

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

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LEWIS J. PINTAR and AFTON B.  
PINTAR

Plaintiffs/Appellants,

v.

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

Defendants/Appellees

---

Case No.: 20100443

---

Brief of Appellees

---

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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For brevity Appellees Martin and Darlene Houck will not restate Appellants **Jurisdiction, Issues Presented For Review, Determinative Statutes, Rules And Regulations**, nor **Statement of the Case** as it pertains to nature of case and course of pleadings. Appellees will address issues covered in the **Statement Of Facts** because Appellees disagree with these statements and feel that they should be clarified.

### **STATEMENT OF FACTS**

Numbers 1 through 5 will not be addressed. Beginning with Statement #6 which pertains to the property elevation difference: For clarification, Appellees Houck do not refute that elevation differences have existed but Appellants' property has a pile of manure on Appellants' side of the adjoining property line, which Appellants' have built up the height of since July 2004, but state that if their irrigation water management is done correctly flooding is not an issue. Water management is the clue to control the water shed between elevations. Appellees' property has had no Appellants' irrigation water on it since the July 2004 letter. R.545, 82: 12-25 R. 83: 1-2 R. 344 15 & 16.

Statement #7: Appellants' statement that irrigation water on both properties flows from the South to the North, while this is true, Appellees property is located to the West of Appellants' property.

Statement #8: Not addressing.

Statement #9: Appellants' statement "despite the fact that is where the water flowed"

Appellants' home is constructed on the North end of their property. Irrigation water on these properties does flow from the South to the North, however, Appellees



were not aware when they bought the property that Appellants' irrigation water flowed onto Appellees property in an east to west direction when their irrigation water was not managed correctly. Appellants' addressing in Statement #9 "the water", not Appellants' water. R. 550 & 551, 39: 1-25 & 42: 1-23 R. 606 20: 11-13

Statement #10: Appellants' address a "further action" meaning in the July 8, 2004 letter as to imply the legal definition of these words. Appellees are not schooled in the legal profession, so, to imply that Appellees are applying that definition to those words is incorrect, Appellees, as stated in their depositions, did not intend the legal definition. R. 567 305: 9-14 R. 567 305: 9-14 R. 597 89: 20-25 R. 597 90: 1-8

Statement #11: Appellants' state that an "effort to resolve it", Appellees statement is that if you call the two Appellants' exhibiting child like behaviors with Appellant Lewis only addressing what business Appellee Darlene had in writing the letter and Appellant Afton only expounding on the Appellants personal issues against Appellees and their property. Appellees do not consider Appellants' discourse as a "resolution".

Neither Appellants', while at the Appellees' door, in their discourse, denied the flooding; in fact, Appellant Afton asked "what do you want us to do". Appellee Darlene response was to keep their water off of our property.

Also in Statement #11, Appellants' further state that Appellants' were using profanity at Appellee Darlene. Appellees have never stated that Appellant Afton used profanity.

R. 544 92: 11-25 R.570 282: 18-25 R.572 260: 5-11 R.572 262: 5-13 R.573 254: 13-16 R.594 115: 1-25 R.594 116: 1-15 R.595 105: 16-25 R.595 106: 1-9 R. 596 102: 23-25

R. 596 103: 1-24 R. 597 95: 19-25 R. 597 98: 1-25 R. 598 88: 18-25 R. 597 90: 24 – 96: 21

Statement #12: If Appellant is addressing the Statement 11 incident in this statement regarding while Appellants' were at Appellees door, Appellants' never denied the flooding PERIOD.

Statement #13 Not Addressing.

Statement #14: Contrary to this statement about Appellees exhibiting great hostilities towards Appellants, Appellees have tolerated being flooded by Appellants' contaminated irrigation water throughout the years; never exhibiting anger or frustration towards Appellants. In fact, throughout both Appellees depositions we cited examples of being good neighbors . (R. 610 95:19)

The great hostilities exhibited were Appellants' towards Appellees through the flagrant disregard of a neighbors property by the years of trespass by contaminated irrigation water, prohibiting Appellees from the normal use of their property, jeopardizing the health of the Appellees corralled animals along the Appellees easterly fenceline, plus the nuisance of having to work in wet conditions. (R. 556 93: 2-19)

Subsequently to the July 2004 letter asking Appellants to discontinue the flooding Appellees have been subjected to years of threatening behavior exhibited at them by Appellant Lewis. These threatening behaviors necessitated that Appellees seek protection from local law enforcement in lieu of taking matters in their own hands.

Appellees have had to endure the childish exhibition incident wherein Appellants' Lewis profane words and Appellant Afton threatening statement about making Lewis mad; that he never forgets; we have had threats of violence from Appellants' son

Nicholas; we have been denied access to irrigation water , the right to which we have been entitled to and have enjoyed during our ownership of this land, illegally denied us by Appellants' counsel (son) Jason.

Except for one occasion ( where Appellant Lewis appearing unexpectedly at the Appellees property taking pictures Appellee Martin did say a profane word to Appellant Lewis ) Appellees have never reciprocated "in kind" to Appellants threats.

Appellees can not go anywhere in this area without feeling the need to look over our shoulder to see where Appellants' are lurking. Again, there have bee hostilities exhibited, but they have been Appellants' towards Appellees.

R. 537 145: 13-15 R. 544 90: 23-25 91: 1-25 R. 545 82: 12-23, 85: 2- 86:19, 87: 19-25 R. 547 72: 13-16 R. 548 59: 11-17 60: 1-24 R 549 52: 22-24 R. 595 105: 16-18 R. 598 85: 1-25 86:6-17R. 600 71: 21-24

Statement #15: This May 12, 2006 incident did not happen as was stated. Appellee Martin's vehicle never entered Appellants' property. During an excess water incident Appellants' son Nicholas incited a verbal altercation with Appellee Martin; during the ongoing heated discussion, Appellant Afton came out of the house and joined in on the conversation. Appellees concur that the minor children, which Appellant Afton brought out of the house with her, should have not been subjected to the verbiage being expressed between the parties; Appellant Afton should never have brought children into that environment.

It is Appellants' contention that this incident started between Appellant Afton and Appellee Martin, when in fact as our proof we cite all of the references below where

throughout the proceedings Appellants' counsel refer to the incident as to Appellants' son Nicholas and Appellee Martin, not Afton. Not until Appellant Afton's Affidavit and Appellant's son Nicholas' Affidavit did this event get changed as to it being between Appellant Afton and Appellee Martin.

