

2010

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LEWIS J. PINTAR and AFTON B.
PINTAR

Plaintiffs/Appellants,

v.

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

Defendants/Appellees.

Case No.: 20100443

Oral Arguments Requested

Brief of Appellants

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

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JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Annotated §78-2a-3(2)(j) (2002).

ISSUES PRESENTED FOR REVIEW

Issue #1

(a) Did the Trial Court properly rule that Susan Morgan, a Deputy in the Utah County Sheriff's Department (hereinafter "Deputy Morgan"), is not a policymaker for Utah County and therefore liability cannot attach to Utah County?

(b) The standard of review for this Court is to consider the Trial Court's interpretation of the law for correctness. *State v. Richardson*, 843 P.2d 517, 518 (Utah 1992). "Questions of common law interpretation are questions of law which the appellate court is well suited to address, and thus give no deference to the lower court." *Trujillo v. Jenkins*, 840 P.2d 777, 778-79 (Utah 1992).

(c) The Pintars preserved this issue for appeal in the Trial Court. R. 137-40, 1292.

Issue #2

(a) In considering the Utah County Defendants' Motion to Dismiss pursuant to Rule 12(b)(6), Utah Rules of Civil Procedure, did the Trial Court properly not consider certain facts plead by the Pintars as true, including, but not limited to, the allegations made by Appellees, Martin Houck and Darlene Houck

(hereinafter “Houcks”) to Deputy Morgan that, even if true, did not constitute a crime under Utah law?

(b) In considering a Motion to Dismiss pursuant to Rule 12(b)(6), Utah Rules of Civil Procedure, the Court must accept all factual allegations in the Complaint as true and consider them and all reasonable inferences drawn from them in the light most favorable to the Pintars as the non-moving party. *Whipple v. American Fork Irrigation Company*, 910 P.2d 1218, 1219 (Utah 1996); *Russell v. Standard Corp.*, 898 P.2d 263, 264 (Utah 1995) *citing* *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990); *Lowe v. Sorenson Research Co.*, 779 P.2d 668, 669 (Utah 1989); *Mackey v. Cannon*, 996 P.2d 1081, 1082 (Utah 2000); *Cruz v. Middlekauff Lincoln-Mercury, Inc.*, 909 P.2d 1241, 1253 (Utah 1996).

(c) The Pintars preserved this issue for appeal in the Trial Court. R. 4-5, 818, 829-30, 854, 862, 947-50, 956, 970, 980, 983, 985, 987, 992, 1135, 1292.

Issue #3

(a) Did the Trial Court err in finding that Deputy Morgan is protected by qualified immunity and therefore shielded from liability against the Pintars’ Second and Third Causes of action for Conspiracy and Malicious Prosecution pursuant to Title 42 U.S.C. §1983?

(b) The standard of review for **Issue #3** is identical to that of **Issue #1**, *supra* (this Court is to consider the Trial Court's interpretation of the law for correctness).

(c) The Pintars preserved this issue for appeal in the Trial Court. R. 4-5, 141-45, 1292.

Issue #4

(a) Did the Trial Court abuse its discretion in denying the Pintars' Motion for Leave to File Second Amended Complaint?

(b) The Trial Court abuses its discretion if there is "no reasonable basis for the decision." *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993).

(c) The Pintars preserved this issue for appeal in the Trial Court. R. 357-59, 486-88, 1295.

Issue #5

(a) Did the Trial Court properly rule as a matter of law it cannot grant the declaratory relief the Pintars are requesting in their first cause of action?

(b) The standard of review for **Issue #5** is identical to that of **Issue #1**, *supra* (this Court is to consider the Trial Court's interpretation of the law for correctness).

(c) The Pintars preserved this issue for appeal in the Trial Court. R. 2-3, 812-14, 823-27, 1293-94.

Issue #6

(a) In considering the Houcks' Motion for Summary Judgment, did the Trial Court properly not consider certain facts plead by the Pintars as true, including, but not limited to, the allegations made by the Houcks to Deputy Morgan that, even if true, did not constitute a crime under Utah law?

(b) In considering a motion for summary judgment and determining whether there are any genuine issues of material fact for a trier-of-fact to decide, the Court must construe all facts and reasonable inferences from those facts in a light most favorable to the nonmoving party. *Winegar v. Froerer Corp.*, 813 P.2d 104, 107 (Utah 1991); *Allen v. Ortez*, 802 P.2d 1307, 1309 (Utah 1990).

(c) The Pintars preserved this issue for appeal in the Trial Court. R. 4, 5, 818, 829-30, 854, 862, 947-50, 956, 970, 980, 983, 985, 987, 992, 1135, 1294.

Issue #7

(a) Did the trial court properly find that as a matter of law, there are no triable issues of fact regarding the Pintars' Second Cause of Action for Malicious Prosecution pursuant to Title 42 U.S.C. §1983, Third Cause of Action for Civil Conspiracy pursuant to Title 42 U.S.C. §1983, and Civil Conspiracy pursuant to state law?

(b) The standard of review for **Issue #7** is identical to that of **Issue #1**, *supra* (this Court is to consider the Trial Court's interpretation of the law for correctness).

(c) The Pintars preserved this issue for appeal in the Trial Court. R. 828-37, 1294.

DETERMINATIVE STATUTES, RULES AND REGULATIONS

I. Utah Criminal Code §76-9-102 states:

(1) A person is guilty of disorderly conduct if:

(a) he refuses to comply with the lawful order of the police to move from a public place, or knowingly creates a hazardous or physically offensive, by any act which serves no legitimate purpose; or

(b) intending to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, he;

(i) engages in fighting or in violent, tumultuous, or threatening behavior;

(ii) makes unreasonable noises in a public place;

(iii) makes unreasonable noises in a private place which can be heard in a public place;

(iv) obstructs vehicular or pedestrian traffic.

II. Utah Code Ann. §17-22-2 states in pertinent part:

Sheriff – General Duties.

(1) The Sheriff shall . . . (b) make all lawful arrests

III. Utah Code Ann. §77-7-2 states in pertinent part:

A peace officer may make an arrest under authority of a warrant or may, without warrant, arrest a person:

(3) when the peace officer has reasonable cause to believe the person has committed a public offense. . . .

