

2010

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LEWIS J. PINTAR and AFTON B.)	
PINTAR,)	Case No. 20100443
)	
Plaintiffs/Appellants)	
)	
vs.)	
)	
MARTIN HOUCK, DARLENE)	
HOUCK, SUSAN MORGAN, and)	
UTAH COUNTY,)	
)	
Defendants/Appellees)	

BRIEF OF APPELLEES SUSAN MORGAN AND UTAH COUNTY

On Appeal from the Fourth District Court, State of Utah
The Honorable Gary D. Stott and The Honorable David N. Mortensen

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BRIEF OF APPELLEES SUSAN MORGAN AND UTAH COUNTY

STATEMENT OF JURISDICTION

This action is within the original jurisdiction of the Supreme Court of Utah, pursuant to Utah Code Ann. § 78A-3-102(3)(j). The Supreme Court assigned this case to the Court of Appeals by the authority of Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

Issue #1: Was the district court correct in concluding that liability for Utah County cannot attach under 42 U.S.C. § 1983 because Susan Morgan, a

deputy with the Utah County Sheriff's Department ("Deputy Morgan"), is not a policymaker for Utah County?

Standard of Review: The trial court dismissed the Pintars' 42 U.S.C. § 1983 claims against Utah County pursuant to the Utah County Defendants' Utah R.Civ.P. 12(b)(6) motion to dismiss. The propriety of a Rule 12(b)(6) dismissal is a question of law. *Whipple v. American Fork Irrigation Co.*, 910 P.2d 1218 (Utah 1996). In ruling on a motion to dismiss for failure to state a claim, the court must construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor. *Russell v. Standard Corp.*, 898 P.2d 263 (Utah 1995).

Issue #2: Was the district court correct in concluding that Deputy Morgan is entitled to qualified immunity from the Pintars' 42 U.S.C. § 1983 claims of malicious prosecution and conspiracy?

Standard of Review: The trial court dismissed the Pintars' 42 U.S.C. § 1983 claims against Deputy Morgan pursuant to the Utah County Defendants' Utah R.Civ.P. 12(b)(6) motion to dismiss. The propriety of a Rule 12(b)(6) dismissal is a question of law. *Whipple v. American Fork Irrigation Co.*, 910 P.2d 1218 (Utah 1996). In ruling on a motion to dismiss for failure to state a claim, the court must construe the complaint in the light

most favorable to the plaintiff and indulge all reasonable inferences in his favor. *Russell v. Standard Corp.*, 898 P.2d 263 (Utah 1995).

STATEMENT OF THE CASE

Nature of the Case. Appellants, Lewis J. Pintar and Afton B. Pintar (the “Pintars”) live in Spanish Fork (Palmyra), Utah and share a boundary line with Appellees, Martin and Darlene Houck (the “Houcks”). The Pintars’ dispute with the Houcks began on July 8, 2004 when Mr. Houck sent a letter to Mr. Pintar asking him to keep his irrigation water from flooding the Houcks’ property. Thereafter, hostilities developed between the Pintars and the Houcks, prompting Mrs. Houck to call the Utah County Sheriff’s Department to complain about Mr. Pintar’s verbal and demonstrative hostilities towards them. Deputy Morgan investigated Mrs. Houck’s complaints and eventually issued a class C misdemeanor citation to Mr. Pintar for disorderly conduct.

On October 30, 2006, Utah County Attorney Kay Bryson and Deputy Utah County Attorney Timothy Barnes issued a criminal summons and filed an information against Mr. Pintar for disorderly conduct. Subsequently, the Utah County Attorney’s Office moved to dismiss the case against Mr. Pintar based on lack of evidence to support the charges and the motion was granted on August 1, 2007.

Course of Proceedings and Disposition in District Court. Shortly thereafter, the Pintars filed a lawsuit against Martin and Darlene Houck, their daughter-in-law Tonya Houck (a secretary with the Utah County Sheriff's Department), Deputy Morgan, Utah County Attorney Kay Bryson, Deputy Utah County Attorney Timothy Barnes, and Utah County. For the purpose of this appeal, Tonya Houck, Deputy Morgan, Utah County Attorney Kay Bryson, Deputy Utah County Attorney Timothy Barnes, and Utah County will be referred to collectively as the "Utah County Defendants."

In their complaint, the Pintars alleged six state law claims in the Fourth through Ninth Causes of Action and 42 U.S.C. § 1983 claims of malicious prosecution and conspiracy in the Second and Third Causes of Action against the Utah County Defendants. The Utah County Defendants moved for dismissal of the state law claims based on the Pintars' failure to meet the Utah Governmental Immunity Act's notice of claim requirements. At the same time and in a separate motion, the Utah County Defendants moved for dismissal of the Section 1983 claims based on the Pintars' failure to allege any facts rising to the level of a Section 1983 claim and even if they did allege sufficient facts, the individual Utah County Defendants were entitled to judicial or qualified immunity.

Shortly after filing the motions, the district court dismissed Kay Bryson and Timothy Barnes pursuant to a Stipulated Motion to Dismiss and subsequent Order dated May 27, 2008. Tonya Houck, Deputy Morgan, and Utah County remained in the lawsuit, in addition to Martin and Darlene Houck. After briefing was complete on the Utah County Defendants' motions to dismiss and oral argument was heard, the district court issued a Memorandum Decision on August 20, 2008 and an Order Dismissing Utah County Defendants dated September 10, 2008 ("September 10 Order"). Aple. Add. p. 22. Martin and Darlene Houck were still parties to the lawsuit, as the motions to dismiss did not address the Pintars' claims against them.

The Pintars then appealed the September 10 Order and the Utah County Defendants moved for summary disposition. A Memorandum Decision was issued and the Utah Court of Appeals dismissed the appeal because the September 10 Order was not final and was not certified under Utah R.Civ.P. 54(b). *See* 2008 UT App 451 (Aple. Add. p. 30).

The action continued in the district court with the claims against Martin and Darlene Houck only. On a motion for summary judgment, all remaining claims were dismissed, pursuant to an order issued on June 14, 2010. R. 1291. The Pintars filed a notice of appeal on May 28, 2010.

STATEMENT OF RELEVANT FACTS

Deputy Morgan and Utah County were dismissed pursuant to Utah R.Civ.P. 12(b)(6) because the Pintars failed to state a claim for which relief can be granted. Under the motion to dismiss standard, the district court must only consider the facts alleged in the complaint. Accordingly, Deputy Morgan and Utah County state only the relevant facts alleged in the complaint upon which the motion to dismiss was granted.

The Pintars and Martin and Darlene Houck both own real property located in Spanish Fork, Utah and share a common boundary line. Both have certain rights to irrigation water administered by the Westfield Irrigation Company. R. 11, 12, and 211. Deputy Morgan is employed as a deputy by the Utah County Sheriff's Office. R. 11 and 211. Tonya Houck is the daughter-in-law of Martin and Darlene Houck and is employed by the Utah County Sheriff's Office as a secretary. The Pintars allege that Ms. Houck has a personal and friendly working relationship with Deputy Morgan. R. 10, 11, and 211. Kay Bryson was the Utah County Attorney and Timothy Barnes was a Deputy Utah County Attorney at the time of the events alleged in the complaint. R. 11.

Over the years, beginning prior to 2004, disagreements have arisen between the Pintars and Martin and Darlene Houck regarding the

management of the irrigation water between them. R. 10, 11, and 211. On May 12, 2006, Deputy Morgan contacted Mrs. Pintar and issued a verbal criminal injunction to the Pintars to stop all contact with the Houcks. R. 10 and 211. Deputy Morgan took this action without following proper procedure, without consulting her superiors at Utah County, and without disclosing her friendship with Tonya Houck. R. 10 and 211. Deputy Morgan also took this action on the basis of complaints presumably made by someone in the Houck family about the water issues between the Pintars and the Houcks, and about threats made allegedly by the Pintars' son, Nick. R. 9, 10, and 210.

On May 14, 2006, Deputy Morgan took another informal, undocumented (at the time) report that Mr. Pintar had improperly gestured at Martin and Darlene Houck from his property as the Houcks drove by. R. 9. Neither Deputy Morgan nor any other representative of the Utah County Sheriff's Office contacted Mr. Pintar about the allegations that gave rise to the actions taken by Deputy Morgan on May 12, 2006 and May 14, 2006. R. 9 and 210.

On June 11 and July 4, 2006, Deputy Morgan received information regarding two incidents wherein it was alleged that Mr. Pintar said "there goes the monkeys" as Martin and Darlene Houck walked by his property and

at a public event, Mr. Pintar shook his finger at Mrs. Houck while making derogatory comments. R. 9 and 211. Deputy Morgan did not document these incidents until a later date. R. 9 and 211.