As for Appellants' Afton & Lewis Affidavits (857 866) and to Nicholas and Jason Pinter's Affidavits (851 1179), Appellees choose not to address "he said, she said" heresay, not proofs, extolled in their Affidavits. Appellees state that they strongly disagree with their perceptions and allegations, and it is unfortunate that they jeopardize their respective integrities by using this material.

As for the Neeves Affidavit (845), Appellees feel that it is ambiguous and disagree with its contents.

R. 519 264: 1-5 R. 541 113:1-25 114: 1-25 115: 1-25 116: 1-25 117: 1-25  
118: 1-25 119: 25 R. 542 111: 7-8 R. 543 99: 23-24 R. 570 276: 20-21 R. 572  
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R. 592 129: 5-14 R. 593 121: 17-18 R. 851 2: 4 R. 857 4: 10 Also Pg. 14 of  
Appellants' brief #19 R. 1292 16:10.

Statement #16: Not Addressing

Statement #17: Appellees did call Appellee Tonya Houck, who responded that Appellees should call Dispatch for help.

Statement #18: Not Addressing

Statement #19: Even though Appellant Lewis was not a party to this conformation, because of his previous threatening behaviors, Appellees developed anxieties in anticipation of a repeat of Appellants' overreaction again. Appellees would like to point out again Appellants' reference to the conformation as being between

Nicholas and Martin, not Afton and Martin.

Statement #20: We can not speak for the actions of Deputy Morgan.

Statement #21: Appellees strongly refute the Appellant Afton's denial of the "monkeys" incident. Appellees hold steadfast to their story that this "monkeys" occurrence did happen. R. 589 153: 1-25 154: 1-25 155: 1-25 156: 1-25 R. 538 137: 2-25 138: 1-12

Statement #22: Regarding the "flag rising ceremony" Appellees stand firm on their statements that this event did take place. R. 588 158: 24 thru 166: 10 R.538 138: 13 thru 142: 25

Statement #23: Appellants' comment in this statement as to when the incident took place is ambiguous, as there were several incidences of Marty being "flipped off" by Appellant Lewis after the July 2004 letter.

Statement #24: Appellees can not speak for Deputy Morgan.

Statement #25: Appellants' Brief, page 5, "i" stipulates threatening behavior as a determinative statute. Subsequent to the July 2004 letter from Appellants' to Appellees, the crux of Appellant Lewis' behavior has been one of threatening, as have the aforementioned Afton, Nicholas and Jason Pintars threats.

Statements 26, 27 & 28 are part of the records.

### **SUMMARY OF ARGUMENTS**

The Trial Court correctly ruled that Deputy Morgan was not a policy maker for Utah County and in the absence of evidence that Deputy Morgans' actions constituted

official policy, also that her decisions were reviewed and ratified by those having official policy making authority; the Appellants did not bring forth any allegations that official Utah County policy was unconstitutional, and Appellants inability to state which claims could relief be granted upon, were the courts' findings with regard to arguments # 1 and 2.

Regarding the Second Amended Complaint filing attempt, because of discovery timing issues which we have spelled out; the fact that the proposed additional language would have altered the landscape of the original complaint; because Appellants knew of the proposed facts at the time that the original complaint was filed, or shortly thereafter, the proposed amendment should have been brought sooner; that the Appellees discovery was considered closed it was inappropriate to add new issues; Appellants did not offer any more specifics and instead simply relied on overboard, conclusory allegations which are simply not enough to sustain this cause of action, therefore, the Court denied this filing attempt.

Regarding the declaratory relief as to the Houcks: Under this request Appellants contend that they should maintain the right to continue irrigating their property as they have traditionally done, requesting the court to grant them the right for any run over onto Appellees property to be legal; and if it happens so be it, any defensive methods to withhold the runoff water is the obligation of the Appellees to undertake. Appellants must use reasonable care in the use of their wate so as not to damage the property of their neighbors.

There is ambiguity in the declaratory request, Appellants did not state what “matters” were to be addressed in a declaratory judgment.

Appellants can not deny Appellees their right to receive irrigation water from Westfield Irrigation Company irregardless of whether it is a regular or excess water turn, nor whether it is appropriated or not. The water company board is the governing body on these issues and have already taken care of this matter.

Finally, the alleged pipe installation obstruction in a drain ditch is a cause of action that is totally unrelated to the facts pled in the original complaint.

As for the conspiracy and malicious prosecution claims: the facts were not pled with specificity; that there was no proof of an agreement or concerted action among defendants; that there was nothing more than conclusory allegations of conspiracy; that a single defendant can not conspire alone, how can you have a meeting of the minds between two, shy of being complete strangers, persons (between Utah County employees).

Appellees would like to now address the ARGUMENTS which were entered on Appellants’ brief.

I. **THE TRIAL COURT ERRED IN HOLDING THAT DEPUTY MORGAN IS NOT A POLICYMAKER FOR UTAH COUNTY AND THEREFORE LIABILITY CANNOT ATTACH TO UTAH COUNTY.**

In Judge Stott’s August 20, 2008 Memorandum Decision (R. 200-202) “Plaintiff’s have brought forth no allegations that official Utah County policy was unconstitutional.”

In this same Memorandum (R. 203), Judge Stott states:

“Plaintiff’s 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...”

On Judge Stott’s Order Dismissing Utah County Defendants (R 215, 216)

“...nor can Utah County be held liable for Section 1983 claims under a theory of respondeat superior....”

“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)”

**II THE TRIAL COURT ERRED IN HOLDING THAT DEPUTY MORGAN IS ENTITLED TO QUALIFIED IMMUNITY FROM THE PINTARS’ SECOND AND THIRD CAUSES OF ACTION (MALICIOUS PROSECUTION AND CONSPIRACY PURSUANT TO 42 U.S.C. § 1983)**

Also in Judge Stott’s August 20, 2008 Memorandum Decision (R. 203)

Utah County Defendants may claim relief under qualified immunity for discretionary actions when the officers did not clearly know their actions were violative of the law, Defendants’ Motion to Dismiss Section 1983 Claims must therefore be granted.”

(R. 216) “To summarize, Plaintiff’s 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.”



“The Court GRANTS Utah County Defendants’ Motion To Dismiss Plaintiffs

Section 1983 claims, with prejudice, for the following reasons:

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,...The fact that the charges against Mr. Pinter later turned out to be unsubstantiated does not make Tonya Houck’s and Deputy Morgan’s actions unreasonable in light of the circumstances prevailing at the time” (R.214).