IV. Rule 15(a) of the Utah Rules of Civil Procedure states:

A party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

STATEMENT OF THE CASE

Nature of the Case and Course of the Proceedings

On November 1, 2007, Appellants, Lewis J. Pintar and Afton B. Pintar (hereinafter “Pintars”) filed a Complaint and Jury Demand in the Fourth District Court in Provo, Utah naming Martin Houck, Darlene Houck, Tony Houck, Susan Morgan, Kay Bryson, and Timothy Barnes as Defendants. R. 1. On February 14, 2008, the Pintars amended their Complaint to replace “DOE Defendant 1” with Utah County. R. 13-14. Along with general allegations, the Pintars alleged eleven causes of action in their Complaint. R. 1-12. The First Cause of Action is the Pintars’ request for Declaratory Relief as to Defendants, Martin Houck and Darlene Houck, regarding the Pintars’ rights and responsibilities as to the irrigation of their agricultural land. R. 6-7. The Second and Third Causes of Action—Malicious Prosecution and Conspiracy—are as to all Defendants pursuant to U.S.C. Title 42 §1983. R. 7-8. The Fourth through Seventh Causes of action—

Civil Conspiracy, Negligent Infliction of Emotional Distress, Intentional Infliction of Emotional Distress, Defamation—are state law claims as to all Defendants. R. 8-10. The Eighth and Ninth Causes of Action –Negligent Misrepresentation and Intentional Misrepresentation—are state law claims as to Defendants Martin Houck, Darlene Houck and Susan Morgan. R. 10-11. The Tenth and Eleventh Causes of Action (misabeled as the Eighth and Ninth Causes of Action)—Negligent Misrepresentation and Intentional Misrepresentation—are as to Defendants Martin Houck and Darlene Houck. R. 11-12.

On March 24, 2008, counsel for Defendants Tonya Houck, Susan Morgan, Kay Bryson, Timothy Barnes and Utah County (the “Utah County Defendants”) filed a motion to dismiss pursuant to Rule 12(b)(6), Utah Rules of Civil Procedure. R. 66. Counsel on behalf of the same Defendants also filed a Motion to Dismiss pursuant to Rule 12(b)(1), Utah Rules of Civil Procedure. R. 46. Counsel on behalf of the same Defendants filed a third Motion to Bifurcate the case regarding the “Utah County Defendants from Defendants, Martin and Darlene Houck. R. 82-89. The Motion to Dismiss pursuant to Rule 12(b)(6) was as to the Pintars’ causes of action pursuant to U.S.C. Title 42 §1983. R. 66-81. The Motion to Dismiss pursuant to Rule 12(b)(1) was as to the Pintars’ causes of action pursuant to state law claims. R. 46-65. Defendants Martin Houck and Darlene Houck did not join the Utah County Defendants in these Motions. Defendants Kay Bryson and

Timothy Barnes were dismissed without prejudice by stipulation filed by the parties on May 27, 2008. R. 158-60.

On August 20, 2008, the Fourth District Court, the Hon. Gary D. Stott presiding, issued a Memorandum Decision granting both of the Utah County Defendants' motions to dismiss, and the Court dismissed the Utah County Defendants from the case. R. 194-212. The Court further ruled that since the Utah County Defendants' motions to dismiss were granted, their Motion to Bifurcate was moot. R. 210. On September 10, 2008, the decision of the Court to dismiss the Utah County Defendants was memorialized as an Order of the Court. R. 213-220. On October 7, 2008, the Pintars filed a Notice of Appeal of the Court's decision regarding the 12(b)(6) motion for the claims pursuant to U.S.C. Title 42 §1983. R. 221-24. However, this Court dismissed the Notice of Appeal without prejudice to re-file pursuant to the Utah County Defendants' Motion for Summary Disposition. R. 299-302. This Court based its decision on the fact that all claims against all Defendants had not been adjudicated (Defendants Martin and Darlene Houck remained in the case) and the order of the Court had not been properly certified as a final order pursuant to Rule 54(b), Utah Rules of Civil Procedure. R. 299-302.

After the Utah County Defendants were dismissed, the Pintars and Defendants Martin and Darlene Houck entered into a Stipulated Case Management

Order which was filed with the Trial Court on April 27, 2009. R. 324-27. The parties subsequently filed an Amended Stipulated Case Management Order which was filed with the Court on August 4, 2009. R. 329-31. Pursuant to the Amended Stipulated Case Management Order, the parties agreed to a deadline to amend the pleadings of October 31, 2009. R. 330. On October 20, 2009, the Pintars filed a Motion for Leave to File a Second Amended Complaint.¹ R. 332-69. On January 19, 2010, Fourth District Court, the Hon. David N. Mortensen presiding, denied the Pintars' Motion for Leave to File a Second Amended Complaint. R. 789, 1295.

Also on January 19, 2010, Defendants Martin and Darlene Houck filed a Motion for Summary Judgment as to all of the remaining causes of action against them. R. 623-788. On May 7, 2010, the Fourth District Court, the Hon. David N. Mortensen presiding, issued a memorandum decision granting the Houck Defendants' Motion for Summary Judgment and dismissed them from the case. R. 1248-75. The Memorandum Decision was memorialized by written Order filed on June 14, 2010. R. 1289-91.

The Pintars filed Notice of Appeal on May 28, 2010. R. 1278-81. In their Notice of Appeal and subsequent Docketing Statement filed on June 18, 2010, the Pintars state that they are appealing the following issues:

¹ The Pintars' First Amended Complaint was simply replacing the name of "DOE Defendant 1" with Utah County. This was done prior to service of the Complaint. There were no substantive changes to the complaint with this amendment.

(1) The Memorandum Decision dated August 20, 2008 and subsequent Order dated September 10, 2008 dismissing the Second and Third Causes of Action for Civil Conspiracy and Malicious Prosecution pursuant to U.S.C. Title 42 §1983 against Defendants Deputy Susan Morgan and Utah County;

(2) The Order denying the Pintars leave to file their Second Amended Complaint issued from the bench on January 19, 2010;

(3) The Memorandum Decision dated May 7, 2010 and subsequent Order dated June 14, 2010, granting summary judgment in favor of Defendant Martin Houck and Defendant Darlene Houck as to all causes of action. The Pintars appealed as to the First Cause of Action (Declaratory Relief), Second Cause of Action (Civil Conspiracy pursuant to U.S.C. Title 42 §1983), Third Cause of Action (Malicious Prosecution pursuant to U.S.C. Title 42 §1983), Fourth Cause of Action (Civil Conspiracy), Fifth Cause of Action (Negligent Infliction of Emotional Distress), Sixth Cause of Action (Intentional Infliction of Emotional Distress, and Seventh Cause of Action (Defamation).