On August 20, 2006, Deputy Morgan received a call from Mr. Houck who complained that Mr. Pintar allegedly called him an “asshole” and flipped him off from the Plaintiffs’ property. R. 9 and 210. Deputy Morgan prepared a written summary of the incident and detailed the history of the dealings between the parties, but she did not contact the Pintars and did not even attempt to undertake a rudimentary investigation. R. 9 and 210. Also on August 20, 2006, Deputy Morgan referred the matter to the Utah County Attorney’s Office for the institution of a criminal prosecution against Mr. Pintar for disorderly conduct. R. 8 and 209-210.

On October 30, 2006, Utah County Attorney Kay Bryson and Deputy Utah County Attorney Timothy Barnes received the one and a half page narrative prepared by Deputy Morgan and issued a criminal summons and filed an information against Mr. Pintar for disorderly conduct. R. 8 and 209. The commencement of the criminal matter required Mr. Pintar to appear at the Utah County Jail for booking, fingerprinting, photo, and arrest. R. 8. The Utah County Attorney’s Office moved to dismiss the case against Mr.

Pintar and the motion was granted on August 1, 2007, based on lack of evidence to support the charges. R. 7-8 and 209.

SUMMARY OF ARGUMENT

As pertaining to the Utah County Defendants, the Pintars appeal only the district court's dismissal of the Section 1983 claims of malicious prosecution and conspiracy against Deputy Morgan and Utah County based on the Pintars' failure to state a claim pursuant to Utah R.Civ.P. 12(b)(6).

The Pintars never made any factual allegations against Utah County in their complaint. While the Pintars agree that Section 1983 liability cannot attach to Utah County under the doctrine of *respondeat superior*, the Pintars argue that Deputy Morgan's discretionary action of instituting disorderly conduct charges against Mr. Pintar makes Deputy Morgan a policymaker for Utah County. According to the Pintars, this makes Utah County liable.

The district court was correct in ruling that Deputy Morgan is not a policymaker. Such a ruling would be an incorrect interpretation of municipal liability and lead to the absurd result that all discretionary actions by police officers could be considered the creation of municipal policy. In turn, the municipality could then be held vicariously liable for a police officer's actions, the very thing prohibited by Section 1983.

Next, the Pintars argue that Deputy Morgan is not entitled to qualified immunity for the Section 1983 claims of malicious prosecution and conspiracy because the facts, as alleged in the complaint concerning the disorderly conduct charge against Mr. Pintar, do not constitute the crime of disorderly conduct. Thus, Deputy Morgan lacked probable cause to bring these charges. The district court never ruled on whether the facts constituted probable cause and instead, looked at the bigger picture: Whether the Pintars alleged facts showing that Deputy Morgan violated Mr. Pintar's constitutional rights and whether those facts would clearly establish that a reasonable officer would know that the conduct was clearly unlawful.

The Pintars offer no argument concerning the dismissal of the Section 1983 conspiracy claim against Deputy Morgan despite including "conspiracy" in the title of their argument section. Aplt. Br. at 24. The Pintars later argue the Section 1983 conspiracy claim as it pertains to Martin and Darlene Houck, for which the district court granted summary judgment. Aplt. Br. at 36. In the event the Court decides to consider the argument concerning the Houcks as it applies to Deputy Morgan, Deputy Morgan offers her argument as to why the district court was correct in dismissing the Section 1983 conspiracy claim under the motion to dismiss standard. Her argument is based on the Pintars' failure to allege anything more than

conclusory allegations that Deputy Morgan was involved in a “conspiracy” with Martin and Darlene Houck. Even with the benefit of the deposition testimony of Deputy Morgan and Tonya Houck, which occurred after they were dismissed from the lawsuit and therefore not considered by the district court in granting the motion to dismiss, the Pintars still failed to sustain a claim of conspiracy against the Houcks and by implication, Deputy Morgan.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE PINTARS FAILED TO STATE A SECTION 1983 CLAIM AGAINST UTAH COUNTY.

A. Introduction.

The trial court dismissed the Pintars’ 42 U.S.C. § 1983 claims against Utah County pursuant to the Utah County Defendants’ Utah R.Civ.P. 12(b)(6) motion to dismiss. The propriety of a Rule 12(b)(6) dismissal is a question of law. *Whipple v. American Fork Irrigation Co.*, 910 P.2d 1218 (Utah 1996). In ruling on a motion to dismiss for failure to state a claim, the court must construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor. *Russell v. Standard Corp.*, 898 P.2d 263 (Utah 1995). Following this standard, the district court correctly concluded that the Pintars failed to allege a viable Section 1983 claim against Utah County.

In their complaint, the Pintars failed to allege that Utah County has an official policy, custom or deliberately indifferent training that led to a violation of Mr. Pintar's constitutional rights. The Pintars also failed to allege that Deputy Morgan acted pursuant to such official policy or custom, or that she received deliberately indifferent training from Utah County. Such allegations are the minimum requirement to sustain a Section 1983 claim premised on municipal liability.

After failing to make these allegations in the complaint and faced with a motion to dismiss, the Pintars then argued that 42 U.S.C. § 1983 liability must attach to Utah County because Deputy Morgan became a policymaker for Utah County when she made the discretionary decision to institute disorderly conduct charges against Mr. Pintar. The Pintars have alleged no facts in the complaint that Deputy Morgan is a policymaker, that she establishes the final governmental policy regarding such activity, or that her decisions are not reviewable by others. Even if the district court had concluded that Deputy Morgan was a policymaker, it would lead to the absurd result that all discretionary actions by police officers could be considered the creation of municipal policy and therefore, create a municipal liability on the basis of *respondeat superior* that Section 1983 was intended

to prevent. As explained below, the Pintars cannot prevail on their interpretation of what constitutes municipal liability.

B. The District Court Was Correct In Dismissing The Section 1983 Claim Against Utah County Because The Pintars Alleged No Facts In Their Complaint That Utah County Has Unconstitutional Policies, Customs, Or Provided Inadequate Training.

The Pintars agree with the district court ruling that 42 U.S.C. § 1983 liability cannot attach to Utah County for the actions of Deputy Morgan unless they meet the requirements of *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). It is well settled that a governmental entity “may be held liable under Section 1983 only for its own constitutional or illegal policies and not for the tortious acts of its employees.” *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998) (citing *Monell*, 436 U.S. at 694). In *Monell*, the United States Supreme Court concluded that “Congress did not intend for local governments to be held liable for their employees’ actions unless the action that caused a constitutional tort was made pursuant to an official policy or procedure.” *Monell*, 436 U.S. at 691.

Accordingly, municipal liability may not be premised upon the employment of a person who has violated a plaintiff’s federally protected rights. *Id.* Instead, a municipal wrong is one resulting from the enforcement of a municipal policy or custom. *Monell*, 436 U.S. at 694. A municipal

custom or policy may be established through an officially promulgated policy, a custom or persistent practice, or deliberately indifferent training that results in the violation of plaintiff's federally protected rights. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989).

Therefore, a plaintiff suing a local government under Section 1983 for the acts of one of its employees must prove: (1) that a local government employee committed a constitutional violation, and (2) that a government policy or custom was the moving force behind the constitutional deprivation. *Myers v. Oklahoma Bd. Of County Comm'rs*, 151 F.3d 1313, 1316 (10th Circuit 1998) (citing *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978)). Furthermore, liability against a municipality under a theory of *respondeat superior* or vicarious liability is unavailable for claims asserted pursuant to Section 1983. *Monell*, 436 U.S. at 694.

The Pintars never allege in their complaint that Utah County has a policy or custom that was the moving force behind the constitutional deprivation, nor do they allege that Utah County provided inadequate training to Deputy Morgan. Rather, the Pintars seek to attach liability to Utah County by claiming that Deputy Morgan is a policymaker for Utah County. Not only is this allegation absent from their complaint, the Pintars

offer no valid support, either in fact or in law, to show that Deputy Morgan is a policymaker for Utah County.

C. The District Court Correctly Concluded, Based On The Facts Alleged In The Complaint And The Application Of The Law, That Deputy Morgan Is Not A Policymaker For Utah County.

The official policy of requirement of *Monell* was intended to distinguish acts of the municipality from acts of the municipality's employees, and thereby makes clear that municipal liability is limited to actions for which the municipality is actually responsible:

Not every decision by municipal officers automatically subjects the municipality to § 1983 liability. 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, 475 U.S. 469 (1986). “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*, 485 U.S. 112, 123 (1988). “Whether a particular official has final policymaking authority for purposes of § 1983 liability is a question of state law.” *Id.* “Simply going along with discretionary decisions made by subordinates is not “delegation to them of authority” to make city policy for purposes of imposing § 1983 liability upon municipality.” *Id.* at 130.