(R200) ...” Plaintiffs have brought forth no allegations that official Utah County policy was unconstitutional, and in the absence of evidence that Deputy Morgans’ actions constituted official policy, or that her decisions were reviewed and ratified by those having official policy making authority, the Plaintiff’s claim against the Defendants’ for a Section 1983 violation cannot stand.”

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

(R. 442) Plaintiffs seek to add two new causes of action (Second and Third Causes of Action) and to “adequately plead the other causes of action stated in the original Complaint” which are unrelated to the arrest incident. (See Plaintiffs’ Supporting Memorandum, 3:1). Plaintiffs knew of the additional facts and claims alleged prior to filing the first Complaint on November 1, 2007. With respect to the First and Third Causes of Action, and knew of the facts alleged in the Second Cause of Action on May

15, 2008. Plaintiffs argue that they were unable to move to amend their Complaint until two months before the fact discovery deadline between the first year of this lawsuit was focused on motions to dismiss the Utah County Defendants. These Motions did not involve the Houcks. Plaintiffs argue that the other reason they were unable to move to amend their Complaint is that the Houcks filed a complaint with the Utah State Bar against Plaintiffs' attorney during a time when the Houcks were unrepresented by counsel. Plaintiff's counsel did not ask the Court for a stay of the proceedings and it was not a situation where counsel's own clients filed a bar complaint which would possibly prohibit counsel from continuing with this lawsuit."

(R. 441) Finally, in addition to the new facts and causes of action being unrelated to the original Complaint, Plaintiffs seek the following: 1) to have the Court declare that it is legal for Plaintiffs' to flood Defendants' property (First Cause Of Action); 2) to have the Court rule on an issue concerning the use of excess water which has already been decided by the Westfield Irrigation Board and which issue properly belongs before the Board (Second Cause of Action); and 3) specific performance relating to a drainage ditch and pipe installed by the Houcks in that ditch (Third Cause Of Action). R 774 pg 11.

### **ARGUMENT**

#### **I. PLAINTIFFS SHOULD BE DENIED TO LEAVE TO AMEND THEIR COMPLAINT.**

Rule 15 states that leave to amend a pleading shall be freely given when justice so requires. Utah R.Civ.P. 15 (a) The factors the Court should consider in deciding whether

to allow amendment of pleadings include (1) whether the movant was aware of the facts underlying the proposed amendment long before its filing; (2) the timeliness of the motion; (3) the justification for the delay; and (4) any resulting prejudice to the responding party. *Jones v. Salt Lake City Corporation*, 2003 UT App 355, ¶ 16, 78 P.3d 988 (citations *omitted*). While the motion to amend analysis is a multi-factored, flexible inquiry that allows trial courts the leeway to evaluate the factual circumstances and legal developments involved in each particular case, the circumstances of a particular case may be such that a court's ruling on a motion to amend a pleading can be predicated on only one or two of the particular factors. *Kelly v. Hard Money Money, Inc.*, 2004 UT App, ¶¶ 41-42, 87 P.3d 734. The Court is not limited to these factors in making a determination whether to grant or deny motions to amend pleadings. *Id.* At ¶¶ 41-42.”

(R.440) Discussed below are the reasons why the Court should deny Plaintiffs' motion to amend their Complaint.

**A. Plaintiffs' Reasons for the Delay in Seeking Leave to Amend Complaint are Unjustified.**

Plaintiffs give two reasons to justify their delay in moving to amend their Complaint. First, Plaintiffs state that in 2008 the litigation was concentrated on the defendants who have since been dismissed (Utah County, Tonya Houck, Sandra Morgan, Kay Bryson, and Timothy Barnes) and that is why Plaintiffs were unable to move to amend their Complaint sooner. See Plaintiffs' Memorandum, 3:24-29. What essentially transpired was the briefing on two motions to dismiss filed by those defendants and a motion for bifurcation. The motions were heard on June 17, 2008 and were subsequently

granted, and the motion for bifurcation was denied as moot. Plaintiffs then sought to appeal the decision and the appeal was dismissed on summary disposition in December 2008. This is not a valid reason for Plaintiffs' delay in seeking to amend their Complaint with regard to claims against Martin and Darlene Houck because **Martin and Darlene Houck were not involved in those motions or in the appeal.** It certainly was not a situation where the amendment of the Complaint might depend on the outcome of the motions to dismiss or on some discovery that was being conducted. In fact, there was not even an attorneys' planning meeting or scheduling order entered in this case until April 2009 after current counsel entered her appearance.

The second reason Plaintiffs give to justify their delay is that Darlene Houck filed complaint with the Utah State Bar against plaintiffs' counsel during a time when she was unrepresented by counsel. Plaintiffs' state that "...the litigation was stopped dead in its tracks... The Complaint was meritless.....Plaintiffs' counsel was so advised not to (R.439) proceed further with the litigation until the bar complaint matter was cleared up." Plaintiffs' Supporting Memorandum, 3:29 – 4:4. This excuse is likewise not a valid reason for delay. The Houck's former attorney withdrew his representation in January 2009 so there was a period of time when the Houcks were without representation. On February 23, 2009, Plaintiffs' attorney (and son), Jason Pintar, sent the Houcks a letter essentially threatening them, among other things, not to bring their water dispute to the Westfield Irrigation Board or Mr. Pintar would add more counts of defamation to the lawsuit. (R 428 & R.427). The Houcks, still unrepresented by counsel, filed a complaint against Mr. Pintar with the Utah State Bar Office Of Professional Conduct ("Bar

Complaint”). Although Mr. Pinter represents to this Court that the Bar Complaint was meritless, the Office found otherwise, even though the Bar Complaint was dismissed on other grounds, R.583 208:18 R. 582 209: 2, and R. 582 211:18 R.582 212:3. Mr. Pinter also represents, in his Reply Brief Re: Pretrial Scheduling Conference at 2:25-26, that he was “ordered to halt all work on this case...” It is apparent that “order” did not come from this Court. Mr. Pinter could also have asked the Court to stay these proceedings but he did not and continued to actively participate in this case during the time that “the litigation was stopped dead in its tracks”. Since the Bar Complaint was not filed by Mr. Pinter’s client, there is no justifiable reason for Mr. Pinter to blame the Bar Complaint for his delay in seeking to amend the Complaint.”

