

2010

Lewis J. Pintar and Afton B. Pintar v. Martin Houck, Darlene Houck, Susan Morgan, County of Utah : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LEWIS J. PINTAR and AFTON B.
PINTAR

Plaintiffs/Appellants,

v.

MARTIN HOUCK, DARLENE
HOUCK, SUSAN MORGAN,
COUNTY OF UTAH,

Defendants/Appellees.

Case No.: 20100443

Oral Arguments Requested

Reply Brief of Appellants

Appeal from Judgment Entered by The Fourth District Court, Utah County,
The Honorable Gary D. Stott and The Honorable David N. Mortensen

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UTAH APPELLATE COURTS

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I. APPELLEES' CONTRADICTIONS OF AND DISCREPANCIES IN THE FACTS SET FORTH IN THE RECORD ARE IRRELEVANT FOR PURPOSES OF THIS APPEAL.

A. Utah County Appellees.

In ruling on a Motion to Dismiss pursuant to Utah Rule of Civil Procedure 12(b)(6), the Court must accept all factual allegations in the Complaint as true and consider them and all reasonable inferences drawn from them in the light most favorable to the Plaintiff as the non-moving party. *Whipple v. American Fork Irrigation Company*, 910 P.2d 1218, 1219 (Utah 1996).

Appellees, Deputy Morgan and Utah County (hereinafter “Utah County Appellees”), misstate facts as set forth in the record. Utah County Appellees state in their brief that “hostilities developed between the Pintars and the Houcks, prompting Mrs. Houck to call the Sheriff’s Department to complain about Mr. Pintar’s verbal and demonstrative hostilities toward them.” Utah County Appellees’ Brief p. 3. However, Appellants plead in their Complaint that there was great hostility exhibited by the Houcks toward the Pintars, not that there were hostilities between the parties. R. 3. This hostility included the Houcks contacting the Utah County Sheriff’s Department at least six (6) times regarding the Pintars. R. 819-22, 855-56, 863-65, 1071-74, 1096-1115, 1130. Also, Utah County Appellees state in their brief that: (1) “Deputy Morgan investigated Mrs. Houck’s complaints. . . .” and (2) “[The Pintars allege] Deputy Morgan failed to properly investigate

the claims before turning over her report to the Utah County Attorney(s)' Office for prosecution." Utah County Appellees.' Brief pp. 3, 23. The record is clear, however, that Appellants alleged in their Complaint and argued throughout that Deputy Morgan conducted absolutely no investigation in this matter. R. 4, 5, 818, 854, 862, 947-50, 956, 970, 980, 983, 985, 987, 992, 1135, 1292, 1294. Utah County Appellees further state that "[T]he Pintars allege in their Complaint that because the allegations leading to Mr. Pintar's arrest were false, Deputy Morgan's actions were unreasonable." Utah County Appellees.' Brief pp. 23. This is also incorrect. Appellants alleged that the allegations leading to Mr. Pintar's arrest, even if true, did not constitute a crime. R. 5, 829-30, 1292, 1294.

In misstating the facts, Utah County Appellees attempt to depict the situation as a mutually hostile neighbor dispute rather than what the allegations on the record clearly show: the only hostility in this situation was that of the Houcks toward the Pintars. Utah County Appellees further attempt to skew the record to portray Deputy Morgan as well-intentioned, or at worst, negligent in her duties (e.g. "she failed to properly investigate"). In fact, Deputy Morgan willfully did not investigate the matter. Also, Utah County Appellees misrepresent the allegations by stating that Deputy Morgan took a complaint regarding criminal activity committed by L. Pintar, who later turned out to be innocent.

These discrepancies are material and important in that they are factors which tend to show concerted effort between the Houcks and Deputy Morgan to have Mr.

Pintar wrongfully arrested. It is somewhat understandable that reasonable officers commit negligence from time to time in the course of an investigation. However, it is neither reasonable nor understandable that an arrest takes place without a crime being alleged by a complainant and absolutely no investigation by the arresting officer. This is especially true in light of the fact that the complaining party's close relative worked at the same law enforcement agency as the arresting officer, and there was no crime committed, or even alleged.

Utah County Appellees' version of the allegations is irrelevant. This Court is obliged to follow the standard set forth in *Whipple, supra* at 1219, and accept all factual allegations in the Complaint as true and consider them and all reasonable inferences drawn from them in the light most favorable to Appellants as the moving party in this matter.