In determining whether a municipality can be liable under Section 1983 for an official's discretionary act, the Tenth Circuit Court of Appeals examines two factors in deciding whether the official is a final policymaker within his area of authority: (1) whether his or her discretionary decisions are constrained by general policies enacted by others, and (2) whether those decisions are reviewable by others. *Milligan-Hitt v. Board of Trustees of Sheridan County School District No. 2*, 523 F.3d 1219, 1228 (10th Cir. 1998). Deputy Morgan's decision was clearly restrained by general policies and her decision is reviewable by others.

First, the Pintars argue that it is within the discretion of a single law enforcement officer to determine what constitutes a lawful arrest and there is no review or constraint prior to an arrest to determine whether it is lawful. Under this interpretation, any other law enforcement officer must be considered a policymaker for the municipality. However, the Pintars do not cite to one case in which a court has determined that an officer's discretionary decision to arrest constitutes municipal policy.

Second, the Pintars correctly state that Deputy Morgan's authority is delegated to her by state law and then incorrectly argue that because her decision is not immediately reviewable before the execution of that decision, she is making policy for Utah County. It is true that the law does not

provide for an immediate review of each and every decision of a police officer prior to the execution of that decision. However, the law does provide a review of actions taken after that decision. In making such an argument, the Pintars are attempting to distinguish a “decision” from an “action” when no such distinction was made by the *Milligan-Hitt* court.

Further, the Pintars did not allege that Deputy Morgan handcuffed Mr. Pintar at his home and took him to jail. Instead, the Pintars allege that Deputy Morgan referred the matter to the Utah County Attorney’s Office for the institution of a criminal prosecution against Mr. Pintar for disorderly conduct. R. 8 and 209-210. The Pintars further allege that on October 30, 2006, Utah County Attorney Kay Bryson and Deputy Utah County Attorney Timothy Barnes received the one and a half page narrative prepared by Deputy Morgan and issued a criminal summons and filed an information against Mr. Pintar for disorderly conduct. R. 8 and 209. Based on the facts alleged by the Pintars and applicable law, the district court correctly stated that Deputy Morgan’s actions are constrained by other policies and her decisions are reviewable by others. Accordingly, the Pintars have failed to meet the *Milligan-Hitt* test and the district court’s decision must be affirmed.

Finally, the Pintars have not alleged that Deputy Morgan creates Utah County policy regarding arrests or that Utah County itself has a policy of

false arrest or a policy of intimidation. Rather, Deputy Morgan, as a subordinate, made a discretionary decision to arrest Mr. Pinta. Ruling that Deputy Morgan created Utah County policy in this instance would only lead to the result that all discretionary actions by police officers could be considered as the creation of municipal policy and thus make the municipality liable for the officers' actions under a theory of *respondeat superior*, the very thing that is prohibited for Section 1983 claims. The Pintars' argument is simply without merit and the dismissal of the Section 1983 claims against Utah County should be affirmed.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT DEPUTY MORGAN IS ENTITLED TO QUALIFIED IMMUNITY FROM MALICIOUS PROSECUTION AND CONSPIRACY UNDER SECTION 1983.

A. Introduction.

The trial court dismissed the Pintars' 42 U.S.C. § 1983 claims against Deputy Morgan pursuant to the Utah County Defendants' Utah R.Civ.P. 12(b)(6) motion to dismiss. The propriety of a Rule 12(b)(6) dismissal is a question of law. *Whipple v. American Fork Irrigation Co.*, 910 P.2d 1218 (Utah 1996). In ruling on a motion to dismiss for failure to state a claim, the court must construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor. *Russell v. Standard Corp.*, 898 P.2d 263 (Utah 1995). Following this standard, the district court

correctly concluded that the Pintars failed to allege a viable Section 1983 claim against Deputy Morgan.

The Pintars argue that the district court failed to accept the factual allegations of the complaint as true in finding that Deputy Morgan is entitled to qualified immunity for the claims of malicious prosecution and conspiracy under Section 1983. More specifically, the Pintars argue that the facts alleged in the complaint do not constitute a charge of disorderly conduct against Mr. Pintar and that Deputy Morgan violated clearly established law. In order to defeat a claim of qualified immunity on a motion to dismiss, the Pintars must allege facts which, if taken as true, would defeat her qualified immunity claim. The district court correctly concluded Pintars have alleged no such facts in their complaint.

B. The Qualified Immunity Standard.

Qualified immunity “protects governmental officials from liability for civil damages insofar as their conduct does not violate ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Pearson v. Callahan*, 129 S.Ct. 808, 815 (2009) (citation omitted). To determine whether an official is entitled to qualified immunity, the court must consider the following: (1) whether, after viewing the facts in the light most favorable to the party asserting the injury, there was a

deprivation of a constitutional or statutory right; and, if so, (2) whether the right was clearly established at the time of the deprivation such that a reasonable official would understand his conduct was unlawful in the situation he confronted. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

To overcome the defense of qualified immunity, a plaintiff must establish that the defendants' actions violated a constitutional right and that the right was clearly established at the time of the actions. *Pearson*, 129 S.Ct. 808 at 815-16. It is within the court's discretion to consider either factor first. *Id.* at 818. The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his or her conduct was unlawful in the situation he or she confronted. *Wilson v. Layne*, 526 U.S. 603, 615 (1999). If the law did not put the officer on notice that his or her conduct would be clearly unlawful, dismissal based on qualified immunity is appropriate. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the court defined qualified immunity, holding that "governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights." *Id.* at 818.

C. Deputy Morgan Is Entitled To Qualified Immunity From The Section 1983 Malicious Prosecution Claim.

The Pintars agree that the district court's recitation of applicable qualified immunity law is correct but argue that the district court took "great liberties with the facts" when it applied the law to them. The Pintars' entire argument is based on the theory that the facts alleged in the complaint do not constitute probable cause for disorderly conduct and therefore, Deputy Morgan's actions were unreasonable. The district court never ruled on whether the facts constituted probable cause and instead, looked at the bigger picture: Whether the Pintars alleged facts showing that Deputy Morgan violated Mr. Pintar's constitutional rights and whether those facts would clearly establish that a reasonable officer would know that the conduct was clearly unlawful.

The Pintars further attempt to distinguish the cases cited by the district court to support its conclusions on the ground that the facts pled by the Pintars do not allege a crime, unlike the facts alleged in *Anderson* and *Beard* which are examined below. In doing so, the Pintars ignore the fact that the district court never made a finding that the Pintars' facts did or did not constitute disorderly conduct. Further, even if Deputy Morgan erroneously believed the facts constituted a disorderly conduct charge, she turned the matter over to the prosecutor who proceeded to issue a criminal summons

and file an information against Mr. Pintar for disorderly conduct. R. 8. Even if the prosecutor had erroneously decided that the facts constituted disorderly conduct, Deputy Morgan cannot be held liable for his actions.

In *Anderson v. Creighton*, 483 U.S. 635 (1987), a police officer conducted a warrantless search for a suspect in the plaintiff's home on what he perceived to be exigent circumstances. *Id.* The suspect was not found and the plaintiffs filed suit, claiming that their Fourth Amendment rights had been violated. *Id.* The Supreme Court explained that although a right may be clearly established in the Constitution, it does not necessarily lead to the conclusion that the officer's actions were unreasonable under the circumstances. *Id.* at 641. The Supreme Court recognized that "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials . . . should not be held personally liable." *Id.* The Pintars attempt to distinguish this case by claiming that the facts, as presented to the prosecutor by Deputy Morgan, even if true, did not constitute a crime, unlike the facts in *Anderson*. The Pintars likewise attempt to distinguish *Beard v. City of Northglenn*, 24 F.3d 110 (10th Cir. 1994), a case more similar to the instant case.

In *Beard*, the plaintiff claimed that the warrant contained false information which the police officers failed to adequately investigate. *Id.* at 14. The Tenth Circuit defended the officer's qualified immunity and reaffirmed that a constitutional violation does not occur merely because later events demonstrate that the arrested person is innocent. *Id.* The Tenth Circuit further reiterated the established principle that negligence cannot form the basis of a constitutional violation. *Id.* at 115.

The Pintars allege in their complaint that because the allegations leading to Mr. Pintar's arrest were false, Deputy Morgan's actions were unreasonable. The Pintars do not allege that Deputy Morgan fabricated the allegations herself but rather, Deputy Morgan failed to properly investigate the claims before turning over her report to the Utah County Attorney's Office for prosecution. R. 9. As the *Beard* court stated:

[T]he failure of the arresting officer to investigate the matter fully, to exhaust every possible lead, interview all potential witnesses, and accumulate overwhelming corroborative evidence rarely suggests knowing or reckless disregard for truth so as to constitute Fourth Amendment violation; rather, it is generally considered to betoken negligence at most.

Id. at 117.