The Pintars hereby waive appeal as to the Fifth Cause of Action (Negligent Infliction of Emotional Distress), Sixth Cause of Action (Intentional Infliction of Emotional Distress, and Seventh Cause of Action (Defamation).

Statement of Facts

1. The Pintars are husband and wife and residents on agricultural property located in and around 4808 South 1850 West, Spanish Fork, Utah. Appellees Martin Houck and Darlene Houck (hereinafter “Houcks”) are husband and wife and residents on agricultural property located in and around 2015 West 4780 South, Spanish Fork, Utah. R. 1, 812.

2. The Plaintiffs and the Houcks share a common boundary between their property—the western boundary for Plaintiffs and the eastern boundary for the Houcks. R. 2, 812, 851, 859.

3. Plaintiffs have lived on their property since on or about 1977. R. 813, 850, 858. Plaintiffs are informed and believe that their property was owned by direct ancestors of Plaintiff, Afton B. Pintar, going back to at least the 1930s. R. 813, 851, 859.

4. The Houcks purchased the property that they own, which is the subject property herein, in 1991. R. 813, 851, 859, 1068, 1082.

5. The Pintars have irrigated their property in the same manner since about 1977. Prior to that, the Pintars are informed and believe that their ancestors irrigated the property in the same manner. R. 851, 859.

6. The Houck property is lower in elevation than the Pintar property. R. 813, 851, 859.

7. The irrigation water on both properties flows from south to north. R. 814, 851, 859, 1070.

8. There were no improvements on the Houck property prior to 1991. R. 814, 851, 859, 1069.

9. The Houcks constructed their home and improvements on their property on the north end despite the fact that is where the water flowed. R. 814, 851, 859, 1070.

10. On July 8, 2004, the Houcks sent correspondence to the Pintars threatening “further action” if the Pintars did not take care of “their” flooding problem. R. 814, 851, 859, 1095

11. The Pintars subsequently went to the Houcks’ home in July, 2004, to discuss the matter with them in an effort to resolve it. They spoke with Darlene Houck, who has subsequently stated repeatedly throughout this matter that the Pintars were threatening to her and used profanity at her when the Pintars discussed the matter with her—an accusation that the Pintars have denied. R. 814-15, 851-52, 859-60, 1084-90, 1106, 1110.

12. The Pintars denied that the flooding, if any, was the result of their doing anything improper. R. 3, 815.

13. Since the conversation on or about July, 2004, with regard to the Houcks' correspondence, Lewis J. Pintar, has had no direct contact with the Houcks, and Plaintiff, Afton B. Pintar, has only had direct contact on two occasions when Plaintiffs' cows got out of their property. R. 815, 852, 860.

14. There has been great hostility exhibited by the Houcks toward the Pintars over the years, including contacting the Utah County Sheriff's Department at least six times regarding Plaintiffs. R. 819-22, 855-56, 863-65, 1071-74, 1096-1115, 1130.

15. On May 12, 2006, Martin Houck sped his truck onto property which was owned by Afton B. Pintar and yelled and cursed at Afton B. Pintar who was there tending her grandchildren, one of whom, a minor, was present. Martin Houck, angrily accused Afton B. Pintar of stealing his irrigation water, which was false, in front of her grandchild, a minor. Actually, Martin Houck had forgotten to pull the dam out of the ditch to let the irrigation water through to his property. Nicholas Pintar, the son of Lewis J. Pintar and Afton B. Pintar, who was present on the property, heard the commotion caused by Martin Houck and verbally confronted him regarding the situation and Martin Houck left the property. R. 815-16, 847-48, 853.

16. The Houcks contacted the Sheriff's Department on May 12, 2006. At that time, and all times relevant herein, the Houcks' daughter-in-law, Tonya Houck, was employed at the Utah County Sheriff's Office. R. 3, 816, 818-19, 848, 944, 1116-18

17. The Houcks called their daughter-in-law, Tonya Houck, regarding the Pintars on May 12, 2006, the same day they called the Utah County Sheriff's Department regarding the Pintars. R. 819, 1048.

18. When the Sheriff's Officer, Deputy Susan Morgan (hereinafter "Deputy Morgan") responded in person at the Houcks' residence, they told her that their daughter-in-law, Tonya Houck, worked at the same Utah County Sheriff's Office. R. 818-19, 834, 854, 862, 929, 1018, 1294.

19. Lewis J. Pintar was not present during the incident on May 12, 2006. Despite this, the Houcks had contacted the Utah County Sheriff's Department regarding Lewis J. Pintar even though the confrontation was between Martin Houck and Nicholas Pintar. R. 816-17, 861, 1078, 1092-1093, 1116-18.

20. That same day Deputy Morgan went to the Pintar property and rudely confronted Afton B. Pintar in a threatening manner. Deputy Morgan threatened Afton B. Pintar with criminal sanctions if Lewis J. Pintar had any further contact with the Houcks. When Afton B. Pintar told Deputy Morgan that Lewis J. Pintar was not present earlier that day and had nothing to do with the incident caused by

Martin Houck, she was quickly rebuffed by Deputy Morgan. No written documents were given to the Pintars on May 12, 2006, by Deputy Morgan. R. 3-4, 816-17, 853, 861.

21. On August 20, 2006, the Houcks reported to Deputy Morgan that on June 11, 2006, Lewis J. Pintar hollered “there go the monkees [sic]” as they walked by the Pintar property. The Pintars have denied this accusation. R. 817, 854, 862, 1123.

22. Also on August 20, 2006, the Houcks reported to Deputy Morgan that on July 4, 2006, Lewis J. Pintar shook his finger at Darlene Houck and made derogatory remarks at a 4th of July flag-raising ceremony. The Pintars have denied this accusation as well. R. 817, 844, 854, 862-63, 1123.

23. Also on August 20, 2006, the Houcks reported to Deputy Morgan that Lewis J. Pintar “flipped off” Martin Houck and called him an “ass hole.” R. 4.

24. Without conducting an investigation, and without even contacting Lewis J. Pintar to hear his statements regarding the matter, Deputy Morgan issued a criminal summons for Lewis J. Pintar to be arrested. R. 4, 5, 818, 854, 862, 947-50, 956, 970, 980, 983, 985, 987, 992, 1135, 1292, 1294.