(R. 438) Plaintiffs’ two reasons for the delay in seeking to amend the Complaint (1) concentrating on one group of defendants by opposing motions to dismiss which did not involve the Houcks, and (2) that a Bar Complaint was filed against him by someone who was not his client, do not provide sufficient justification for any delay in seeking to amend the Complaint a second time.

**B The Houcks Would Be Prejudiced If the Court Allowed Plaintiffs Leave To Amend Their Complaint.**

Plaintiffs inaccurately state that “the additional language that Plaintiff proposes to add to the Complaint do not alter the landscape in any way.” Plaintiffs’ Supporting Memorandum, 5:9-10. As argued throughout this brief, Plaintiffs seek to bring two causes of (R. 437) action and plead numerous additional facts that are unrelated to their original Complaint. On the January 19, 2010 Oral Arguments Transcript , pg. 15: line 6-

12, Judge Mortensen stated: “I’ve considered all of the arguments here and I do understand that –and—but I believe it’s accurate that Mr. Pintar’s argument is that a multiplicity of litigation is typically to be avoided; however, given the current status of this case and the plaintiffs’ position that discovery has closed, the Court is going to deny the motion for an amendment....” (lines 17-21):

Also on 1295 transcript: Pg. 9, line 24 – Pg. 10: 1-13 “...I just wanted to verify. The assertion was made in the defendant’s memoranda that there are no facts in the amended complaint that were only recently discovered, those were all known at the time of the original complaint; is that true? Mr. Pintar: With – no, it’s not. With regard to the– with the cause of action for specific performance that has to do with the obstruction that was put in the drainage ditch. The discovery of the damage that that has been causing has only happened within late 2008 and 2009, which is after the complaint was filed. With regard to the controversy that’s arisen with putting a lock on a head gate, that occurred on or about May of 2008, which again, the—the original complaint was filed in November 0f ’07.”

In the March 26, 2010 Telephone Conference (1293), pg. 5: 20-23 “I already mentioned this in oral arguments, the second amended complaint was – the motion to amend to allow the second amended complaint was denied, therefore, the second amended complaint is not a pleading before the Court, because I didn’t allow it.”

In the June 28, 2010 Motion For Summary Judgment (1294), pg. 52:2-5, “... I hope I’ve communicated that for purposes of this case, we’re not amending. And so, we’re going to take care of what’s been pled in this complaint, in this action.” In May 7,

2010 Memorandum Decision, (1267) “More importantly, in this case this court denied the motion to allow the second amended complaint. Accordingly, the second amended complaint has never become operative in this case.”

“I find that the facts, if not known at the time the complaint was filed, were known relatively shortly thereafter so that an amendment could have been brought far sooner. Again, because the discovery is going to be considered closed, I think it would be inappropriate to grant the amendment.”

## **II THE MOST IMPORTANT REASON TO DENY PLAINTIFFS’ MOTION TO AMEND IS FUTILITY.**

A Court should deny motions to amend when the moving party seeks to assert a new claim that is legally insufficient or futile. *Tretheway v. Furstenau*, 2001 UT App 400, ¶ 19, 40 P.3d 649 (citations omitted).

## **IV. THE DISTRICT COURT ERRED IN DISMISSING THE PINTARS’ FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF AS TO THE HOUCKS.**

### **First Cause of Action (Declaratory Judgment)**

.In the original Complaint, Plaintiffs allege that the Houcks falsely asserted that Plaintiffs had improperly managed their irrigation water causing flooding to the Houcks’ property. the source of the Houcks’ allegation is a letter sent by Mr. Houck to Mr. Pintar, dated July 23, 2004 In (1293) Line 21, “...If our – we want to go back to what we traditionally did and if it incidentally sends the water on the Houck property, so be it.” (R. 947) Plaintiffs also allege that the reason the Houcks’ property was flooded with Plaintiffs’ irrigation water is the Houcks’ failure to comply with the established

procedures of the water company. Complaint dated November 1, 2009, ¶ 14. R. 775, R. 776. R.780, pg 5: # 9: In the proposed Second Amended Complaint, Plaintiffs have revised the facts concerning their declaratory judgment request and state the following: “Plaintiffs request that this Court declare pursuant to applicable statute and common law that Plaintiffs have the right to reasonably irrigate their property, and given the facts and circumstances herein, **if any water runs onto Defendants’ property as a result of Plaintiffs’ reasonable irrigation of their property, said water running over is legal and therefore not actionable by Defendants”**. # 10 Plaintiffs have also changed their claim that the Houcks “falsely alleged flooding to their property” as alleged in the original Complaint to the “false assertion that Plaintiffs improperly and irresponsibly irrigated their property.” Proposed Second Amended Complaint ¶46.’ #11: Most importantly. Plaintiffs no longer claim that the Houcks falsely asserted, in the July 8, 2004 letter, that the Pintars’ irrigation water flooded their Property. See proposed Second Amended Complaint.” Based on the alleged misperceptions of the Houcks regarding the flooding of their property by the Pintars, Plaintiffs proceed to outline facts about a conspiracy among the Houcks, their daughter-in-law Tonya Houck who is employed as a secretary at the Utah County Sheriff’s Department, and Deputy Sandra Morgan to have Mr. Pintar arrested for disorderly conduct complaint dated (R. 436) November 1, 2009, ¶¶ 15-16. The remaining facts (¶¶ 17-32) Concern allegations about how Deputy Morgan and the other Utah County Defendants violated Mr. Pintar’s civil right and maliciously prosecuted Mr. Pintar, based on the alleged conspiracy with the Houcks. The First Cause of Action is a request for declaratory judgment concerning the “determination of this



Court declaring the respective rights, status and legal relationship between the parties based upon statutes, ordinances, irrigation water stock, deeds, prior precedence, and related matters affecting their duties and responsibilities” Complaint dated November 1, 2009, ¶ 35. Plaintiffs do not offer any more specifics and instead simply rely on overboard, conclusory allegations which are simply not enough to sustain this cause of action. With regard to damages, Plaintiffs allege that as a result of the Houcks’ alleged misrepresentations stemming from the 2004 letter; they were forced to build a dike along the field where the flooding took place to placate the Houcks. Complaint dated November 1, 2009, ¶ 70.