B. Houck Appellees.

Appellees Martin and Darlene Houck (hereinafter "Houck Appellees") dispute the facts plead and attempt to introduce their version of the facts as set forth on the record in their Statement of Facts. Houck Appellees' Brief, pp. 1-6. For purposes of this Appeal, this court must consider all facts in the Complaint as true and consider them in a light most favorable to Appellants. Whether the Houcks dispute those facts is irrelevant to this appeal.

II. DEPUTY SUSAN MORGAN WAS A POLICYMAKER FOR UTAH COUNTY IN THIS MATTER AND THEREFORE LIABILITY MUST ATTACH TO UTAH COUNTY.

A. The Facts Alleged in the Complaint Show that Officer Morgan is a Policymaker for Utah County.

Utah County Appellees argue that Appellants failed to allege in their original Complaint that Utah County has an official policy that led to a violation of Mr. Pinter's constitutional rights and that Deputy Morgan acted pursuant to such policy. This argument is not well taken. Appellants have plead facts in their Complaint from which any reasonable inference therefrom shows that Deputy Morgan herself established official Utah County policy which led to the unconstitutional arrest of Mr. Pinter (R. 3-6; Appellants' Brief pp. 25-26).

Furthermore, Utah County Appellees do not dispute that: (1) a governmental custom or policy may be established by a single policymaker, *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); (2) the identification of officials having "final policymaking authority" is a question of state (including local) law, *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) citing *Pembaur v. City of Cincinnati*, *supra*, at 483; and (3) Utah law gives law enforcement officers the final authority to determine what is a lawful arrest. Utah Code Ann. §17-22-2; Utah Code Ann. §77-7-2. As the Utah County Appellees correctly point out:

The fact that a particular official has discretion in the exercise of particular functions does not give rise to municipal liability based on

an exercise of that discretion *unless the official is also responsible, under state law, for establishing final governmental policy respecting such activity.*

Pembaur v. City of Cincinnati, *supra* at 481-482 [emphasis added]; Utah County Appellees.’ Brief p. 3.

As the Utah County Appellees further point out: “Only those municipal officers who have final policymaking authority may by their actions subject municipal government to §1983 liability.” *City of St. Louis v. Praprotnik*, *supra*, at 123.

Utah law is clear that police officers have final decision-making authority to make arrests. In the State of Utah, an arrest by a law enforcement officer is not the municipality or government entity “simply going along with discretionary decisions made by subordinates” *Id.* at 130. The officer’s final authority to arrest is mandated by state law. The only constraint the law of the State of Utah places on law enforcement officers in making an arrest is that that arrest be “lawful.” Utah Code Ann. §17-22-2. However, the State of Utah is silent as to what constitutes a “lawful” arrest for a sheriff to make. It is therefore the duty of the officer to determine the policy on behalf of a municipality as to what constitutes a “lawful” arrest.

In the instant case, Utah County’s policy, as established by Deputy Morgan, was to have Mr. Pintar arrested where there was no allegation of a crime and no investigation of the complaints made. Furthermore, Utah County’s policy in this

matter was to ignore the fact that the complaining witness' close relative worked at the same Sheriff's Department as Deputy Morgan—a fact that Deputy Morgan was aware of when she responded to this matter. R. 818-19, 834, 854, 862, 929, 1018, 1294. The policy of Utah County in this matter clearly violated Mr. Pintar's Constitutional Fourth Amendment right to be free from arrest without probable cause. *Terry v. Ohio*, 391 U.S. 1 (1968). Therefore, liability must attach to Utah County.

B. Deputy Morgan's Decision To Arrest Mr. Pintar And Initiate Criminal Proceedings Against Him Was Not Reviewable Nor Constrained By Any Other Policies.

Utah County Appellees concede that the law does not provide a review of a police officer's decision to arrest prior to the arrest. Utah County Appellees argue instead that because the law provides a review of actions after the fact, the officer's decision is reviewable by others rendering the officer less than a final policymaker pursuant to *Milligan-Hitt v. Board of Trustees of Sheridan County School District No. 2*, 523 F.3d 1219 (10th Cir. 1998). This argument is flawed on two grounds: (1) there was no review of an arrest that took place after the arrest, and even if there were, (2) the *Milligan-Hitt* ruling does not consider a situation where the review takes place after the fact. *Id.* at 1229-1230.