25. Deputy Morgan issued the criminal summons for arrest even though the allegations made by the Houcks, even if true, did not constitute a crime. R. 5, 829-30, 1292, 1294.

26. On November 2, 2006, Lewis J. Pinter was served with the criminal summons for arrest by substituted service. R. 5.

27. Pursuant to the criminal summons, Lewis J. Pinter appeared at the Utah County Jail where he was arrested for disorderly conduct pursuant to Utah Criminal Code §76-9-102, booked, fingerprinted, read his *Miranda* rights, had his “mug shot” taken. The “mug shot” and the details of the arrest were posted on the Utah County Jail website on the Internet. R. 1294.

28. The criminal proceedings were terminated on August 1, 2007, in favor of Lewis J. Pinter. R. 5-6, 818, 1164.

SUMMARY OF ARGUMENTS

The Trial Court incorrectly ruled that Deputy Morgan was not a policymaker for Utah County and therefore liability could not attach to Utah County. Under Utah law, Deputy Morgan has complete autonomy to make an arrest. This fact, along with the lack of exigency in this matter, establishes that Deputy Morgan is the sole policymaker for Utah County in the circumstances presented herein.

The Trial Court incorrectly ruled that Deputy Morgan is entitled to qualified immunity under the facts presented herein. The Trial Court abused its discretion in ignoring the fact that Deputy Morgan conducted no investigation in this matter. The Trial Court also abused its discretion in ignoring the fact that, even if the

allegations against Lewis J. Pinter were true, they did not constitute a crime. These facts, plus the facts and circumstances herein, establish that Deputy Morgan is not entitled to qualified immunity.

The Trial Court abused its discretion in denying the Pinters' Motion for Leave to File Second Amended Complaint where the Pinters filed their Motion prior to the agreed-upon deadline and the Houcks had an opportunity to conduct discovery regarding the issues raised by the proposed Second Amended Complaint.

The Trial Court incorrectly granted summary judgment in favor of Defendants Martin and Darlene Houck. In doing so, the Trial Court erred in finding that, as a matter of law, the Pinters could not sustain their request for Declaratory Relief where the Pinters are requesting a Declaration from the Court that they can irrigate their property in the same manner as they have done for decades prior to the Houcks purchasing their property, and liability cannot attach if the irrigation water drains as it has historically done.

The Trial Court erred in granting summary judgment in favor of the Houcks regarding the causes of action for conspiracy pursuant to 42 U.S.C. §1983, civil conspiracy and malicious prosecution. The Trial Court further abused its discretion in finding that Deputy Morgan conducted a haphazard investigation where in fact no investigation took place and also by ignoring the fact that even if the allegations against Lewis J. Pinter were true, they did not constitute a crime.

Given these and other facts, the Trial Court erred in finding that, as a matter of law, there could be no meeting of the minds or concerted action between Deputy Morgan and the Houcks.

ARGUMENT

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.

Utah County argued before the Trial Court that liability cannot attach to it through a theory of *Respondeat Superior*. R. 72. Therefore, in order for liability to attach to Utah County, the Pintars must show that: (1) a local government employee committed a constitutional violation, and (2) that a governmental policy or custom was the moving force behind the constitutional deprivation. *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). Utah County claimed that the Pintars failed to meet this burden. The Pintars agreed that the standard for liability to attach to Utah County is that set forth in *Monell, supra*; however, the Pintars disagreed with Utah County's assertion that they failed to meet that standard. The Trial Court agreed with Utah County; however, in doing so, it misapplied the law to the facts set forth herein.

It is undisputed by Utah County and the Trial Court that a governmental custom or policy may be established by a single policymaker. *Pembaur v. City of*

Cincinnati, 475 U.S. 469 (1986). The United States Supreme Court explained its holding in *Pembaur* as follows:

. . . .it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under §1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy. . . .

But the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. *Monell's* language makes clear that it expressly envisioned other officials “whose acts or edicts may fairly be said to represent official policy.” *Monell, supra*, 436 U.S. at 694, and whose decisions therefore may give rise to municipal liability under §1983. Indeed, any other conclusion would be inconsistent with the principles underlying §1983.

Pembaur v. City of Cincinnati, supra, at 480 [emphasis added].

It was further undisputed by Utah County and the Trial Court that the identification of officials having “final policymaking authority” is a question of state (including local) law. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) *citing Pembaur v. Cincinnati, supra*, at 483.

Utah County argued that in determining whether a governmental entity can be liable under §1983 for a single official’s act, the Court must look to two (2) factors: (1) whether his or her discretionary decisions are constrained by other policies; 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. 2008). R. 176. This test was, quite correctly, adopted by the Trial Court, however, the Trial Court erred distinctly in two fashions in applying the facts to this test as set forth in *Milligan, supra*.

The Trial Court found that 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. R. 205-06. However, the Trial Court, or Utah County for that matter, does not show how Deputy Morgan's action to arrest Lewis J. Pintar is constrained by any state policy or how it was reviewable by others. In fact, it is clearly not in either case.

It is undisputed by Utah County that Utah Code Annotated §17-22-2 (General Duties of Sheriff), subsection (b) authorizes a sheriff to make all lawful arrests, however, it is silent on what constitutes a lawful arrest. It is undisputed that it is at the discretion of the sheriff to determine what constitutes a lawful arrest. Only after the arrest has been made does one have the opportunity through the Courts to review whether the arrest was proper. However, there is no such review or constraint prior to the arrest taking place. It is therefore at the discretion of the single officer to determine County policy as to what constitutes a lawful arrest before up to and including the point it takes place.

Utah Code Annotated §77-7-2 (Arrest by Peace Officers) states in pertinent part: “A peace officer may make an arrest under authority of a warrant or may, without warrant, arrest a person when he has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may flee, destroy evidence or injure another person.” However, again, this code section leaves it to the discretion of the police officer to determine what is reasonable or probable cause to make an arrest. There is no constraint or review regarding the arrest until after the arrest is actually made.