Now, Plaintiffs propose to amend the First Cause of Action “specifically” to ask the Court to “declare pursuant to applicable statute and common law that Plaintiffs have the right to reasonably irrigate their property, and given the facts and circumstances herein, if any water runs onto Defendants’... property as a result of Plaintiffs’ reasonable irrigation of their property, said water running over is legal and therefore not actionable by Defendants.” Proposed Amended Complaint, ¶ 70. In the Memorandum Decision, May 7, 2010, (1265 & 1266): “Both *Wayment* and *gardner* address an appropriator’s right to continue use of a method of diversion. Diversion of water is not synonymous with use of water. Diversion of water describes the method by which a water right holder gets water to his property. Diversion of water does not describe anything concerning the control of water onto property of others. The *Wayment* court did discuss a right to continued historical use of water, but in no way does that case address the issues presented here. On the other hand, Utah law does address the issues presented here. In

fact, a case identified by the Plaintiff at oral argument sets out some principles. In *Sanford v. University of Utah*, 488 P.2d 741, 744 (Utah 1971), the court acknowledged doctrine of reasonable use for the discharge of surface waters. The *Sanford* court stated:

An unjustified invasion of a possessor's interest in the use and enjoyment of his land through the medium of surface waters is as much a tort as a trespass or private nuisance produced by smoke or smells. Nevertheless, the courts and writers seldom analyzed the problems in terms of tortious conduct, causation or other tort concepts.

Id. (quoting Kinyon & McClure, *Interference with Surface Waters*, 24 MINN. L. REV. 891, 936 (1940))

In *Sanford* the court adopted the Restatement (second) of Torts § 833: Non-trespassory invasions of a person's interest in the use and enjoyment of land resulting from another's interference with the flow of surface water are governed by the rule stated in §§ 822-831. Thus, in later cases the reasonable use doctrine was applied even in the face of statutory mandate. The Utah Supreme Court in *Erickson v. Bennion*, 28 Utah 2d 371, 503 P.2d 139 (1972) noted that Utah Code Ann. § 73-1-8 provide: "The owner of any ditch ...or other watercourse shall maintain the same in repair so as to prevent waste of water or damage to the property of others..." The court in *Erickson* noted :

Notwithstanding the mandatory sound of the emphasized words of that statute, it is our established law that users of irrigation waters are not insurers against damages they may cause. They are held only to the standard of care that is generally applied import law; that which persons of ordinary intelligence and prudence would observe under the particular circumstances.

This is not so different than the law provided in Provo City Ordinance 10.05.030 which provides:

(1) Persons using water for irrigation within the limits of the City shall be required to control all the water distributed to them, and shall be liable for all damages caused by their neglect.

...

(3) It shall be unlawful for any person, so using or conducting such water, to permit the same to flood the street, sidewalks or private property or to run to unnecessary waste (.)

The court, of course, is not relying on this provision, but only notes its consistency with state law already established. *Erickson*, 28 Utah 2d at 373-74. Therefore, Utah law provides that the Pintars must use reasonable care in the use of their water so as not to damage the property of their neighbors.

In the Telephone Conference (1293 ), dated March 26, 2010, pg. 9, line 20 – Pg. 10, line 8: "...we're stipulating that this water has traveled, it's been, for the purposes of the motion, we're going to assume that it was properly and reasonably diverted in a quantity that did not exceed their rights with the irrigation canal company and that it incidentally flowed downhill onto the Houcks' property and what the declaratory judgment action is seeking is a declaration from the Court that if that happens, there cannot be liability to the Pintars and if – if a party is supposed to do something about it, the onus is on Houcks to do something, create a berm or other obstacle so that the flooding does not occur. Is that right Mr. Pintar? Mr Pintar: Yes, your Honor.

In the original Complaint, as noted above, Plaintiffs allege that the Houcks falsely accused Plaintiffs of flooding their property with irrigation water. Now Plaintiffs want to

amend the Complaint to ask the Court to declare that the Plaintiffs have the right to flood the Houcks' property. Plaintiffs offer no legal support for the outlandish proposition that (R. 435). Plaintiffs should be allowed to flood the Houcks' property with their irrigation water, which will damage the Houcks' corrals and their livestock, instead of containing the water on their own property.

In 1268 : “ As stated in a supplemental telephonic hearing this Court attempted to perform its duty by asking plaintiffs’ counsel exactly what declaratory relief was being sought. In response to this questioning, it appears that plaintiffs’ seek a declaratory judgment specifically that they are entitled under the law to allow their irrigation water to run onto the defendants’ property. The problem with plaintiff’s assertion is that such a conclusion is not supported by Utah law.” (1263) “The Houcks are under no duty to perform any act or effort to keep water from running onto their property.”

(1264): “Utah law likewise answers the question as to whether a person is under a duty to protect their private property from surface water running onto it. In *Reeder v.Brigham City*, supra, the court stated: “(The adjoining landowner) has the right to be free from receiving waters on his lands to his damage which do not find their way in their natural course and under natural conditions.”

In (1269): “The complaint upon close review does not indicate exactly what a bona fide dispute is, nor what “matters” are to be addressed in a declaratory judgment action. Paragraph 36 comes closer than any other paragraph, not seeking a declaratory judgment as to the Plaintiff’s rights or duties, but only seeking new declaratory judgment

adjudicating the specific responsibilities and duties to “Defendants Martin and Darlene Houck” regarding the use and management of irrigation water between the properties.”

(1293) pg. 4—7, addresses the Plaintiffs’ intention for declaratory judgment ruling on the right to water our property in the same manner as we have for decades of usage. ... And if that incidentally puts water onto the Houck property, then you want a declaration that you can’t be liable for that. Mr. Pintar “Correct”. And are you seeking a declaration that if the Houcks don’t like it, they need to do something about it? Mr. Pintar “Correct”.

### **Second Cause Of Action (Declaratory Judgment).**

Next, Plaintiff wants to insert another declaratory judgment action unrelated to the facts pled in the original Complaint “The power of the court to permit an amendment of pleadings does not extend so far as to permit the importation of an entirely new and different cause of action”. *Hartford Accident & Indemnity Co.v. Clegg* 135 P.2d 919, 922-23 (Utah 1943); see also *Crane v. Crane*, 131 P.2d 1022, 1023 (Utah 1942) (a new and different cause of action cannot be injected under the guise of an amendment to a complaint). Plaintiffs’ Second Cause of Action asks the Court to declare that the Houcks have no right to flow unappropriated water across the Pintars’ property and that Plaintiffs have the right to block the flow of that water. Proposed Amended Complaint, ¶¶ 52-54. Plaintiffs have not presented the entire picture concerning this issue.