Additionally, Deputy Morgan is entitled to qualified immunity because the Pintars have not alleged or shown that she is responsible for the actions taken by Utah County Attorney Kay Bryson or Deputy Utah County

Attorney Timothy Barnes after she turned the matter over to them. R. 8. Even if the information given to the prosecutor did not amount to a disorderly conduct charge, as the Pintars claim, Deputy Morgan cannot be held liable for the actions of the Utah County Attorney's Office when it issued a criminal summons and information against Mr. Pintar for disorderly conduct. R. 8. Clearly, the decision to prepare and initiate the charges based on the facts received from Deputy Morgan falls within the scope of their duties as prosecutors. The Pintars cannot show that Deputy Morgan has any control over their actions. Deputy Morgan has no control over their actions and the Pintars have not alleged any impropriety by Deputy Morgan after she turned the matter over to prosecutors.

Whether or not the prosecutor was correct in issuing a criminal summons and information based on the information given to him by Deputy Morgan is irrelevant. The prosecutor was dismissed by stipulation and Deputy Morgan cannot be held liable for the actions of the prosecutor. Therefore, the district court was correct in ruling that Deputy Morgan is entitled to qualified immunity for the malicious prosecution claim.

D. Deputy Morgan Is Entitled To Qualified Immunity From The Section 1983 Conspiracy Claim.

The Pintars tie the conspiracy claim with the malicious prosecution claim under Section 1983 by alleging that Deputy Morgan took false

information from the Houcks and failed to investigate the charges before turning the matter over to the prosecutor because she was conspiring with the Houcks. The Pintars base their conclusions on their allegation that Deputy Morgan had a friendship with their daughter-in-law, Tonya Houck, who also worked at the Utah County Sheriff's Office.

The Tenth Circuit has indicated that “a conspiracy to deprive a plaintiff of a constitutional or federally protected right under color of state law” was actionable. *Snell v. Tunnell*, 920 F.2d 673, 701 (10th Cir. 1990) (citing *Dixon v. City of Lawton*, 898 F.2d 1443 (10th Cir. 1990)). However, in order to prevail on such a claim, “a plaintiff must plead and prove not only a conspiracy, but also an actual deprivation of rights; pleading and proof of one without the other will be insufficient.” *Id.* (quoting *Earle v. Benoit*, 850 F.2d 836, 844-46 (1st Cir. 1988)). In the instant case, the Pintars must first show that there was an actual deprivation of their constitutional rights before the conspiracy claim can be considered.

To sustain a conspiracy claim under Section 1983, a plaintiff must allege specific facts showing an agreement and concerted action among defendants. *Cardoso v. Calbone*, 490 F.3d 1194, 1199 (10th Cir. 2007) (citing *Tonkovich v. Kansas Board of Regents*, 159 F.3d 504, 533 (10th Cir. 1998)). Conclusory allegations of conspiracy are insufficient to state a valid

Section 1983 claim. *Tonkovich v. Kansas Board of Regents*, 159 F.3d 504, 533 (10th Cir. 1998) (citing *Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir. 1994)).

The Pintars present nothing more than conclusory allegations of conspiracy based on the following facts concerning Tonya Houck: (1) Ms. Houck is employed as a secretary in the Judicial Services Division of the Utah County Sheriff's Office; (2) Ms. 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. (Complaint, ¶ 16.) None of these allegations, even if all true, separately or together, show a concerted agreement and action involving Deputy Morgan that rises to the level of a conspiracy under Section 1983.

The Pintars have not properly pled the elements of civil conspiracy and draw their conclusions from their conclusory facts because there are no facts alleged in the complaint which connect the Houcks with Deputy Morgan other than that Tonya Houck and Deputy Morgan were friends and that both women are employed by the Utah County Sheriff's Office in different divisions. The Pintars, as with the malicious prosecution issue discussed above, do not allege facts in their complaint that Tonya Houck used her alleged friendship with Deputy Morgan to coerce her to falsely

arrest Mr. Pintar. Rather, the Pintars make only conclusory allegations, which are insufficient to establish a claim of conspiracy under Section 1983.

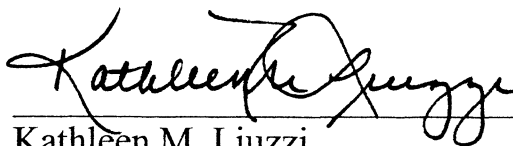
CONCLUSION

Liability cannot attach to Utah County under Section 1983 because Deputy Morgan is not a policymaker for Utah County based on her discretionary decision to institute charges against Mr. Pintar and then turning the matter over to the Utah County Attorney's Office. Deputy Morgan is also entitled to qualified immunity from the Section 1983 claims of malicious prosecution and conspiracy because the Pintars have not pled any facts sufficient to state a claim. Even if Deputy Morgan failed to fully investigate the matter, at the most, she was negligent and negligence does not support a Section 1983 claim. If the facts given to the Utah County Attorney's Office did not support a charge of disorderly conduct, Deputy Morgan has no control over their actions.

Finally, the Pintars have not pled facts sufficient to show a conspiracy between Deputy Morgan and the Houcks. For these reasons, Deputy Morgan and Utah County respectfully request that the Court affirm the decision of the district court dismissing Deputy Morgan and Utah County.

Dated November 17, 2010.

DUNN & DUNN, P.C.



Kathleen M. Liuzzi

*Attorney for Appellees Susan Morgan
and Utah County*

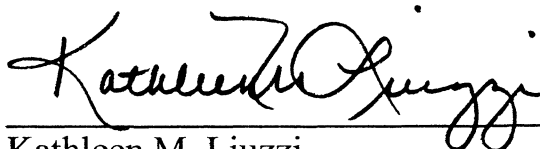
CERTIFICATE OF SERVICE

I certify that on November 17, 2010, I served two copies of the Brief
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ADDENDUM

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Utah R.Civ.P. 12(b)(6)

b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

FILED

AUG 20 2008

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT,
UTAH COUNTY, STATE OF UTAH

LEWIS J. PINTAR and AFTON B. PINTAR,

Plaintiffs,

vs.

MARTIN HOUCK, DARLENE HOUCK,
TONYA HOUCK, SUSAN MORGAN,
COUNTY OF UTAH, and DOES 2-50,

Defendants.

MEMORANDUM DECISION

Date: August 20, 2008

Case No.: 070403245

Judge: Gary D. Stott

On March 25, 2008, defendants Tonya Houck, Susan Morgan and Utah County ("Utah County Defendants") filed a Motion to Dismiss Plaintiffs' State Law Claims with supporting memorandum, a Motion to Dismiss Plaintiffs' Section 1983 Claims with supporting memorandum, and a Motion to Bifurcate the proceedings. The Motion to Dismiss Plaintiffs' State Law Claims is based on Rule 12(b)(1) of the Utah Rules of Civil Procedure for lack of subject matter jurisdiction. The Motion to Dismiss Plaintiffs' Section 1983 Claims is based on Rule 12(b)(6) of the Utah Rules of Civil Procedure for failure to state a claim upon which relief can be granted. The Motion to Bifurcate is based on Rule 42(b).

Plaintiffs Lewis J. Pintar and Afton B. Pintar ("Plaintiffs") filed their Oppositions to the three motions on May 13, 2008. Utah County Defendants filed their memoranda in reply on June 11,

2008, along with requests to submit for decision. The court heard oral arguments on all three motions on July 21, 2008. The court now issues this memorandum decision and grants Utah County Defendants' Motions to Dismiss.

BACKGROUND

In ruling on a motion to dismiss, the court “must construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor.” *Mounteer v. Utah Power & Light Co.*, 823 P.2d 1055, 1058 (Utah 1991). In that light, the Court sets forth the facts of the case.

Plaintiffs live in Spanish Fork, Utah, and share a boundary line with defendants Martin and Darlene Houck (“the Houcks”). Plaintiffs and the Houcks both have rights to irrigation water administered by Westfield Irrigation Company. Over the past several years, disagreements have arisen between Plaintiffs and the Houcks regarding the management of the water rights. These disagreements have led to hostility between the parties.

Tonya Houck, who is the daughter-in-law of the Houcks and works as a secretary at the Utah County Sheriff's Office, has a personal and friendly working relationship with Deputy Susan Morgan (“Deputy Morgan”), who is also employed by the Utah County Sheriff's Office.

On May 12, 2006, Deputy Morgan contacted Plaintiff Afton Pintar and issued a verbal criminal injunction to the Plaintiffs to stop all contact with the Houcks. Deputy Morgan took this action without following proper procedure and without consulting her superiors at Utah County. Deputy Morgan also did not disclose to her superiors her friendship with Tonya Houck.

Deputy Morgan took this action on the basis of complaints presumably made by someone in the Houck family about the water issues between Plaintiffs and the Houcks and threats allegedly made by Plaintiffs' son to the Houcks. Deputy Morgan issued this criminal injunction under penalty of criminal prosecution.

On May 14, 2006, Deputy Morgan took another informal, undocumented report that Plaintiff Lewis Pinter had improperly gestured at the Houcks from his property as the Houcks drove by. Neither Deputy Morgan nor any other representative of the Utah County Sheriff's Office contacted Plaintiff Lewis Pinter about the allegations that gave rise to the actions taken by Deputy Morgan on May 12, 2006, and May 14, 2006.