In other words, the decision to arrest Lewis J. Pintar was Deputy Morgan’s and Deputy Morgan’s alone. The Trial Court or Utah County have not shown where Deputy Morgan’s decision to make the arrest was subject to a vote by a superior body of legislators or administrators on behalf of the County. Neither of them have shown where Deputy Morgan needed the permission of a superior to make the arrest. Deputy Morgan was not required to notify a superior, the district attorney, or a Court of competent jurisdiction to have the proposed arrest reviewed prior to making the arrest. The policymaking authority as to whether or not to make an arrest is vested directly with the individual officer under Utah law. This is magnified in the instant case by the fact that there were no exigent circumstances—it was Deputy Morgan alone who dealt with this matter on behalf of Utah County over a sixteen month period prior to the arrest. R. 139.

Indeed, in *Milligan-Hitt, supra*, a Wyoming schoolteacher sued a school district and personally named the superintendent for allegedly discriminating against her by not hiring her for a position based on her sexual orientation. *Id.* at 1221-23. In holding that the school superintendent was not the final policymaker in the matter, the Court looked to the fact that it was the school district's board of trustees who were vested with authority to make personnel decisions under Wyoming law—it was merely the role of the superintendent to put candidates forward before the Board of Trustees. *Id.* at 1227. Using this analysis, it is impossible as a matter of law to find that Deputy Morgan's decision to arrest Lewis J. Pintar was constrained by any governmental policy or reviewable by others.

Secondly, the Trial Court erred in holding that the Pintars brought forth no allegations that official Utah County policy was unconstitutional. R. 206. As discussed *supra*, it is clear that a single individual can make policy for a governmental entity and liability will attach if that policy is found to violate the constitutional rights of an individual. *Pembaur v. City of Cincinnati, supra*, at 480. Liability may attach if either (1) if an official follows previously established unconstitutional policy or (2) that official makes policy which is unconstitutional. *Id.* The Trial Court's ruling ignores the latter.

It is undisputed that the Trial Court must accept all factual allegations in the Complaint as true and consider them and all reasonable inferences drawn from them in the light most favorable to the Pintars as the non-moving party. *Whipple v. American Fork Irrigation Company, supra* at 1219; *Russell v. Standard Corp., supra* at 264. The Pintars alleged in their complaint that Deputy Morgan used her delegated police power and official position to: (1) deliberately choose not to conduct even a rudimentary investigation of the allegations against Lewis J. Pintar; (2) take only statements from the alleged complaining witnesses without substantiating them; (3) not contact Lewis J. Pintar before making an arrest; (4) have Lewis J. Pintar arrested, fingerprinted, and booked with his “mug shot” taken and posted on the Internet; and (5) to do all of these acts or omissions where there was not even the allegation of a crime. R. 3-6. Viewing these facts as true and all inferences from them in a light most favorable to the Pintars, it must be concluded that Deputy Morgan was promulgating the policy of Utah County with regard to the underlying allegations.

Furthermore, it must be inferred from the facts plead in the Pintars’ complaint that there was a conflict of interest with Deputy Morgan or anyone from the Utah County Sheriff’s Department handling this matter based on the fact that the complainants’ close relative worked there. R. 3. There were no exigent circumstances surrounding the arrest which would have prevented Deputy Morgan

from addressing the conflict of interest. R. 139. Therefore, the Trial Court must conclude that Utah County has no policy regarding inherent conflicts of interest which may lead to an abridgment of an individual's constitutional rights.

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).

A. Factual Error

The Trial Court erred by not accepting the factual allegations of the Complaint as true and all reasonable inferences therefrom in a light most favorable to the Pintars as the nonmoving party. *Whipple v. American Fork Irrigation Company, supra* at 1219; *Russell v. Standard Corp., supra* at 264. Specifically, the Pintars clearly plead in their Complaint that, in addition to the allegations being false, even if the facts as alleged in Deputy Morgan's report were true, they did not constitute the crime of disorderly conduct as defined by the Utah Criminal Statute. R. 5. The Pintars also argued this fact in their Opposition to the Utah County Defendants' Motion to Dismiss. R. 143. Despite this, the District Court found as follows in ruling that Deputy Morgan is entitled to qualified immunity:

"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." R. 209.

The Trial Court also ignored the following facts alleged by the Pintars in their Complaint:

(1) Deputy Morgan verbally threatened the Pintars with criminal sanctions without probable cause or authority; R. 3, 143.

(2) Deputy Morgan did not even undertake a rudimentary investigation of the matter to determine if there was any criminal act by Lewis J. Pintar; R. 4, 143.

(3) Deputy Morgan did not even have any contact with Lewis J. Pintar before filing a police report which caused him to be arrested; R. 4, 143.

(4) Deputy Morgan was aware that the complaining witness's daughter-in-law worked for the same law enforcement agency. R. 3.

The Trial Court erred in ignoring these facts and replacing them with its own interpretation that "Plaintiffs have alleged that because the allegations that led to their arrest were false, that Deputy Morgan's actions were unreasonable." R. 209. This error is material in that it forms the entire basis for the Trial Court granting qualified immunity to Deputy Morgan.

B. Legal Error

The Trial Court cites *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) in articulating the doctrine of qualified immunity: "[G]overnment 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. R. 206-07. The *Harlow* Court relied upon the “objective reasonableness” of an official’s conduct as measured by reference to clearly established law in determining whether a grant of qualified immunity was appropriate. *Id.* Subsequently, the United States Supreme Court broke down the “objective reasonableness” test into two parts for a Court’s analysis in considering a claim for qualified immunity: (1) whether the facts alleged, taken in the light most favorable to 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). The Trial Court further cites *Saucier* in support of its analysis: “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 question then turns on the objective reasonableness of the officer given the circumstances.

While the District Court’s recitation of the applicable law is correct, it takes great liberties with the facts plead by the Pintars in applying the law to them:

“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 prevailing.*” R. 209-10. [Emphasis added].

The Pintars did not plead that there were charges tendered against Lewis J. Pintar that later turned out to be unsubstantiated. The Pintars plead and argued that even if the allegations against Lewis J. Pintar were true, they did not constitute a crime under Utah law. R. 5, 829-30, 1292. In the instant case the elements of a crime were not even alleged. This fact alone defeats the assertion that Deputy Morgan's actions in this matter were not unreasonable. It is clear, as a matter of law, to a reasonable officer, or any reasonable individual for that matter, that a law enforcement officer cannot arrest someone without at least the accusation or suspicion of conduct that constitutes a crime.

The fact that there was not an allegation of a crime in the instant case also completely distinguishes this case from each case the District Court cites in its decision. The District Court relies on *Anderson v. Creighton*, 483 U.S. 635 (1987):

[A]lthough 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

....

