Orr's parents filed suit against Pete Martin Drilling, Brian Grayson and Moon Lake Electric. In August 2007, some ten months after the accident, the Uintah County Supervisors signed a document acknowledging Pete Martin Drilling and Brian Grayson to be "volunteers" for the County. (Exhibit C.) Thereafter, the County head of personnel also agreed that Grayson and Pete Martin were volunteers for the County.

Uintah County filed a motion to intervene in the lawsuit in an attempt to indemnify Grayson and PMD under the "Government Volunteer Workers Act," Utah Code Ann. 67-20-1 et seq. (Exhibit D.) In response to this motion, Plaintiffs argued that the preapproval requirement of Utah Code Ann. 67-20-4 had not been met, and therefore the Act's protections did not apply to Grayson and PMD. (Exhibit E.) However, Plaintiffs argued that if the two were found to be volunteers of any kind, they would be subject to the Immunity for Persons Performing Voluntary Services Act (Utah Code Ann. 63G-8-101 et seq). That Act

does not require preapproval of voluntary services, but still conveys liability to the County for the negligence of Grayson and PMD. *See* Utah Code Ann. § 63G-8-202. Thus, Plaintiff's argued that the County may bear liability under that statute, instead of the Government Volunteer Workers Act.

The court agreed with Plaintiffs that the requirements of the Government Volunteer Workers Act had not been met, and that neither Grayson nor PMD were entitled to its protections. *See* Exhibit A. As such, it denied the County's motion to intervene and did not allow the County to be included as a defendant. However, the court declined to offer an opinion as to the applicability of the Immunity for Persons Performing Voluntary Services Act. Plaintiffs then filed the present action against Uintah County alleging that the County was liable for Grayson's ordinary negligence under the Voluntary Services Act. That Complaint (Exhibit F) alleged the following:

1. Holley Orr is the wife of the deceased and personal representative of the deceased and personal representative of the estate. *See* Complaint, ¶ 2; R. 9.
2. Uintah County is a political subdivision of the State of Utah. *Id.* ¶ 3; R. 9.
3. Proper notice was given under the Utah Immunity Act. (Utah Code Ann 63G-7-401 et seq.) *Id.* ¶ 6; R. 9.
4. 4. On or about November 21, 2006, Detective Kevin Orr was fatally injured in the line of duty. *Id.* ¶ 7; R. 9.

5. The proximate cause of Detective Orr's death was a collision between the helicopter in which he was riding and a high voltage electrical transmission line. Id. ¶ 8; R. 8.
6. The helicopter was owned by Pete Martin Drilling, Inc. and piloted by Brian Grayson. Id. ¶ 9; R. 8.
7. Brian Grayson was negligent in colliding with the high voltage power lines which he had previously identified on an aerial map prior to taking off but failed to locate despite two passes over the area before colliding with the line. Id. ¶ 10; R. 8.
8. In August and September of 2007, months after the accident, the Uintah County Commissioners declared Grayson to be a volunteer. This was followed by a letter so declaring. Id. ¶ 19; R. 7.
9. Mrs. Orr called the County's attention to the provisions of "Immunity for Persons Performing Voluntary Services Act." (Utah Code Ann. 63G-8-101. Id. ¶ 21; R. 7.
10. Uintah County refused to consider that provision. Id. ¶ 21; R. 7.
11. Mrs. Orr is entitled to recovery her damages from Uintah County under a statutory policy of defense and indemnity. Id. ¶¶ 30 and 32; R. 5-6.

Thus, the complaint alleged that Grayson and PMD had both been declared as volunteers by the County, and that Grayson's negligence was a proximate cause

of Detective Orr's death. The complaint therefore requested relief under the Immunity for Persons Performing Voluntary Services Act and the Governmental Immunity Act, as provided by Utah Code Ann. § 63G-8-202.

### **Argument**

**A. Rule 12(b)(6) permits dismissal only when a plaintiff is not entitled to relief under any state of facts which could be proved in support of its claims.**

Dismissal under rule 12(b)(6) of the Utah Rules of Civil Procedure is warranted “only in cases in which, even if the factual assertions in the complaint were correct, they provide no legal basis for recovery.” *Mackey v. Cannon*, 2000 UT App 36, ¶ 13, 996 P.2d 1081. “A dismissal is a severe measure and should be granted by the trial court only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim.” *Id.* at ¶ 9 (citing *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990)). “The courts are a forum for settling controversies, and if there is any doubt about whether a claim should be dismissed for the lack of a factual basis, the issue should be resolved in favor of giving the party an opportunity to present its proof.” *Id.* at ¶ 12 (citing *Colman*, 795 P.2d at 624). Rule 12(b)(6), therefore, is not a basis for dismissal if there is *any way* that a plaintiff can make a case under the allegations pled in its complaint.

**B. Plaintiffs' Claims Set Forth A Proper Cause of Action and Facts Sufficient To Meet It.**

The only statutory elements of a cause of action under Utah Code Ann. 63G-8-202 are (1) a legal action against a public entity; (2) injury resulting as result of a person who (3) was performing voluntary service.

It is clear that Mrs. Orr alleged that she was damaged through the wrongful death of her husband. It is also clear that Detective Orr's death was caused or contributed to by Grayson and PMD, and that the County declared them to have been acting as volunteers at the time. She brought a legal action against a public entity, Uintah County alleging that a proximate cause of her loss was the death of her husband at the hands of Mr. Grayson. She further alleges that Mr. Grayson was a volunteer for the County at the time of Detective Orr's demise. She thus has alleged all of the applicable elements of the cause of action under Utah Code Ann. 63G-8-202.

**C. Dismissal Under Rule 12(b)(6) was Therefore Improper.**

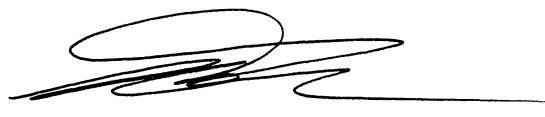
The Utah Courts have made plain that in a Motion to dismiss, the facts alleged by Mrs. Orr are deemed to be true. *Puttuck v. Gendron*, 199 P.3d 971, 976 (UT App. 2008). Thus, the Court must assume that Detective Orr died in the line of duty. It must assume that a proximate cause of his death was the negligence of Brian Grayson. Further, it must assume that Mr. Grayson was a volunteer of the County.

When such assumptions are made, there is no justification for dismissing Mrs. Orr's Voluntary Services Act cause of action. Relief can be granted upon the alleged facts under the Immunity for Persons Providing Voluntary Services Act and the Governmental Immunity Act. As such, dismissal under Rule 12(b)(6) was improper.

**Conclusion**

Plaintiffs therefore respectfully ask this Court to reverse the decision of the trial court dismissing her cause of action under the Voluntary Services Act, Utah Code Ann. 63G-8-202 and remand the matter to the trial court for trial on the merits of her claim.

DATED this 10 day of December, 2010.



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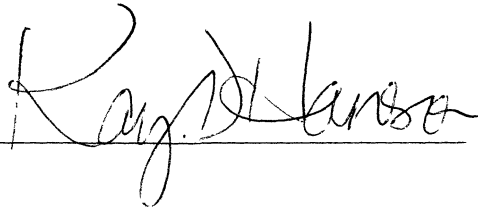
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of December, 2010, I served the attached **BRIEF OF APPELLANTS AND ADDENDUM TO THE BRIEF OF APPELLANTS** by U. S. Mail, postage paid, on the following:

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