On June 11, 2006, and July 4, 2006, Deputy Morgan received information regarding two other incidents between Plaintiffs and the Houcks, wherein it was alleged that Plaintiff Lewis Pinter made derogatory comments about the Houcks in their presence. Deputy Morgan did not document these incidents until a later date. Deputy Morgan did not contact the Plaintiffs regarding these incidents, nor did Deputy Morgan review the matter with supervisors or county attorneys. On August 20, 2006, Deputy Morgan received a call from Martin Houck, who complained that Plaintiff Lewis Pinter allegedly called him an "asshole" and flipped him off from the Plaintiffs' property. Deputy Morgan prepared a written summary of the incident and detailed the history of the dealings between the parties, but she did not contact the Plaintiffs. The claims made by the Houcks accusing the Plaintiffs of inappropriate conduct are false.

On August 20, 2006, Deputy Morgan referred the matter to the Utah County Attorney's

Office for the institution of a criminal prosecution against Plaintiff Lewis Pinter, charging disorderly conduct. On October 30, 2006, the Utah County Attorney's Office received the one-and-a-half page narrative of Deputy Morgan and issued a criminal summons and filed an information against Plaintiff Lewis Pinter for disorderly conduct. Plaintiff Lewis Pinter was served with the summons by substitute service on November 2, 2006. The commencement of the criminal matter required the appearance of Plaintiff Lewis Pinter at the Utah County Jail for booking, fingerprinting, photo, and arrest. This information was made public both as a matter of public record and the posting of Plaintiff Lewis Pinter's picture and booking information on the Utah County Jail website. Plaintiff Lewis Pinter retained counsel in the matter. The Utah County Attorney's Office made a motion to dismiss the case which was granted on August 1, 2007, based on the lack of evidence to support the charges.

Plaintiffs served a notice of claim on Utah County on November 1, 2007. On the same day, November 1, 2007, Plaintiffs filed their complaint naming as defendants Martin Houck, Darlene Houck, Tonya Houck, Susan Morgan, Kay Bryson, Timothy Barnes, and Does 1-50. Plaintiffs brought eleven causes of action, including a request for declaratory relief, and claims for malicious prosecution under section 1983, conspiracy under section 1983, civil conspiracy, negligent infliction of emotional distress, intentional infliction of emotional distress, defamation, negligent misrepresentation, and intentional misrepresentation. On February 14, 2008, Plaintiffs amended their complaint to include Utah County as a defendant since 60 days had elapsed since they had served their notice of claim on Utah County and had received no response.

DISCUSSION

I. MOTION TO DISMISS STATE LAW CLAIMS

The court grants Utah County Defendants' Motion to Dismiss Plaintiffs' State Law Claims. Plaintiffs brought six state law causes of action against Utah County Defendants: civil conspiracy, negligent infliction of emotional distress, intentional infliction of emotional distress, defamation, negligent misrepresentation, and intentional misrepresentation ("state law claims"). As argued by Utah County Defendants, Plaintiffs failed to strictly comply with the requirements of the Utah Governmental Immunity Act ("UGIA"), which deprives this court of subject matter jurisdiction to hear Plaintiffs' state law claims against Utah County Defendants.

A. Notice of Claim under UGIA

The UGIA requires that a person having a claim against a governmental entity or an employee of that entity must file a notice of claim. Specifically, UGIA's notice requirement provides:

(2) Any person having a claim against a governmental entity, or against its employee for an act or omission occurring during the performance of the employee's duties, within the scope of employment, or under color of authority shall file a written notice of claim with the entity before maintaining an action, regardless of whether or not the function giving rise to the claim is characterized as governmental.

(3) The notice of claim shall set forth:

- (I) a brief statement of the facts;
- (ii) the nature of the claim asserted;
- (iii) the damages incurred by the claimant so far as they are known; and
- (iv) if the claim is being pursued against a governmental employee individually as provided in Subsection 63G-7-202(3)©, the name of the employee.

Utah Code Ann. § 63G-7-401(2)-(3) (2008) (previously section 63-30d-401). In addition,

section 63G-7-402 requires that a claimant file a notice of claim “with the person and according to the requirements of Section 63G-7-401 within one year after the claim arises....” Utah Code Ann. § 63G-7-402. If the governmental entity denies the claim or fails to respond within 60 days of the claim being filed, “a claimant may institute an action in the district court against the governmental entity or an employee of the entity.” *Id.* at § 63G-7-403(2)(a). Plaintiffs have failed to meet several of the requirements embodied in the notice statute. The court will address the dispositive provisions of UGIA supporting its decision to grant Utah County Defendants’ motion.

1. Claim against an employee

Subsection (2) of section 63G-7-401 requires that a person having a claim against an employee of a governmental entity must file a written notice of claim with the entity *before* maintaining an action if the employee was acting during the performance of the employee’s duties, within the scope of employment, or under color of authority. *Id.* at § 63G-7-401(2). Initially, Plaintiffs argued that Deputy Morgan and Tonya Houck were acting outside the scope of their employment, and the notice requirements of UGIA were therefore inapplicable. However, Plaintiffs conceded on the record at oral arguments that Deputy Morgan and Tonya Houck were acting at least under color of authority, which renders any claims against them subject to the notice requirements of UGIA.

Plaintiffs filed their Notice of Claim with the Utah County Clerk on October 31, 2007. Plaintiffs filed their Complaint naming Deputy Morgan and Tonya Houck as defendants on

November 1, 2007, without waiting for Utah County to approve or deny their claims against Deputy Morgan and Tonya Houck or for the expiration of the 60 days. Therefore, Plaintiffs failed to comply with the notice requirements of section 63G-7-401(2). Plaintiffs' argument that there is still time to correct the defective Notice is without merit and is discussed in further detail below.

2. Nature of the claim asserted

As noted above, the notice of claim must set forth the nature of the claim asserted. Utah Code Ann. § 63G-7-401(3)(ii). The Utah Supreme Court has stated that the purpose of the notice requirement is to allow the governmental entity "an opportunity to correct the condition that caused the injury, evaluate the claim, and perhaps settle the matter without the expense of litigation." *Houghton v. Dep't of Health*, 2005 UT 63, P20. The provision requiring a claimant to set forth the nature of the claim asserted mandates "enough specificity in the notice to inform as to the nature of the claim so that the defendant can appraise its potential liability." *Yearsley v. Jensen*, 798 P.2d 1127, 1129 (Utah 1990).

Plaintiffs rely on *Peeples v. State of Utah*, 2004 UT App 328, 100 P.3d 254, for the assertion that their notice of claim was sufficient in setting forth the nature of the claim because a claimant is not required to exceed the requirements of the UGIA. The court disagrees. In *Heideman v. Washington City*, 2007 UT App 11, P13, 155 P.3d 900, the Utah Court of Appeals held that the plaintiffs' notice of claim was inadequate because in setting forth the nature of the claim, they listed breach of contract, section 1983 claims and other causes of action. The court

found that this notice of claim failed to give the defendant notice of potential claims for intentional interference with economic relations. *Id.* at P13.

Here, in the section setting forth the nature of their claims, Plaintiffs recited allegations concerning failure to implement and enforce rules, malicious prosecution, and conspiracy. Plaintiffs never actually stated that they have a claim for “malicious prosecution,” as such, nor did they mention anywhere in sections setting forth the facts or the nature of the claims asserted that they had potential claims for defamation, misrepresentation, or infliction of emotional distress. Despite Plaintiffs’ argument that it is “well-known to Utah County and/or its insurer that Defamation, Negligent and Intentional Misrepresentation, and Negligent and Intentional Infliction of Emotional Distress arise out of circumstances associated with wrongful arrest, malicious prosecution and conspiracy,” the court concludes that Plaintiffs’ notice of claim failed to adequately set forth the nature of the claims asserted. As noted above, the notice of claim is intended to give enough specificity to the governmental entity so that it can ascertain its potential liability. Plaintiffs’ notice of claim identifying only malicious prosecution and conspiracy failed to give enough specificity to Utah County to ascertain its potential liability on the claims for defamation, misrepresentation, or infliction of emotional distress. Therefore, Plaintiffs failed to strictly comply with the requirement of UGIA setting forth the nature of the claims asserted with respect to defamation, misrepresentation, and infliction of emotional distress and these claims are subsequently barred.

3. Time to correct or file new notice of claim

In addition to the requirements of section 63G-7-401, UGIA requires that the notice of claim be filed “within one year after the claim arises. . . .” Utah Code Ann. § 63G-7-402. All of Plaintiffs’ state law claims are tort causes of action. As noted by Utah County Defendants, “[a] tort cause of action accrues when all its elements come into being and the claim is actionable.” *Retherford v. AT&T Communications*, 844 P.2d 949, 975 (Utah 1992).