[I]t is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present.

Id. at 641. R. 208.

However, the instant case is completely distinguishable from *Anderson*. In *Anderson*, the U.S. Supreme Court upheld qualified immunity for a police officer who conducted a warrantless search for a bank robber under what he perceived to

be exigent circumstances in a plaintiff's home. *Id.* at 637. The key distinction is that in *Anderson*, there was at least an accusation of an underlying crime that was committed—a bank was robbed. Further distinguishing the instant case from *Anderson*, is the lack of any exigency. Unlike *Anderson*, there was no split-second decision that was required by the officer under the circumstances. Deputy Morgan's conduct in this matter was deliberate and concerted over a sixteen month period. R. 139.

The Trial Court also relies on *Beard v. City of Northglenn*, 24 F.3d 110 (10th Cir. 1994) where qualified immunity was upheld against a Plaintiff who sued an official who conducted a search regarding a check kiting scheme based on false information contained in the warrant. Again, in *Beard*, there was the accusation of an underlying crime – check kiting. In the instant case, there is not even the allegation of a crime. R. 5, 829-30, 1292. By definition, if there is no allegation of a crime, there can be no probable cause to support the arrest of Lewis J. Pinta. Furthermore, in the absence of an allegation of a crime, it is impossible to argue that an officer acted reasonably in making an arrest.

In order to confer qualified immunity upon Officer Morgan, there must be a finding that, as a matter of law, Deputy Morgan acted reasonably in issuing an arrest warrant for Lewis J. Pinta where: (1) Deputy Morgan verbally threatened the Pintas with criminal sanctions without probable cause or authority; (2) Deputy

Morgan did not even undertake a rudimentary investigation of the matter to determine if there was any criminal act by Lewis J. Pintar; (3) Deputy Morgan did not even have any contact with Lewis J. Pintar before filing a police report which caused him to be arrested, (4) a close relative of the complaining witnesses worked at the same law enforcement agency as Officer Morgan, and (4) the underlying conduct as alleged, even if true, does not constitute a crime. R. 143. The Pintars respectfully submit that the District Court cannot meet its burden and therefore qualified immunity cannot be conferred upon Deputy Morgan.

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

On August 4, 2009, the parties filed a Stipulated Case Management Order whereby they agreed to a deadline of October 31, 2009, to amend the pleadings. R. 356, 361. Prior to that deadline, the Pintars filed and served a Motion for Leave to File a Second Amended Complaint. The proposed Second Amended Complaint split the first cause of action for declaratory relief regarding irrigation issues into three causes of action – one of those being for specific performance rather than declaratory relief – that more specifically dealt with irrigation issues. R. 338-42. The parties further stipulated to a discovery cut-off date of December 31, 2009. R. 356, 361. Despite the discovery cut-off date, the Pintars agreed that the Houcks could serve their discovery the week of January 11, 2010 and they would answer it

after on or before March 1, 2010. R. 1295. The Houcks did indeed propound discovery questions the week of January 11, 2010—some which dealt with the issues raised in the proposed Second Amended Complaint. R. 1295. The Pintars intended to respond to those discovery requests. R. 1295.

Despite the fact that the Pintars filed and served their Motion for Leave to Amend prior to the agreed upon deadline, the District Court denied the Pintars Motion. R. 1295. The District Court questioned the Pintars' counsel about future discovery. R. 1295. The Pintars counsel, while indicating that the parties had an agreement that he would respond to discovery already propounded and that he would honor that agreement, indicated that he was not agreeable to reopening discovery entirely. R. 1295. The Court ruled from the bench that the Pintars could have brought their amendment sooner, therefore, the Court denied the Pintars' Motion for Leave to Amend. R. 1295. The Court also indicated that because the Pintars' position was that discovery was closed it denied the Pintars' Motion. R. 1295. In doing so, the Court abused its discretion.

Rule 15(a) of the Utah Rules of Civil Procedure states in pertinent part:

A party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. [emphasis added]

The courts in Utah have frequently and consistently followed this plain language. *Teague v. District Court*, 528 P.2d 802 (Utah 1974); *Fishbaugh v. Utah Power & Light*, 969 P.2d 403 (Utah 1998). The Utah Supreme Court has held:

When leave of the court is required to amend a pleading, Utah Rules of Civil Procedure 15(a) provides that “leave shall be freely given when justice so requires.” We have stated, “Courts should be liberal in allowing amendments to the end that cases may be fully and fairly presented on their merits.”

Timm v. Dewsnup, 851 P.2d 1178, 1183 (Utah 1993) quoting *Hancock v. Luke*, 148 P. 452 (Utah 1915).

The Courts look to three factors in determining whether or not to grant leave to amend: (1) the timeliness of the motion; (2) the justification for the delay; and (3) any resulting prejudice to the responding party. *Lewis v. Moultrie*, 627 P.2d 94, 98 (Utah 1981). All three prongs of the analysis weigh in favor of granting the Pintars leave to amend.

First of all, the parties agreed to a deadline of October 31, 2009 to amend the pleadings. The Pintars timely met that deadline. There is no reason to establish a case management plan with deadlines to file documents if a particular pleading filed prior to a deadline is still found to be untimely. The Pintars relied on this deadline. It would be inherently unjust for the Trial Court to hold them to a different deadline. The Pintars’ Motion was filed prior to the deadline and therefore was timely.

The Trial Court's reliance on the fact that, aside from the discovery already propounded by the Houcks, the Pintars considered discovery closed pursuant to their agreement in the Stipulated Case Management Order is misplaced. This in no way prejudiced the Houcks. The Motion for Leave to Amend and proposed Second Amended Complaint were served on the Houcks on October 19, 2009. R. 332-69. They had until December 1, 2009, to propound discovery given the discovery cut-off of December 31, 2009. R. 356, 361. The Pintars even granted the Houcks extensions past that date until the week of January 11, 2010, to serve discovery which they did. R. 1295. It is undisputed that the Houcks propounded discovery questions that dealt solely with the issues of the proposed Second Amended Complaint. R. 1295. The Trial Court's position that Defendants had no opportunity to conduct discovery regarding the proposed Second Amended Complaint is contradicted by the actual facts. R. 1295. There is no reasonable basis for the decision of the Trial Court to deny the Pintars Leave to File a Second Amended Complaint; therefore, the Trial Court abused its discretion.