The headgate referred to by Plaintiffs, which is believed to be located on the LDS Church property, allows unappropriated excess water to flow through the Westfield Irrigation Company supply ditch running east to west at the south end of the properties owned by the Pintars, the Binks, and the Houcks, in that order. Plaintiff Lewis Pinter had placed a lock on the headgate, at the direction of his attorney and in violation of Utah Code Ann. § 73-1-14, to prevent the Houcks from taking the excess water down the ditch. This issue appropriately belongs before the Westfield Irrigation board and in fact, was resolved by the Westfield Irrigation Board on May 15, 2008.

(R. 434) which mentioned a confrontation that consisted of a locked head gate and refusing to let others water. Excess water must be treated the same as a regular turn. The water master has to be the mediator ... the shareholders have the right to excess water but they must contact the water master prior to use of it.....No one has the right to stop someone else from watering. A locked head gate is obstruction. The Board further clarified the issue on February 4, 2009:

Other business brought before the board was the concern of the excess water running down the ditch unassigned and who is entitled to use the water...Policy for this water is to obtain approval through the water master prior to use of it.

In the Spanish Fork Westfield Irrigation Company, Board Of Directors minutes, dated February 4, 2009, the Westfield Irrigation Board has established procedures for accessing the water that Plaintiffs complain runs through the ditch in front of their property and in front of the Binks property and the Houck property. This issue has been resolved by the Westfield Irrigation Board and in the event any further such issues arise,

the appropriate course of action is for Plaintiffs to contact the Westfield Irrigation Board, not seek a declaratory judgment from the Court. (R. 594 120: 11-25).

(1267)...within the purview of rule 56(d) this court has attempted to narrow some of the issues presented by the declaratory judgment action. First, Westfield Irrigation Company is not a party to this matter. As a result, any judgment of this court cannot as a matter of law adjudicate any duties or obligations of Westfield Irrigation Company. The only rights which can be adjudicated are those between the Pintars and the Houcks.

(1268)The parties acknowledged and agreed in the telephonic hearing that there were no factual disputes pertinent to the declaratory judgment. Thus, the only question remaining is whether the declaratory relief sought is legally sustainable. The court concludes that it is not.

(1269)In sum, Plaintiffs should not be allowed to amend Complaint to Include this cause of action because (1) it is unrelated to the original Complaint; (2) the matter has been resolved by the irrigation board; (3) the water master and the irrigation board are best suited and with authority to resolve any disputed over the use of that water; and (4) other parties whose rights would be affected, such as the Westfield Irrigation Company, the Binks, and potentially the LDS Church, will need to be (R. 433) brought into the lawsuit since any issue concerning the headgate and the flow of water will affect their rights as well.

### **Third Cause of Action (Specific Performance).**

In their Third (and entirely new) Cause of Action, Plaintiffs seek to bring claims against the Houcks concerning the alleged obstruction of a drain ditch which runs east to west along 4780 South on the northern boundary of the properties belonging to the Houcks, the Pintars, and the Roaches. Plaintiffs allege that the drainage pipe which the Houcks installed subsequent to the purchase of their property in 1991 is too small and is the main source of alleged problems concerning the ditch. Plaintiffs should not be allowed to amend their Complaint to include this cause of action because the original Complaint has no references whatsoever to this cause of action or any facts concerning this cause of action. As noted above, and supported by *Hartford* and *Crane*, Plaintiffs should not be allowed to add a cause of action that is totally unrelated to the facts pled in the original Complaint.

## **II. PLAINTIFFS' MOTION FOR LEAVE TO AMEND IS UNTIMELY**

In *Kleinert v. Kimball Elevator Company*, 854 P.2d 1025 (Utah Ct. App. 1993), the appeals court affirmed the trial court's refusal to grant leave to amend their complaint. "An amendment would certainly have delayed the trial and the substance of plaintiff's new allegation was known a full year earlier..." *Id.* At 1028. The motion to amend came at approximately the same time defendant moved for summary judgment. *Id.* at 1027.

With respect to the First Cause of Action, Plaintiffs knew of the additional facts alleged prior to filing their original Complaint on November 1, 2007. In Fact, the



flooding incident complained of took place sometime in July, 2004 as well as in earlier years. (R.432) Yet Plaintiffs waited more than five years after incident and two years since the original Complaint was filed to seek amendment of their Complaint.

With respect to the Second Cause of Action concerning the headgate issue, that issue was resolved by the Westfield Irrigation Board on May 15, 2008. At that time, Plaintiffs knew of the facts they now allege but waited a year and a half later to ask the Court for a declaratory judgment on an issue that had already been resolved.

With respect to the Third Cause of Action concerning specific performance, Plaintiffs allege a cause of action for specific performance concerning a pipe installed by the Houcks in a drain ditch. Plaintiffs allege that the pipe was installed after the Houcks purchased the property in 1991. Mr. Houck acknowledges in his deposition that the changes to the drainage ditch were made “less than five years ago.” Therefore, the time frame extends from after 1991 when the Houcks purchased their property to around late 2002 or shortly thereafter, when the pipe was purchased and then installed. These events took place several years prior to filing the original Complaint. Again, Plaintiffs knew of these alleged problems at least at the time they filed their original Complaint but failed to plead those facts or bring the Third Cause of Action until now. Houcks had no prior knowledge of an obstruction in the ditch nor about any alleged Pintar property flooding until this allegation was filed in the Second Amended Complaint.

**V & VI THE DISTRICT COURT ERRED IN DISMISSING THE PINTARS’  
THIRD AND FOURTH CAUSES OF ACTION FOR CONSPIRACY  
PURSUANT TO TITLE 42 U.S.C. § 1983 AND CIVIL CONSPIRACY**

**AS TO THE HOUCKS AND THE SECOND CAUSE OF ACTION  
FOR MALICIOUS PROSECUTION ...AS TO THE HOUCKS'**

(R. 773) Plaintiffs Second Cause of Action alleges malicious prosecution under Section 1983 for the proceedings stemming from Mr. Pintar's booking for disorderly conduct, which Plaintiffs allege were instituted and maintained in the absence of probable cause. Tied in with the malicious prosecution claim are Plaintiffs' claims of negligent and intentional misrepresentation concerning information they provided to Deputy Morgan. Deputy Morgan investigated their complaints about the Pintars based on her judgment, issued a disorderly conduct citation to Mr. Pintar. Deputy Morgan then turned the matter over to the Utah County Attorney's Office...Plaintiffs maintain that the Houcks, private individuals, acted in concert with state actors to prosecute Mr. Pintar by supplying them with false information. However, reporting perceived criminal activity alone does not show that an individual assisted in bringing a criminal charge when the responding officer subsequently brings such charges. *Smith v. Colorado Sears Roebuck*, 21 Fed. Appx. 796, 801 (10<sup>th</sup> Cir. 2001).