Utah County Defendants argue that the elements of all the state law claims accrued on November 2, 2006, the day that Plaintiff Lewis Pintar was served with the criminal summons because the alleged defamatory statements, misrepresentations and emotional distress inflicted by Tonya Houck, Deputy Morgan, and Utah County happened prior to Lewis Pintar being served with the criminal summons. Plaintiffs argue that their claims accrued on August 1, 2007, the date on which the criminal action was terminated in Lewis Pintar’s favor. Plaintiffs assert that since the cause of action for malicious prosecution does not accrue until the action is terminated in a plaintiff’s favor, they have until August 1, 2008, to file a notice of claim against Utah County.

Plaintiffs’ reliance on accrual of the elements of malicious prosecution is misplaced, as noted by Utah County Defendants. Plaintiffs brought their malicious prosecution cause of action under section 1983, so it is not subject to the one-year time limit of UGIA. The one-year time limit imposed by section 63G-7-402 began to run when the elements of civil conspiracy, infliction of emotional distress, defamation and misrepresentation accrued. Because the Utah County Attorneys were dismissed from the lawsuit, the actions constituting the elements of these

torts must have been taken by Tonya Houck or Deputy Morgan and not the Utah County Attorneys.

The court concludes that any actions allegedly constituting defamation, infliction of emotional distress, misrepresentation and conspiracy were taken by Tonya Houck and Deputy Morgan prior to Lewis Pintar being served with the criminal summons on November 2, 2006. Therefore, Plaintiffs had until November 2, 2007, to file a proper notice of claim against Utah County for their state law claims. However, even if the court were to accept the date argued by Plaintiffs as the date the causes of action accrued, Plaintiffs likewise failed to file a proper notice of claim on Utah County by August 1, 2008, and are therefore barred from filing a notice of claim against Utah County under section 63G-7-402.

Because Plaintiffs' notice of claim was filed prematurely, did not adequately identify the nature of the claims asserted, and the time to file a proper notice of claim has expired, the court hereby grants Utah County Defendants' Motion to Dismiss Plaintiffs' State Law Claims.

II. MOTION TO DISMISS SECTION 1983 CLAIMS

The court grants Utah County Defendants' Motion to Dismiss Plaintiffs' Section 1983 claims. Plaintiffs brought claims for malicious prosecution and conspiracy under section 1983 ("section 1983 claims"). As argued by Utah County Defendants, Plaintiffs failed to state a claim upon which relief can be granted due to the lack of municipal liability for the discretionary actions of its officers. There is not relief under a theory of *respondeat superior* for the actions of a municipality's employees. Additionally, Utah County Defendants may claim relief under

qualified immunity for discretionary actions where the officers did not clearly know their actions were violative of the law. Defendant's Motion to Dismiss Section 1983 Claims must therefore be granted.

A. Liability of Municipality under Section 1983

Vicarious liability through a §1983 violation may not be imposed on a governing body merely by the existence of an employer/employee relationship. Although foreclosing relief under the doctrine of *respondeat superior*, the United States Supreme Court held that a government municipality may be sued under §1983 when official municipal policy or custom is the “moving force” behind the constitutional violation and the tortious acts of its employees. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 694 (1978). The importance of their holding is to distinguish the acts of an employee from the acts of the municipality, thereby limiting municipal liability to actions “for which the municipality is actually responsible”—those which they have sanctioned or ordered. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986).

Although there must be a “direct causal link between the municipal policy or custom and the alleged constitutional deprivation,” *City of Canton v. Harris*, 489 U.S. 378, 385 (1989), in *Pembaur*, the Supreme Court found that a municipal policy or custom may be established “by a single decision by municipal policymakers” if it was made under certain circumstances. 475 U.S. at 480. The Court clarified by stating that the decision must be said to reflect the municipality's official policy. *Id.* “Municipal liability attaches only where the decisionmaker

possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official . . . has discretion in the exercise of a particular function does not, without more, give rise to municipal liability based on an exercise of that discretion.” *Id.* at 482.

In the case of a decision on a single occasion, a municipality is responsible only for actions taken by final policymakers whose conduct may be said to represent official policy. *Simons v. Uintah Special Services District*, 506 F.3d 1281, 1286 (10th Cir. 2007). Although the identification of policymaking officials is a question of state law, (*St. Louis v. Praprotnik*, 485 U.S. 112 (1988)), there are primarily two factors that a court will consider: 1) whether his/her discretionary decisions are constrained by other policies, and 2) whether those decisions are reviewable by others. *Milligan-Hitt v. Board of Treasurers of Sheridan County No. 2*, 523 F.3d 1219, 1228 (10th Cir. 2008). “When an official’s discretionary decisions are constrained by policies not of that official’s making, those policies, rather than the subordinate’s departure from them, are the act of the municipality.” *Praprotnik*, 485 U.S. at 127.

Plaintiffs argue that Deputy Morgan may be considered a policymaker for the State of Utah because she made a unilateral decision within her discretion with regards to the arrest and subsequent prosecution of plaintiffs. However, the defendants in question did not act according to official policy, nor could their actions be construed to represent official policy. Deputy Morgan cannot be considered a policy maker for Utah County because her actions, though discretionary, are still constrained by other policies, and because her decisions are reviewable by

others. Plaintiffs have brought forth no allegations that official Utah County policy was unconstitutional, and in the absence of evidence that Deputy Morgan's actions constituted official policy, or that her decisions were reviewed and ratified by those having official policy making authority, the Plaintiff's claims against the Defendants for a Section 1983 violation cannot stand.

B. Absolute Immunity of Tonya Houck

Tonya Houck is a secretary in the Judicial Services Division of Utah County. Although she is not a court clerk, Utah County Defendants argue that many of her functions and duties as a secretary in Judicial Services may be considered the functional equivalent of a court clerk. Defendants have argued that inasmuch as those duties were involved in the case before the court, she may be entitled to quasi-judicial immunity. *Ambus v. Utah State Board of Education*, 858 P.2d 1372, 1382 (Utah 1993). However, this Court finds this argument tenuous and focuses its attention on the qualified immunity claims discussed below which form a more substantial basis for the court's decision.

C. Qualified Immunity of Deputy Morgan and Tonya Houck

Utah County Defendants argue that Tonya Houck and Deputy Susan Morgan are entitled to qualified immunity as articulated by the United States Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In *Harlow*, the Court affirmed its holding from prior cases that "governmental officials performing discretionary functions generally are shielded from liability

for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights.” *Id.* at 818. In reaching this holding, the Court briefly discussed the history of the qualified immunity doctrine, noting that it was established in an attempt to balance the need for vindicating constitutional guarantees with the need for terminating insubstantial lawsuits and minimizing the societal cost that results from suits against government officials. *Id.* at 814. In a later case, *Malley v. Briggs*, 475 U.S. 335, 341 (1986), the Court explained, “As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”

When analyzing a claim of qualified immunity on the part of a governmental defendant, a court must initially consider two factors: (1) whether the facts alleged, taken in the light most favorable to the plaintiff, show that the official violated the plaintiff’s constitutional right, and (2) whether the right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In explaining what it means for a right to be clearly established, the United States Supreme Court in *Saucier* stated, “The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Id.* at 202. The court cited to an earlier U.S. Supreme Court case, *Wilson v. Layne*, 526 U.S. 603, 615 (1999), in which the court stated that “the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.” The *Saucier* court further explained that “[i]f the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on

qualified immunity is appropriate. A later Supreme Court case explained that the particular action in question did not have to previously have been held to be unlawful, but “in the light of pre-existing law, the unlawfulness of the action must be apparent.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In *Anderson*, a police officer conducted a warrantless search for a suspect in the plaintiff’s home on what he perceived to be exigent circumstances. 483 U.S. 635. The suspect was not found and the plaintiffs filed suit, claiming that their Fourth Amendment right to be free of unreasonable searches and seizures had been violated. *Id.* The Supreme Court explained that although a right may be clearly established in the Constitution, it does not necessarily lead to the conclusion that the officer’s actions were unreasonable in the circumstances. *Id.* at 641. The Court recognized that “it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials . . . should not be held personally liable.” *Id.* The Court concluded by stating that the general rule behind qualified immunity is to provide government officials with the ability to reasonably anticipate when their conduct may give rise to liability so that as long as their actions are reasonable, they may not fear to act. *Id.* at 646 (citing *Davis v. Scherer*, 468 U.S. 163, 195 (1984)).

In a case similar to that at bar, the plaintiff sued the defendant officers under a Section 1983 violation for arresting the plaintiff on the false assumption that he was involved in a check

kiting scheme. *Beard v. City of Northglenn*, 24 F.3d 110 (10th Cir. 1994). The plaintiff claimed the warrant contained false information which the officers failed to adequately investigate. *Id.* at 114. The Tenth Circuit defended the defendant's qualified immunity and reaffirmed that a constitutional violation does not occur merely because later events demonstrate the arrested person is innocent. *Id.* The court further reiterated the established principle that negligence cannot form the basis of a constitutional violation. *Id.* at 115.