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

The Pintars requested that the Court issue declaratory relief such that, given the facts and circumstances herein, they be allowed to reasonably irrigate their agricultural property as they and their predecessors have done for decades prior to

the Houck Defendants' purchasing the adjoining property. R. 1293. The Trial Court found that this request is unsustainable as a matter of law given the fact that water sometimes spills from the higher Pintar property onto the lower Houck property. The Trial Court erred in reaching this conclusion.

The facts regarding this issue are undisputed. R. 1293. The Pintars owned their property long before the Houcks purchased the adjoining property. R. 813, 850-51, 859, 1068, 1082. The Pintars irrigated their property in the same manner for decades prior to the Houcks purchasing their property. R. 851, 859. The Houck property is lower in elevation. R. 813, 851, 859. There are occasions when the Pintars properly irrigate their property that water drains from their property onto the Houck property. R. 1293.

The District Court misstates the request for Declaratory Relief of the Pintars as being "whether the Pintars are entitled to allow irrigation water to run onto the Houcks' property." R. 1255. This was never the request. The Pintars' request for Declaratory Relief is given the facts and circumstances herein, the Pintars be allowed to irrigate their agricultural property in a reasonable manner as they and their predecessors have for decades prior to the Houck Defendants purchasing the adjoining property, and not be held liable for drainage onto the lower Houck property if they irrigate reasonably. R. 1293.

In disallowing the Pintars the right to irrigate their property as they have for decades, the trial court misapplies the law to the facts. Utah law is clear that an appropriator of water has the right to continue the historical use of water and the same method of diversion. *Wayment v. Howard*, 144 P.3d 1147, 1151 (Utah 2006); *Salt Lake City v. Gardner*, 114 P. 147, 152 (Utah 1911). The Trial Court held these cases to be inapplicable because they have to do with “diversion” of water rather than “use” of water. R. 1256-57. The Trial Court held that “using” water and “diverting” are not synonymous. The Trial Court reasoned that since *Wayment* and *Salt Lake City* address the diversion of water, they do not apply. R. 1257. However, the District Court contradicts itself by clearly stating that in the instant case the irrigation water is diverted by the Pintars. R. 1259. Since the facts are clearly about the diversion of water, the District Court cannot ignore the precedent set forth in *Wayment* and *Salt Lake City* that a landowner has the right to the historical use of diversion of his water.

Secondly, while the Trial Court correctly cites *Sanford v. University of Utah*, 488 P.2d 741, 744 (Utah 1971) in adopting the doctrine of reasonable use for the discharge of surface waters, R. 1257, it misapplies the doctrine to the instant case. The Trial Court relies on *Erickson v. Bennion*, 503 P.2d 139 (1972) quoting Utah Code Ann. §73-1-8, which provides in pertinent part: “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.” R. 1258. The issues regarding the Pintars’ request for Declaratory Relief have nothing to do with ditches or watercourses or the maintenance thereof. Whether or not the Pintars properly maintain their ditches or watercourses is not the issue. The issues are strictly confined to the flood irrigation of the Pintars’ property and the drainage thereof.

Finally, the District Court relies on *Reeder v. Brigham City*, 413 P.2d 300 (1966), and *Northpoint Consolidated Irrigation Co. v. Utah & S.L. Canal Co.*, 52 P. 168, in stating that a 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. R. 1259. However, both of these cases involve circumstances where the individuals and/or entities in question are moving water from their land onto another’s land. In *Reeder* the City of Brigham City channeled an underground system to drain water from an area where new homes were being built to directly upon the landowner’s property. *Reeder v. Brigham City, supra*, at 301-02. The “aggrieved” landowner in *Reeder* owned his property before the city began diverting water onto it—precisely the opposite of the case at bar. *Id.* In *Northpoint*, the Court held that the Plaintiff therein had the proprietary right to a canal to use for irrigation purposes and therefore the Defendants therein had no right to purposefully drain their used irrigation water into said canal for non-irrigation purposes. *Northpoint Consolidated Irrigation Co. v. Utah & S.L. Canal*

Co., at 172-73. In the instant case, while the Pintars divert the irrigation water onto their property, once it is on the Pintar property there nothing artificial that carries the irrigation water from the Pintars' property to the Houck property. It is undisputed that the Houck property is lower in elevation than the Pintar property R. 813, 851, 859., therefore, gravity takes its course.

Finally, in order for a landowner to have the right to be free from receiving waters on his lands, he must show damages from the water in question. *Reeder v. Brigham City*, *supra* at 302. Even if *Reeder*, were applicable to the instant case, the Houcks have not raised the issue in their pleadings or arguments before the Court that they have been damaged by the water drainage at all. Therefore, the Trial Court erred in holding that the Pintars request for Declaratory Relief is legally unsustainable.

V. 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.

A. Factual Error

The Trial Court concedes that the question or whether or not there is a conspiracy is typically a question of fact. *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1448 (10th Cir. 1995). R. 1262. Despite this, though, the Trial Court ruled that as a matter of law, there was not a conspiracy between

Deputy Morgan and the Houcks. R. 1261. In so ruling, the Trial Court committed reversible error.

In considering a motion for summary judgment and determining whether there are any genuine issues of material fact for a trier-of-fact to decide, the Trial Court must construe all facts and reasonable inferences from those facts in a light most favorable to the nonmoving party. *Winegar v. Froerer Corp.*, 813 P.2d 104, 107 (Utah 1991); *Allen v. Ortez*, 802 P.2d 1307, 1309 (Utah 1990).

Unfortunately, the Trial Court did not construe all facts and reasonable inferences from those facts in a light most favorable to the nonmoving party. The Pintars specifically plead and argued that there was no investigation of the matter which was conducted by Deputy Morgan. R. 4, 5, 818, 854, 862, 947-50, 956, 970, 980, 983, 985, 987, 992, 1135, 1294. However, the District Court based its decision on finding that Deputy Morgan's investigation was "haphazard and incomplete." R. 1261. Furthermore, the Pintars specifically plead that even if the facts as alleged against Lewis J. Pintar were true, they did not constitute a crime. R. 5, 829-30, 1294. The Pintars went into great detail regarding the legislative history of Utah Criminal Code §76-9-102 (Disorderly Conduct) and how the allegations herein stated, even if true, could not amount to criminal conduct under the statute. R. 828-29. However, the Trial Court once again completely ignored

this fact in its analysis. Furthermore, the Trial Court once again ignored the following factors in its analysis:

(1) Deputy Morgan verbally threatened the Pintars with criminal sanctions without probable cause or authority; R. 3.