Moreover, when a plaintiff attempts to assert the state action required for a Section 1983 claim against private actors based on a conspiracy with government actors, "mere conclusory (R.772) allegations with no supporting factual averments are insufficient" *Beedle v. Wilson*, 422 F.3d 1059, 1073 (10<sup>th</sup> Cir. 2005) (citations omitted). Rather, the plaintiff must specifically plead "facts tending to show agreement and concerted action." *Id.*

(R.772) The basis for Plaintiffs' Second, Third, and Fourth Causes of Action (Section 1983 claims of malicious prosecution and conspiracy, and state law claim of conspiracy) relies on Plaintiffs' assertion that the Houcks acted with the Utah County Defendants to falsely charge Mr. Pintar with disorderly conduct. Plaintiffs' allegations rest on the alleged "friendship" between Deputy Susan Morgan who investigated the Houcks' complaint and with Tonya Houck, the Houcks' daughter-in-law who is employed as a secretary with the Utah County Sheriff's Office. (780) "... Plaintiffs' allege that Defendant Susan Morgan, a Deputy Utah County Sheriff, had a personal and friendly working relationship with Defendant, Tonya Houck, who was employed at the Utah County Sheriff's Office and who is also the Houcks' daughter-in-law Complaint, ¶16. This allegation, that forms the basis for the Second, Third and Fourth Causes of Action, has been proven untrue. In the depositions of Susan Morgan (R. 688) 26: 13-25 & 18-25 and Tonya Houck, (R.715) 33:22- 34: 3 & 34: 25-35:2 & 49 14-21 both women testified that there was no friendship, and that they did not even know each other. Thus, there could not have been a conspiracy between the Houcks and these women to bring charges against Mr. Pintar. Further, all state actors have been dismissed from the lawsuit and the Houcks are not state actors. (1294) 39: 21-25: Pintar states:

" Because a close relative that works at the Sheriff's Department, the sheriff shows up and says, hey, we Have a close relative that works here, okay, **WINK, WINK**, I'll take care of you. Okay? That's our argument. And that's the fact that we – based on those facts , its perfectly---."

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 (10<sup>th</sup> Cir.2007) (citing *Tonkovich v. Kansas Board of Regents*, 159 F.3d 504, 533 (10<sup>th</sup> 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 (10<sup>th</sup> Cir. 1998) (citing *Hunt v. Bennett*, 17 F.3d 1263, 1266 (10<sup>th</sup> Cir. 1994) Reporting perceived criminal activity alone does (R. 771) not show that an individual assisted an officer in bringing a criminal charge when the responding officer subsequently brings such charges. *Smith v. Colorado Sears Roebuck*, 21 Fed. Appx.796, 801 (10<sup>th</sup> Cir. 2001).

As with the malicious prosecution claim Plaintiffs present us with 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) The testimony given by Tonya Houck and Deputy Morgan in their respective depositions show that none of these allegations are true and Plaintiffs have no proof of a concerted agreement and action among the other Utah County Defendants rising to the level of a conspiracy under Section 1983. A single defendant or in this case, the Houcks, by definition, cannot conspire alone. Further, since the Court agreed to dismiss Plaintiffs' Section 1983 malicious prosecution claims, then there is no claim of a civil rights violation to which a conspiracy claim under Section

1983 can attach. See *Cline II v. State of Utah*, 142 P.3d 127m 136 (Utah App. 2005). Therefore, the Section 1983 claims for malicious prosecution and conspiracy, as well as the civil conspiracy claim rightfully so were dismissed.

(R.1262)...Defendants argue that the crux of the plaintiffs' argument is the alleged relationship between Deputy Morgan and Tonya Houck and that plaintiffs have not forwarded any evidence that these individuals knew each other beyond having heard one another's names. This Court concurs and finds that the plaintiffs' facts do not support a claim for conspiracy and that claim fails as a matter of law.

(R. 1261) To support a cause of action for Section 1983 conspiracy, a plaintiff must allege specific facts showing an agreement and concerted action among the defendants. *Cardoso v. Calbone*, 490 F.3d 1194, 1199 (10<sup>th</sup> Cir. 2007) (citing *Tonkovich v. Kansas Board of Regents*, 159 F.3d 504, 533 (10<sup>th</sup> Cir. 1998)). A plaintiff must also show that "both public and private actors share a common, unconstitutional goal." *Anaya v. Crossroads Managed Care sys.*, 195 F.3d 584, 596 (10<sup>th</sup> Cir. 1999). Whether or not there is a conspiracy is typically a question of fact. See *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1448 (10<sup>th</sup> Cir. 1995); *Waddoups v. Amalgamated Sugar Co.* 2002 UT 69, ¶¶ 35-36. However, A court may grant summary judgment on an issue that is normally a question of fact if no reasonable jury could conclude that fact exists. *Sanderson v. First Sec. Leasing Co.*, 844 P.2d 303, 306 (Utah 1992). See also *Raab v. Utah Ry. Co.*, 2009 UT 61, ¶ 50; *White v. Deseelhorst*, 879 P.2d 1371, 1374 (Utah 1994); *Clover v. Snowbird Resort*, 808 P.2d 1037, 1040 (Utah 1991). When a jury would be left

to speculation, the action fails as a matter of law. *Harline v. Baker*, 912 P.2d 433, 439 (Utah 1996)

Both civil conspiracy and Section 1983 conspiracy require that the co-conspirators have a “meeting of the minds” or agreement, which is the central issue of dispute in this case. Plaintiffs argue the circumstantial evidence they have submitted infers a meeting of the minds. Although the court must assume Plaintiffs’ facts for purposes of summary judgment, it does not have to assume any asserted inferences. *Holland v. Columbia Iron Mining Co.*, 4 Utah 2d 303, 306 (1956)