First, Utah County Appellees do not offer that there was any type of review of Mr. Pintar's arrest. Instead, Utah County Appellees argue that because the Utah County Attorney's Office continued with the criminal prosecution of the matter, it

constituted a “review” of the arrest. Utah law specifically enumerates the duties of County Attorneys in Utah Code Ann. §17-18-1.5 and Utah Code Ann. §17-18-1.7. There is nothing contained in these statutes or any other Utah statute which authorizes or directs a County Attorney to make an arrest, or to review the propriety of an arrest made by a police officer. The County Attorney’s duty is to file charges and prosecute crimes based on the allegations presented to him or her. The County Attorney cannot “undo” an arrest after the fact. County Attorneys have no authority to do so under Utah law.

In the instant case, if the County Attorney declined to prosecute Mr. Pintar immediately after the arrest, the arrest would still have taken place, and Mr. Pintar’s constitutional rights would still have been abridged. Following Utah County Appellees’ logic to its natural conclusion, any police officer can arrest anyone, with or without probable cause, for any reason (such as doing a favor for a friend, or based on race, gender, nationality, etc.) with no liability attaching to a municipality because the County Attorney may or may not prosecute the matter. Similarly, a municipality could simply institute a policy of “reviews” every 10 years. If this court adopts Utah County Appellees’ argument that it does not matter when a review takes place, this would completely obviate any liability to a municipality for the deprivation of constitutional rights incident to a wrongful arrest.

Second, the facts of *Milligan-Hitt, supra*, present a case in which the review of an official's decision is conducted prior to any action being taken. As set forth Appellant's Brief, the *Milligan-Hitt* Court adjudicated a case in which a Wyoming School teacher brought an action against a school district and superintendent alleging she was not hired based on her sexual orientation. In determining whether the superintendent was a policymaker for the school district the Court looked to the local policy of the school district which expressly provided that the superintendent's decisions are to be constrained by the general policies enacted by the school board. Applnts.' Brief, pp. 24-25. Secondly, the Court held:

. . . . under the board's policies at issue in this case, the superintendent's hiring decisions are reviewable by others. . . . When a superintendent puts forward the candidates recommended by the committee, the board may decide not to hire them. If the board does not like the candidates the superintendent puts forward, it may demand new ones. This review prevents the superintendent from being a final policymaker.

Id. at 1229-1230.

In other words, in pursuant to the Court's ruling in *Milligan-Hitt, supra*, the official's decision whether or not to hire someone is reviewable before the hiring is made. This is distinguishable from the instant case, where, assuming *arguendo* that the County Attorney(s)' prosecution constituted a review, a decision either way occurs after the arrest has already occurred.

Moreover, Utah County Appellees argue that Appellants' attempt to distinguish "decision" from "action" where no distinction is made by the *Milligan-Hitt* Court. Utah County Appellees' Brief pp. 16-17. This is misconstruing the precise fact pattern of the *Milligan-Hitt* case, which was: (1) decision, followed by (2) review, followed by (3) action. In the instant case, Deputy Morgan proceeded as follows: (1) decision, followed by (2) action, followed by (3) review (assuming the County Attorney(s)' prosecution constituted a "review").

C. Holding Utah County Liable In This Case Does Not Create Municipal Liability On The Basis Of *Respondeat Superior*.

Lastly, Utah County Appellees argue that holding Utah County liable in the instant case for its unconstitutional policies as set forth by Deputy Morgan would "lead to the absurd result that all discretionary actions by police officers could be considered the creation of municipal policy, and therefore create municipal liability on the basis of *respondeat superior*." Utah County Appellees' Brief pp. 12-13. This is an overbroad and vague public policy argument which could just as easily be countered with: "Not holding Utah County liable would lead to the absurd result that police officers could arrest anyone at any given time for no particular reason and there would be no legal recourse for that individual."

In ruling on municipal liability regarding Section 1983 claims, the United States Supreme Court has made it clear that the Court's duty is to determine where the responsibility lies. *Pembaur v. City of Cincinnati*, *supra*, at 478-479. If an

official or municipal policy was the moving force behind the constitutional deprivation, then the municipality is liable. *Id.* A single individual may be a policymaker for the entire municipality. *Id.* at 480. Whether a single individual is a policymaker for the entire municipality is a question of state law. *City of St. Louis v. Praprotnik, supra* at 124.