Plaintiffs have alleged that because the allegations that led to their arrest were false, that Deputy Morgan's actions were unreasonable. If this premise were true, then any officer who arrested someone falsely would be liable to that person. This in turn would increase the burden upon the government and provide a disincentive to officers to perform their duty under the law. Qualified immunity was established to protect officers from liability for actions that were objectively reasonable under the circumstances. Certainly this creates a more difficult, though not impossible hurdle for plaintiffs to overcome when they sue a government official.

Under the established qualified immunity framework, Plaintiffs must allege facts showing that Houck and Morgan violated Plaintiffs' constitutional rights that were clearly established such that a reasonable officer would know that the conduct engaged in by Houck and Morgan was clearly unlawful. Plaintiffs cite to their Fourth Amendment right to be free from unreasonable seizure and to be subject to arrest only when there is probable cause. Although a right may be clearly established by the Constitution, it does not automatically lead to the

conclusion that a defendant's deprivation of that right was unreasonable. The fact that the charges tendered against the Plaintiffs later turned out to be unsubstantiated does not make the defendant's actions unreasonable in light of the circumstances then prevailing. And as the Supreme Court reiterated in *Anderson*, "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials . . . should not be held personally liable." 483 U.S. at 641. Utah County Defendants are thus entitled to qualified immunity.

Because Utah County is not vicariously liable under section 1983 and Tonya Houck and Deputy Morgan are entitled to qualified immunity, the court grants Utah County Defendants' Motion to Dismiss Plaintiffs' Section 1983 Claims.

III. MOTION TO BIFURCATE

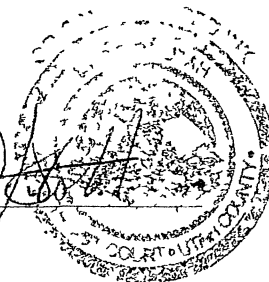
Based upon the court's decision to grant Utah County Defendants' motions to dismiss, the Motion to Bifurcate is rendered moot.

CONCLUSION

For the reasons discussed above, Utah County Defendants' Motion to Dismiss Plaintiffs' State Law Claims and Motion to Dismiss Plaintiffs' Section 1983 Claims are hereby GRANTED. Based on this decision, the Motion to Bifurcate is rendered moot. Counsel for Utah County Defendants shall prepare an appropriate order consistent with this opinion for signature by the court.

Dated this 20 day of August, 2008.

Gary D. Stott
Judge Gary D. Stott



Fourth Judicial District Court

A certificate of mailing is on the following page.

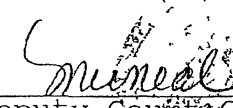
CERTIFICATE OF NOTIFICATION


I certify that a copy of the attached document was sent to the following people for case 070403245 by the method and on the date specified.

METHOD NAME

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Dated this 20th day of August, 2008


Deputy Court Clerk



FILED

SEP 10 2008

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

Prepared by:

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Attorneys for Tonya Houck, Susan Morgan,

Kay Bryson, Timothy Barnes, and Utah County

**IN THE FOURTH JUDICIAL DISTRICT COURT, STATE OF UTAH
UTAH COUNTY, PROVO DEPARTMENT**

LEWIS J. PINTAR and AFTON B. PINTAR,

Plaintiffs,

v.

MARTIN HOUCK, DARLENE HOUCK,
TONYA HOUCK, SUSAN MORGAN, KAY
BRYSON, TIMOTHY BARNES, COUNTY
OF UTAH, and DOES 2-50,

Defendants.

**ORDER DISMISSING
UTAH COUNTY DEFENDANTS**

Case No. 070403245
Judge Gary D. Stott

This matter came before the Court on July 21, 2008 at a hearing on a Motion to Dismiss Plaintiffs' State Law Claims, a Motion to Dismiss Plaintiffs' Section 1983 Claims, and a Motion to Bifurcate filed by Tonya Houck, Susan Morgan, and Utah County (collectively, "Utah County Defendants").¹ In attendance were Jason L. Pinter, representing Plaintiffs Lewis J. Pinter and Afton B. Pinter; Peter C. Schofield representing Defendants Martin Houck and Darlene Houck;

¹ Defendants Kay Bryson and Timothy Barnes were dismissed pursuant to an Order dated May 27, 2008.

and Kathleen M. Liuzzi representing Utah County Defendants. The Court, having reviewed the pleadings and documents filed in this matter, having heard oral argument, and for good cause appearing, enters the following Order:

I. MOTION TO DISMISS STANDARD.

In ruling on a motion to dismiss, the court “must construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his or her favor. *Munteer v. Utah Power & Light Co.*, 823 P.2d 1055, 1058 (Utah 1991). The Court issued a Memorandum Decision on August 20, 2008, setting forth in detail the facts alleged in the Complaint as well as detailed legal reasoning upon which the Court bases its ruling. That Memorandum Decision is incorporated herein by reference.

II. UTAH COUNTY DEFENDANTS’ MOTION TO DISMISS PLAINTIFFS’ STATE LAW CLAIMS.

The Court GRANTS Utah County Defendants’ Motion to Dismiss Plaintiffs’ State Law Claims, with prejudice, for the following reasons:

Plaintiffs brought six state law causes of action against Utah County Defendants: (1) civil conspiracy, (2) negligent infliction of emotional distress, (3) intentional infliction of emotional distress, (4) defamation, (5) negligent misrepresentation, and (6) intentional misrepresentation. However, Plaintiffs failed to strictly comply with the notice requirements of the Utah Governmental Immunity Act (“UGIA”), which deprives this Court of subject matter jurisdiction to hear the state law claims.

A. Claim Against An Employee.

Plaintiffs conceded during oral argument that Utah County employees Tonya Houck and Deputy Morgan were at least acting under color of authority, thus requiring Plaintiffs to file a notice of claim under the UGIA prior to bringing this action against them. Utah Code Ann. § 63G-7-401(2) requires that a person having a claim against a governmental entity or an employee of that entity must file a notice of claim *prior to* maintaining an action against them. After the claim is filed, the governmental entity has sixty days to either approve or deny the claim. A plaintiff may not bring an action until the claim is denied or the sixty days has expired.

Plaintiffs filed their Notice of Claim with the Utah County Clerk on October 31, 2007 and filed their Complaint alleging claims against Tonya Houck and Deputy Morgan the following day, November 1, 2007, without waiting for Utah County to approve or deny their claims against Deputy Morgan and Tonya Houck or for the expiration of the sixty days. By filing their Complaint prematurely, Plaintiffs failed to comply with the notice requirements of Utah Code Ann. § 63G-7-401(2).

B. Nature of the Claim Asserted.

Plaintiffs' Notice of Claim failed to meet the requirements of Utah Code Ann. § 63G-7-401(3) regarding the nature of the claim asserted. In their Notice of Claim, Plaintiffs recite allegations concerning failure to implement and enforce rules, malicious prosecution, and conspiracy. However, Plaintiffs never actually stated that they have a claim for malicious prosecution nor did they mention anywhere in the facts or the nature of the claims asserted that

they had potential claims for defamation, negligent and intentional misrepresentation, or negligent and intentional infliction of emotional distress, as alleged in their Complaint. Despite Plaintiffs' argument to the contrary, the Notice of Claim, identifying only malicious prosecution and conspiracy claims, failed to give enough specificity to Utah County to ascertain its potential liability on the claims for defamation, misrepresentation, or infliction of emotional distress. The Court concludes that the nature of the claim section in Plaintiffs' Notice of Claim was inadequate and therefore, Plaintiffs' claims of defamation, negligent and intentional misrepresentation, and negligent and intentional infliction of emotional distress are subsequently barred.

C. Time to Correct or File a New Notice of Claim.

Plaintiffs' state law claims of negligent and intentional misrepresentation, defamation, and negligent and intentional infliction of emotional distress are tort causes of action. A tort cause of action accrues when all its elements come into being and the claim is actionable. *Retherford v. AT&T Communications*, 844 P.2d 949, 975 (Utah 1992). The UGIA requires that a notice of claim must be filed within one year after the claim arises. Utah Code Ann. § 63G-7-401(2). In this instance, the one-year time limit began to run when the elements of civil conspiracy, infliction of emotional distress, defamation and misrepresentation accrued.² These alleged torts with regard to Tonya Houck and Deputy Morgan took place prior to November 2, 2006, the day Plaintiff Lewis Pintar was served with the criminal summons. Accordingly, Plaintiffs had until November 2, 2007 to file a proper notice of claim with Utah County for their state law claims.