(R. 1260) Inferences are made for the purpose of aiding reason, not to override it. Inferences are nothing more than probable or natural explanation of facts.” *Id.* at 306-307. In this case, the court cannot reasonably infer from the evidence given that there was a meeting of the minds. Though circumstantial evidence may by itself support a cause of action for conspiracy, the evidence given in this instance is insufficient to provide a jury with a reasonable basis for such a finding. Pivotal to the allegation that there was a meeting of the minds is the supposed relationship between Deputy Morgan and Tonya Houck. Defendants’ hostility and Deputy Morgan’s haphazard investigation taken together prove nothing by themselves, but might support a theory of conspiracy if an underlying relationship was shown to exist between the actors. However, no real relationship has been shown or even alleged. The only basis upon which the Plaintiffs rest their allegation of conspiracy is that the parties are aware that they both work for the Utah County Sheriff’s Department an agency that employs hundreds of people. The depositions of Deputy Morgan and Tonya Houck quoted in the motions clearly show that,

though the parties had heard of each other, they did not know each other personally. The Plaintiffs do not dispute this. Thus, evidence in this case is that Tonya Houck and Deputy Morgan were just shy of complete strangers. The court cannot reasonably infer from this circumstance that a conspiracy existed, and no reasonable jury could believe this basis to be sufficient for a finding that there was a meeting of the minds. Therefore, Defendants' Motion for Summary Judgment is granted on the Section 1983 conspiracy and civil conspiracy claims. (R. 1259) Defendants argue that Plaintiffs' malicious prosecution claim is void as a matter of law because simply reporting perceived criminal activity cannot qualify as malicious prosecution. According to *Smith v. Colorado Sears Roebuck*, 21 Fed. Appx. 796, 801 (10<sup>th</sup> Cir. 2001). The court finds that the plaintiffs' 1983 malicious prosecution claim cannot survive because plaintiffs have not shown that the prosecution was done "under color of state law" as applied to the Houcks. The federal statute for malicious prosecution states:

Every person who, under color of any statute, ordinance, regulation...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 proceeding for redress... (.).  
42 U.S.C. § 1983.

In a Section 1983 suit, the plaintiffs have to prove: (1) that there was continued confinement or prosecution; (2) that the original action terminated in favor of the plaintiff, (3) that there was no probable cause to support the original arrest, continued

confinement, or prosecution; (4) that the defendant acted with malice; and (5) that the plaintiff sustained damages. *Novitsky v. City of Aurora*, 491 F.3d 1244, 1258 (10<sup>th</sup> Cir. 2007)(quoting *Pierce v. Gilchrist*, 359 F.3d 1279 (10<sup>th</sup> Cir. 2004). A plaintiff must also show that the defendant acted “under color of state law”, in other words, that the defendant participated in joint action with the State or its agents, *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). To assert that the arrest was a “state action” in a conclusory allegation without a sufficient factual foundation is insufficient, the pleadings must present facts tending to show agreement and concerted action. *Smith v. Colorado Sears Roebuck*, 21 Fed. Appx 796, 800 (10<sup>th</sup> Cir. 2001).

In order to assert a claim of 1983 malicious prosecution with regard to the Houcks, plaintiffs must assert facts tending to show agreement and concerted action with Deputy Morgan to deprive plaintiffs of a constitutional right. Whether there was an agreement and concerted action would typically be a question of fact, as referenced above. However, as also aforementioned, this court may grant a motion for summary judgment, notwithstanding a question of fact, if no reasonable jury could conclude that fact exists. In the previous section, this court concluded that no reasonable jury could find that there was a conspiracy or a meeting of the minds between the Houcks and Deputy Morgan given the facts alleged by the plaintiffs. Setting aside averments of conspiracy, the only evidence that the Houcks acted in concert or agreement with a state actor is their complaints to the Utah County Sheriff's Office and Deputy Morgan. However, reporting suspected criminal activity or filing a complaint against an individual does not fulfill the “under color of state law” requirement of Section 1983. *Pinov. Higgs*, 73 F.3d 1461,



1465 (10<sup>th</sup> Cir. 1996) (private party reported defendant was engaging in criminal activity, *Sykes v. California*, (R. 1257) 497 F.2d 197 (9<sup>th</sup> Cir. 1974) (private party filed a complaint against defendant). See also *Grow v. Fisher*, 523 F.2d 875 (7<sup>th</sup> Cir. 1975); *Brooks v. Peters*, 322 F Supp 1273 (DC Wis 1971); *Kahermanes v. Marchese*, 361 F.Supp. 168 (DC Pa 1973); *Weyandt v. Mason's Stores, Inc.*, 279 F. Supp. 283 (DC Pa 1968). Because Mr. Pintar's alleged constitutional deprivation was not done under color of state law, the plaintiffs cannot sustain their 1983 malicious prosecution claim. Thus, defendants' motion for summary judgment on the 1983 malicious prosecution claim is granted.

Appellee's note: After repeated perceived threats by the Appellants and their two sons towards Appellees, the mere number of these incidents, Appellees deemed it necessary to contact the authorities for assistance. The government provides civilian protection through their law enforcement agencies. Appellees cited their issues with the Sheriff Department responding officer, it was only coincidental that on most of the occasions Deputy Morgan was the responder. Once the statements were taken by the Officer, Appellees were no longer involved, nor did they have input as to what action, if any, the authorities undertook. In fact, it came as a complete surprise to hear of Appellant Lewis booking. Appellees do not think that it is against the law to ask a law enforcement agency for assistance. There has been no new evidence, and the laws have not changed; so Appellees believe that the Honorable Judge David Mortensen and Honorable Judge Gary D. Stott dismissals should be upheld.

## **CONCLUSION**

Based on the foregoing reasons, this Court should **UPHOLD** the District Court's decisions regarding the following:

1. Second Cause of Action for Malicious Prosecution,  
Third Cause of Action for conspiracy,  
As to Utah County;
2. Second Cause of Action for Malicious Prosecution  
Third Cause of Action for conspiracy  
As to Deputy Morgan;
3. .Leave To File Proposed Second Amended Complaint
4. First Cause of Action – Declaratory Relief  
As to the Houcks
5. Second Cause Of Action for Malicious Prosecution  
Third Cause Of Action for Conspiracy  
Fourth Cause of Action for Civil Conspiracy  
As to the Houcks

Martin G. Houck Martin G. Houck, pro se


Darlene Houck Darlene Houck, pro se

**CERTIFICATE OF SERVICE**

I hereby certify that on November 3, 2010, two true and correct  
copies of the foregoing ~~FILE~~ OF APPELLEES were served upon  
the following by United States Mail:

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