In the instant case, Deputy Morgan promulgated Utah County policy by arresting Mr. Pintar in the absence of probable cause, the absence of an investigation, and the absence of the allegation of a crime. This does not mean that every action of every police officer would lead to municipal liability. Each case is fact-specific. The relevant inquiries must be made. Was there in fact a constitutional violation? Was the officer's decisions reviewable by others prior to the constitutional violation? Does state (or local) law confer upon the officer the authority to act as a policymaker for the municipality? If the answers are such that an officer is a policymaker and the policy he or she makes on behalf of the municipality leads to a deprivation of constitutional rights, then the Supreme Court has held that the municipality must be liable. Thus, as the answers to these inquiries differ, the outcomes will differ as well.

III. DEPUTY SUSAN MORGAN IS NOT ENTITLED TO QUALIFIED IMMUNITY FROM MALICIOUS PROSECUTION AND CONSPIRACY UNDER SECTION 1983.

Utah County Appellees state that Appellants do not offer any argument concerning the dismissal of the conspiracy cause of action pursuant to Section 1983. Utah County Appellees' Brief pp. 10. This is incorrect. The district court's decision is silent on whether Appellants met the applicable test to establish a conspiracy cause of action, and the district court ends its inquiry by finding that Deputy Morgan enjoys qualified immunity from both malicious prosecution and conspiracy pursuant to Section 1983. R. 205-209. Therefore, it must be concluded that the district court felt that whether Appellants met the test for conspiracy was irrelevant in light of Deputy Morgan's qualified immunity. Appellants' brief therefore responded to the district court's decision that Deputy Morgan had qualified immunity for both malicious prosecution and civil conspiracy.

A. The Facts Plead In The Complaint Clearly Show That Deputy Morgan Is Not Entitled To Qualified Immunity.

Utah County Appellees do not dispute that the district court abused its discretion in ignoring or misinterpreting facts presented in the Complaint and further does not dispute that those discrepancies are material in determining whether qualified immunity should be conferred upon Deputy Morgan. Instead, Utah County Appellees once again misconstrue the facts plead by Appellants in stating that Appellants "entire argument is based on the theory that the facts

alleged in the Complaint do not constitute probable cause for disorderly conduct.

. .” Utah County Appellees.’ Brief pp. 21. This is incorrect in two ways. First, Appellants alleged in their Complaint, that even if the allegations against Mr. Pinter were true, they did not constitute a crime. R. 5, 829-30, 1292, 1294. Second, Appellants base their argument on the totality of circumstances alleged in the Complaint, including: (1) Deputy Morgan verbally threatened the Pinters with criminal sanctions without probable cause or authority; (2) Deputy Morgan did not even undertake a rudimentary investigation of the matter to determine if there was any criminal act by Lewis J. Pinter; (3) Deputy Morgan did not have any contact with Lewis J. Pinter before filing a police report which caused him to be arrested, (4) a close relative of the complaining witnesses worked at the same law enforcement agency as Officer Morgan, and (5) the underlying conduct as alleged, even if true, does not constitute a crime. R. 3-6, 143; Appellants.’ Brief pp. 28.

Utah County Appellees argue that “. . . the Pinters ignore the fact that the district court never made a finding that the Pinters’ facts did or did not constitute disorderly conduct.” Utah County Appellees.’ Brief pp. 21. In point of fact, the district court ignored the allegation made by Appellants altogether. It was explicitly alleged as a matter of fact in the Complaint that the allegations against Mr. Pinter, even if taken as true, did not constitute a crime under Utah law. The district court had no latitude to make a finding regarding the allegation. The

district court was compelled to accept the allegations of the Complaint as true. *Whipple v. American Fork Irrigation Company, supra* at 1219.

Furthermore, Utah County Appellees argue that the district court never ruled on whether the facts constituted probable cause and instead focused on the “bigger picture.” Utah County Appellees.’ Brief pp. 21. The district court does not have this discretion. Whether or not the facts alleged in the Complaint show an arrest without probable cause—a violation of a clearly established constitutional right—goes directly to the heart of the matter. The law is clear: where an official deprives a constitutional right and that right was clearly established at the time of deprivation such that a reasonable official would understand that his or her conduct was unlawful, he or she does not enjoy qualified immunity. *Saucier v. Katz*, 533 U.S. 194 (2001).