² The Utah County Attorneys have already been dismissed from the lawsuit. Therefore, the actions constituting the elements of these torts must have been taken by Tonya Houck or Deputy Morgan and not the Utah County attorneys.

Plaintiffs argue that the cause of action for malicious prosecution does not accrue until the action is terminated in a plaintiff's favor which occurred on August 1, 2007, the day the criminal action against Plaintiff Lewis Pintar was dismissed. However, Plaintiffs brought the malicious prosecution claim pursuant 42 U.S.C. § 1983 and Section 1983 claims are not subject to the UGIA notice of claim requirements. Even if the Court were to accept Plaintiff's date of August 1, 2007 as the date the causes of action accrued, Plaintiffs still did not file a proper notice of claim on Utah County by August 1, 2008. Therefore, Plaintiffs are barred from correcting or filing a proper notice of claim with Utah County.

To summarize, Plaintiffs' Complaint against Deputy Morgan and Tonya Houck was filed prematurely, the notice of claim did not adequately identify the nature of the claims asserted, and the time to file a proper notice of claim has expired. Therefore, Plaintiffs' state law claims against Utah County Defendants are forever barred.

III. MOTION TO DISMISS SECTION 1983 CLAIMS.

The Court GRANTS Utah County Defendants' Motion to Dismiss Plaintiffs' Section 1983 Claims, with prejudice, for the following reasons:

A. Utah County.

Plaintiffs brought claims for malicious prosecution and conspiracy under 42 § U.S.C 1983 against Utah County Defendants. These claims are dismissed for failure to state a claim for which relief can be granted, pursuant to Utah R.Civ.P. 12(b)(6). A governmental entity may be

sued under Section 1983 when an official municipal policy or custom is the “moving force” behind the constitutional violation.

Plaintiffs made no allegations in their Amended Complaint³ that Utah County policy was unconstitutional and instead, argue that Deputy Morgan may be considered a policymaker for the State of Utah because she made a unilateral decision within her discretion with regard to the arrest and subsequent prosecution of Mr. Pinter. However, Deputy Morgan cannot be considered a policymaker for Utah County because her actions, though discretionary, are still constrained by other policies and because her decisions are reviewable by others. Additionally, Plaintiffs have not alleged that Deputy Morgan’s decisions were reviewed and ratified by those having official policymaking authority nor can Utah County be held liable for Section 1983 claims under a theory of respondeat superior. Therefore, Plaintiffs’ Section 1983 claims against Utah County Defendants fail and must be dismissed.

B. Tonya Houck and Deputy Morgan.

Tonya Houck and Deputy Morgan are entitled to qualified immunity. Under the established qualified immunity framework, Plaintiffs must allege facts showing that Tonya Houck and Deputy Morgan violated Mr. Pinter’s constitutional rights that were clearly established such that a reasonable officer would know that the conduct engaged in by them was clearly unlawful. Plaintiffs have alleged that Mr. Pinter has the right under the Fourth Amendment to be free from unreasonable seizure and subject to arrest only when there is probable cause. The fact that the charges against Mr. Pinter later turned out to be

³ Plaintiffs amended their Complaint to include Utah County on February 15, 2008.

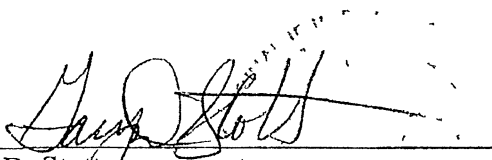
unsubstantiated does not make Tonya Houck's and Deputy Morgan's actions unreasonable in light of the circumstances prevailing at the time.

IV. MOTION TO BIFURCATE.

Utah County Defendants' Motions to Dismiss have been granted. Therefore the Motion to Bifurcate is moot.

DATED this 10 day of Sept 2008.

BY THE COURT:



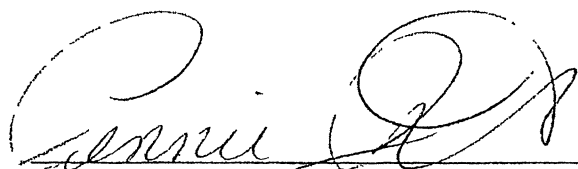
Gary D. Stott
Fourth Judicial District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **ORDER DISMISSING UTAH COUNTY DEFENDANTS** was served by U.S. Mail, postage prepaid, on August 28, 2008, to the following:

Jason L. Pinar
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Attorney for Plaintiffs

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Attorneys for Martin and Darlene Houck


Legal Assistant



Not Reported in P.3d, 2008 WL 5191236 (Utah App.), 2008 UT App 451
(Cite as: 2008 WL 5191236 (Utah App.))

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Utah.
Lewis J. PINTAR and Afton B. Pinter, Plaintiffs
and Appellants,
v.

Tonya HOUCK, Susan Morgan, Utah County, Mar-
tin Houck, and Darlene Houck, Defendants and Ap-
pellees.

No. 20080874-CA.

Dec. 11, 2008.

Fourth District, Provo Department, 070403245; The
Honorable Gary D. Stott.
Jason L. Pinter, San Jose, California, and Douglas
Matsumori, Salt Lake City, for Appellants.

Kathleen M. Liuzzi and Susan Black Dunn, Salt
Lake City, for Appellees.

Before Judges THORNE, BENCH, and McHUGH.

MEMORANDUM DECISION (Not For Official
Publication)

PER CURIAM:

*1 Following the dismissal of Defendants Tonya Houck, Susan Morgan, and Utah County (the Utah County Defendants), Plaintiffs filed a notice of appeal. Plaintiffs concede that their claims against Defendants Martin and Darlene Houck remain pending in the trial court. This case is before the court on the Utah County Defendants' motion for summary disposition.

Under rule 54(b) of the Utah Rules of Civil Procedure, "a party may seek *certification* of finality of an order entered in an action involving ... multiple

parties if the order adjudicates ... all of the claims between two or more but fewer than all of the parties, and the trial court finds no just reason for the delay." *Tyler v. Department of Human Servs.*, 874 P.2d 119, 120 (Utah 1994) (emphasis added). Thus, it is well established in Utah case law that the process of directing entry of a final judgment under rule 54(b) is referred to as certification. *See id.* To certify an order as final for purposes of appeal, a trial court must "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination ... that there is no just reason for delay and upon an express direction for the entry of judgment." Utah R. Civ. P. 54(b). A judgment that does not dispose of all parties or claims may be appealed under exceptions to the final judgment rule if (1) the judgment is certified under rule 54(b), or (2) if the appellate court, in its discretion, grants permission to appeal by granting a timely petition to appeal under rule 5 of the Utah Rules of Appellate Procedure. *See Kennecott Corp. v. Utah State Tax Comm'n*, 814 P.2d 1099, 1102 (Utah 1991). The partial dismissal that Plaintiffs seek to appeal satisfies neither exception to the final judgment rule.

Rule 5(a) contains a savings provision that allows an appellate court to consider an appeal from an order that was improperly certified by the trial court as final under rule 54(b). Plaintiffs' reliance on that savings provision as support for jurisdiction over this appeal is misplaced because there was no attempt to obtain certification under rule 54(b). Furthermore, Utah has consistently refused to adopt the federal collateral order doctrine as a basis for jurisdiction over an appeal of an interlocutory order. *See Tyler*, 874 P.2d at 119; *Merit Elec. v. Department of Commerce*, 902 P.2d 151, 153 (Utah Ct.App.1995).

Plaintiffs concede that the order dismissing the Utah County Defendants leaves their remaining claims against Defendants Martin and Darlene Houck pending in the district court. Plaintiffs' as-

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sertion that there is no certification process under rule 54(b) is frivolous.^{FN1} In the absence of a proper certification under rule 54(b) of a non-final judgment, an appellate court must dismiss an appeal of right taken from a judgment that does not determine all claims as to all parties to the litigation. *See A.J. Mackay Co. v. Oakland Constr. Co.*, 817 P.2d 323, 325 (Utah 1991) (concluding that where an order is not final and is not certified under rule 54(b), the result is

FN1. We note that nonresident counsel for Plaintiffs was admitted pro hac vice by the district court pursuant to rule 14-806 of the Rules Governing the Utah State Bar. Rule 14-806 allows the admitting court to consider “whether non resident counsel ... is familiar with Utah rules of evidence and procedure, including applicable local rules” “in determining whether to enter or revoke the order of admission pro hac vice.” The rule further provides that Utah counsel who sponsors an applicant for pro hac vice admission shall “continue as one of the counsel of record in the case” unless substitute counsel appears. *See id.* dismissal). Because Plaintiffs’ appeal was neither taken from a final, appealable judgment nor from an order properly certified as final under rule 54(b), we dismiss the appeal for lack of jurisdiction. This dismissal is without prejudice to a timely appeal after the entry of a final judgment.

Utah App.,2008.
Pintar v. Houck
Not Reported in P.3d, 2008 WL 5191236 (Utah App.), 2008 UT App 451

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