Finally, Utah County Appellants allege that Deputy Morgan acted as a reasonable officer. Utah County Appellees argue that “The Pintars. . . . [alleged] Deputy Morgan failed to properly investigate the claims before turning over her report to the Utah County Attorney’s Office.” Utah County Appellees.’ Brief pp. 23. This is not true. As set forth, *supra*, Appellants alleged that there was absolutely no investigation that took place. R. 4, 5, 818, 854, 862, 947-50, 956, 970, 980, 983, 985, 987, 992, 1135, 1292, 1294. “Failing to properly investigate” implies that Officer Morgan attempted to investigate the matter, however negligently. Where absolutely no investigation was undertaken by Deputy Morgan, it was clearly an

intentional decision. This is unreasonable. Utah County Appellees further argue that “The Pintars allege in their Complaint that because the allegations leading to Mr. Pintar’s arrest were false, Deputy Morgan’s actions were unreasonable. This is also not true. As set forth, *supra*, the Pintars alleged that even if the allegations were true against Mr. Pintar, they did not constitute a crime R. 5, 829-30, 1292, 1294. Utah County Appellees’ version of the allegations implies that Deputy Morgan reasonably relied on the Houcks’ allegations in arresting Mr. Pintar. However, the Houcks’ initial allegations do not support the conclusion that Deputy Morgan acted reasonably in arresting L. Pintar. Simply put, the Houcks failed to allege a crime. Would a reasonable officer arrest an individual for eating chocolate ice cream? Or wearing a shirt with the wrong color? Just as these types of actions constitute non-criminal activity, so do the allegations made by the Houcks that led to the arrest of Mr. Pintar.

The other facts alleged in the Complaint further evince that Deputy Morgan’s actions were unreasonable: (1) the complaining witnesses’ close relative worked at the same sheriff’s department, (2) Deputy Morgan knew of this fact when she did not investigate this matter and arrested Mr. Pintar without the allegation of a crime, and (3) Deputy Morgan chose not to contact Mr. Pintar at all in this matter before having him arrested. R. 3-6. Applnts.’ Brief, pp. 25-26.

B. The Actions Of The County Attorney(s) Do Not Confer Qualified Immunity Upon Deputy Morgan Nor Do They Relieve Her Of Liability.

Appellees, Martin and Darlene Houck argue that they are not responsible for Deputy Morgan's decision to arrest Mr. Pintar and initiate criminal proceedings. They merely made the complaint. R. 638-639, 1208, Houck Applees.' Brief, pp. 34. Deputy Morgan argues that it is not her fault that the allegations made by the Houcks later turned out to be false. R. 77-78, Utah County Applees.' Brief pp. 23-24. Deputy Morgan merely relied on what the Houcks said. Deputy Morgan further argues that she is not responsible for the County Attorney(s)' decision to prosecute the matter after Mr. Pintar was arrested. She merely turned the matter over to the County Attorney(s). Utah County Applees.' Brief pp. 23-24.

Furthermore, Deputy Morgan argues that, since she is not responsible for the actions of the County Attorney(s) in this matter, she is entitled to qualified immunity. Utah County Applees.' Brief pp. 23-24. While it is true that Deputy Morgan is not responsible for the actions or inactions of the County Attorney(s) during the criminal prosecution, the actions or inactions of the County Attorney(s) are irrelevant. It was Deputy Morgan's decision, and hers alone, to arrest Mr. Pintar and initiate the criminal proceedings. The subsequent actions taken by the County Attorney(s) do not absolve Deputy Morgan of responsibility for her actions.

The courts have used the common law of torts as a “starting point” for determining the contours of constitutional violations under Section 1983. *Pierce v. Gilchrist*, 359 F.3d 1279, 1292 (10th Cir. 2004). The *Restatement of Torts, 2d*, states that malicious prosecution occurs when one (a) initiates *or* procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and (b) the proceedings have terminated in favor of the accused. *Restatement of Torts, 2d*, §§653, 674 (1977). Pursuant to the common law definition, simply initiating the criminal proceedings and having Mr. Pintar arrested by itself subjects Deputy Morgan to liability under Section 1983. This argument is buttressed by the fact that Deputy Morgan took these actions after conducting absolutely no investigation, in the absence of the allegation of crime, and with the knowledge that the complaining witnesses’ close relative worked at the same sheriff’s department. Utah law is also clear that merely initiating or instituting criminal proceedings and causing the arrest of an individual render one liable for malicious prosecution where the other elements of the tort have been met. *Kool v. Lee*, 134 P. 906, 910 (1913).

C. The Facts As Plead In The Complaint Are Sufficient To Sustain A Cause Of Action For Conspiracy Pursuant To Section 1983.

Although the subheading of Utah County Appellees’ argument states that Deputy Morgan is entitled to qualified immunity from conspiracy pursuant to Section 1983, Utah County Appellees’ argument instead addresses whether or not

Appellants met the elements of conspiracy pursuant to Section 1983 in the allegations of their Complaint. Utah County Appellees' Brief pp. 24-27. As set forth *supra*, the district court did not address whether Appellants met the elements of conspiracy pursuant to Section 1983. For this reason, the elements of conspiracy are not at issue here.

Even assuming the elements of conspiracy were at issue in this Appeal, Appellants sufficiently plead those elements. Utah County Appellees argue that Appellants present nothing more than conclusory allegations of conspiracy, which is insufficient. *Tonkovich v. Kansas Board of Regents*, 159 F.3d 504 (10th Cir. 1998). In *Tonkovich v. Kansas Board of Regents*, the court held that a law school professor alleged a conspiracy against him by the faculty because the faculty discussed action against him following allegations of his improper conduct with a student. The court held that the plaintiff provided only conclusory and unsubstantiated allegations of a conspiracy based solely on the fact that the governmental entities discussed the actions that were ultimately taken against Plaintiff. *Id.* at 533. The instant case is clearly distinguishable from the facts of *Tonkovich v. Kansas Board of Regents*.

Utah County Appellees argue that the conspiracy allegation only concerns Tonya Houck, the daughter-in-law of the complaining witnesses, Martin and Darlene Houck, who is employed at the Utah County Sheriff's Department. Utah

County Appellees.’ Brief pp. 26. Utah County Appellees further misstate Appellants’ allegations that the conspiracy is based solely on the following facts: (1) Ms. [Tonya] Houck is employed as a secretary in the Judicial Services Division of the Utah County Sheriff’s Office; (2) Ms. [Tonya] Houck happens to be the daughter-in-law of codefendants, Darlene and Martin Houck; and (3) Ms. Houck has an alleged friendship with Deputy Morgan. Utah County Appellees.’ Brief pp. 26. Utah County Appellees further argue that even if these allegations were true, they present nothing more than conclusory allegations of conspiracy which is insufficient. Utah County Appellees.’ Brief pp. 27.

However, the allegation that Tonya Houck and Deputy Morgan have a personal and friendly relationship is not, nor ever has been, the lynchpin of Appellants’ cause of action for conspiracy. Appellants specifically plead in their Complaint that: (1) the complaining witnesses, Martin and Darlene Houck, had a close relative who worked at the same Utah County Sheriff’s Office they called to complain regarding L. Pintar; (2) the responding officer, Deputy Morgan, knew of this fact when she responded to the call; (3) the Houcks and Deputy Morgan, worked in concert to have L. Pintar arrested by:

(a) Deputy Morgan verbally threatening criminal action against L. Pintar to his wife when he was not present, despite the fact that he was not present at the verbal altercation between Martin Houck and Nicholas Pintar the date of the Complaint; R. 3-6, 808.

(b) Deputy Morgan failing to document in writing the fact that she went to the Pintars' residence and verbally threatened criminal action against Mr. Pinter to his wife. R. 3.

(c) Deputy Morgan failing to conduct any investigation of the matter before having L. Pinter arrested, booked, fingerprinted, and having his mug shot placed on the internet; R. 4, 5, 818, 854, 862, 947-50, 956, 970, 980, 983, 985, 987, 992, 1135, 1292, 1294.

(d) Deputy Morgan mandating L. Pinter's arrest even in the absence of an allegation of a crime. R. 5, 829-30, 1292, 1294.

Most importantly, the allegations of the Complaint lead to the reasonable conclusion that the above actions were done in concert as a result of an agreement, either express or tacit, between Deputy Morgan, Martin Houck and Darlene Houck. R. 5. Plaintiffs must only allege and show "facts tending to show an agreement and concerted action." *Beedles v. Wilson*, 422 F.3d 1059, 1073 (10th Cir. 2005). Although a conspiracy may be established by either direct or *circumstantial evidence, it is usually susceptible of no other proof than that of* circumstantial evidence because direct evidence of a conspiracy is ordinarily in the possession and control of the alleged conspirators and is seldom attainable. *15A Corpus Juris Secundum, Conspiracy §37*.

Utah County Appellees seem to be putting forth a requirement that a conspiracy in this matter must include direct involvement of Tonya Houck.

However, no such requirement exists. The allegations of the Complaint clearly show an agreement and concerted action to deprive L. Pintar of his constitutional right to be free from arrest without probable cause between Deputy Morgan, Martin Houck and Darlene Houck.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE PINTARS LEAVE TO FILE THEIR SECOND AMENDED COMPLAINT.

The Houck Appellees repeat, verbatim, their Opposition to Appellants' original motion in district court as well as the district court's ruling. The Houck Appellees do not address Appellants' argument that Rule 15(a), Utah Rules of Civil Procedure, is clear that "leave [to amend a complaint] shall be freely given where justice so requires." The Houck Appellees do not address the fact that Appellants relied upon and met the agreed upon deadline for the amending of pleadings. Further, the Houck Appellees do not address to the fact that they had an opportunity to conduct discovery regarding the allegations of the proposed Second Amended Complaint and indeed propounded discovery questions which dealt solely with those allegations, thus obviating any claim that they would be prejudiced by the filing of the Second Amended Complaint.

V. THE DISTRICT COURT ERRED IN DISMISSING THE PINTARS' FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF AS TO THE HOUCKS.

Rather than directly addressing Appellants' arguments regarding the First Cause of Action for Declaratory Relief, the Houck Appellees simply repeat from other briefs and rulings on file in this matter regarding the First Cause of Action for Declaratory Relief.

VI. THE DISTRICT COURT ERRED IN DISMISSING THE PINTARS' SECOND, THIRD, AND FOURTH CAUSES OF ACTION FOR MALICIOUS PROSECUTION, CIVIL CONSPIRACY PURSUANT TO SECTION 1983 AND CIVIL CONSPIRACY AS TO THE HOUCKS.

The Houck Appellees again almost exclusively repeat from other briefs and rulings on file in this matter regarding the Second, Third, and Fourth causes of action for Malicious Prosecution, Civil Conspiracy, and Conspiracy Pursuant to Section 1983, respectively. The Houcks do not present any new arguments or authority.

VII. CONCLUSION

Appellants respectfully ask that in ruling on the district court's dismissal of this matter, this Court bear in mind that an individual was arrested by the police based on allegations by his neighbors where: (1) there was a history of great hostility shown by the neighbors toward that individual; (2) the neighbor's close

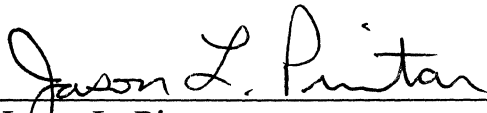
relative works at the same law enforcement agency as the arresting officer—a fact which the officer knew; (3) there was absolutely no investigation of the matter by the arresting officer; and (4) the allegations of the neighbor, even if true, did not constitute a crime.

In order to uphold one or all of the district court's respective rulings, this Court must determine whether such an arrest can happen without assigning any responsibility to Utah County, Deputy Morgan, Martin Houck, and/or Darlene Houck. Appellants respectfully submit that, based on the facts of this case and the applicable law, it is impossible to do so and affirm the district court's rulings.

Based on the foregoing and those reasons set forth in Appellants' Brief, Appellants respectfully request that this court reverse and remand the case to the district court.

DATED this 20th day of December, 2010

Law Offices of Jason L. Pinter,



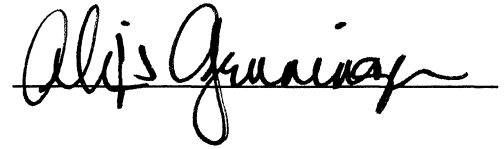
Jason L. Pinter,
Attorney for the Pinters

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2010, two true and correct
copies of the foregoing **REPLY BRIEF OF APPELLANTS** were served
upon the following by United States Mail:

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A handwritten signature in black ink, appearing to read "Ali's Gunning", written over a horizontal line.

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