(2) Deputy Morgan did not even have any contact with Lewis J. Pintar before filing a police report which caused him to be arrested; R. 4.

(3) Deputy Morgan was aware that the complaining witness's daughter-in-law worked for the same law enforcement agency. R. 3, 1294.

These factors are material in that the Trial Court states that the facts it interprets do not support a claim for conspiracy. R. 1261. The Trial Court further states it cannot infer that there was a meeting of the minds from the evidence it interprets. R. 1263. However, the Court does not consider whether it would be reasonable to infer a civil conspiracy between the Houcks and Deputy Morgan where: (1) there was a great deal of hostility by the Houcks toward the Pintars; R. 819-22, 855-56, 863-65, 1071-74, 1096-1115, 1130; (2) the Houcks' daughter-in-law worked at the sheriff's department; R. 3, 816, 818-19, 848, 944, 1116-18; (3) the Houcks informed Deputy Morgan that their daughter-in-law worked at the sheriff's department; R. 818-19, 834, 854, 862, 929, 1018, 1294; (4) Deputy Morgan verbally threatened the Pintars with criminal sanctions without probable cause or authority; R. 3-4, 81-17, 853, 861; (5) Deputy Morgan did not even

undertake a rudimentary investigation of the matter nor contact Lewis J. Pinter to determine if there was any criminal act by Lewis J. Pinter; R. 4, 5, 818, 854, 862, 947-50, 956, 970, 980, 983, 985, 987, 992, 1135, 1294; (6) the underlying conduct as alleged, even if true, does not constitute a crime. R. 5, 829-30, 1294.

Given these facts, it would certainly be reasonable for a jury to conclude that Deputy Morgan acted in concert with the Houcks to deprive Lewis J. Pinter of his right to be free from unreasonable seizure. This is especially true where the Pinters are only required to produce “facts tending to show an agreement and concerted action” rather than an actual agreement by direct evidence. *Beedles v. Wilson*, 422 F.3d 1059, 1073 (10th Cir. 2005) (emphasis added). “Although a conspiracy may be established by either direct or circumstantial evidence, it is usually susceptible of no other proof than that of circumstantial evidence because direct evidence of a conspiracy is ordinarily in the possession and control of the alleged conspirators and is seldom attainable.” *15A Corpus Juris Secundum, Conspiracy* §37.

B. Legal Error

The District Court correctly cites the relevant five-part test as to whether a civil conspiracy exists. In order to prove civil conspiracy, the following five elements must be shown: (1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof.

Peterson v. Delta Air lines, Inc., 42 P.3d 1253, 1257 (Utah 2002) citing *Alta Indus. v. Hurst*, 846 P.2d 1282, 1290 (Utah 1993). In finding that, as a matter of law, the Pintars cannot sustain a cause of action for civil conspiracy against Martin and Darlene Houck, the Court held that the Pintars failed the third prong of the test by not alleging facts which show that there was a meeting of the minds. R. 1263. In so ruling, the Trial Court errs.

The Trial Court liberally construes *Holland v. Columbia Iron Mining Co.*, 293 P.2d 700 (1956) in claiming that it is not obligated to assume any asserted inferences by the Pintars. The Trial Court's position is misplaced. First of all, it has been well settled through the decades subsequent to *Holland, supra*, that in reviewing a matter for summary judgment, a court must accept all factual allegations as true and consider them and all reasonable inferences drawn from them. *Winegar v. Froerer Corp., supra*, at 107; *Allen v. Ortez, supra*, at 1309. Allowing the District Court to ignore reasonable inferences to be drawn from the Pintars' allegations would contradict well-established precedent. Secondly, the District Court misreads the holding of *Holland*. In *Holland*, the Court actually considered the inferences of the facts alleged by the Plaintiffs therein; however, the Court concluded that it could not reasonably make the inferences therefrom that the Plaintiffs desired. *Holland v. Columbia Iron Mining Co., supra*, at 701-02.

The *Holland* Court does not at all excuse the Trial Court from considering the reasonable inferences from the facts alleged.

Moreover, the District Court concentrates its analysis on a conspiracy that involves Deputy Morgan, the Houcks' daughter-in-law (Tonya Houck), and Martin Houck and Darlene Houck. The District Court finds that pivotal to the Pintars allegations of conspiracy is the alleged relationship between Deputy Morgan and Tonya Houck. R. 1263. Because Deputy Morgan and Tonya Houck testified at their respective depositions that they did not know each other personally, the Trial Court reasoned that there could be no meeting of the minds and therefore no conspiracy. R. 1263.

In fact, the relationship between Deputy Morgan and Tonya Houck is not pivotal to the Pintars' causes of action for conspiracy. The Pintars plead that Deputy Morgan and Tonya Houck had a personal and friendly working relationship which influenced Deputy Morgan's decisions. R. 3. The Pintars also plead in the alternative that Deputy Morgan acted in concert with Martin Houck and Darlene Houck – with no involvement from Tonya Houck. R. 5, 1294. This was argued by the Pintars in their opposition, R. 1294; however, it was completely ignored in the Court's analysis. If the Court had considered this allegation and applied the standard that the Pintars need only show facts tending to show an agreement pursuant to *Beedles v. Wilson*, the Court would not have concluded as a

matter of law that there could be no finding of a meeting of the minds and conspiracy between Deputy Morgan and the Houcks.

VI. THE DISTRICT COURT ERRED DISMISSING THE PINTARS' SECOND CAUSE OF ACTION FOR MALICIOUS PROSECUTION PURSUANT TO TITLE 42 U.S.C. §1983 AS TO THE HOUCKS.

The District Court did not dismiss the Pintar's Second Cause of Action on the basis that the Pintars failed to meet any one of the elements required to establish a cause of action for malicious prosecution pursuant to Title 42 U.S.C. §1983. Instead, the District Court dismissed the Pintars' cause of action for malicious prosecution against Martin and Darlene Houck because the District Court found that the Pintars did not show that the Houcks acted "under color of state law." R. 1264. In doing so, the District Court's analysis is flawed in the same manner as its analysis of the Pintars' conspiracy cause of action.

In order to hold a private individual liable for malicious prosecution pursuant to Title 42 U.S.C. §1983, a plaintiff must show that the private defendant participated in joint action with the State or its agents *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980). The Trial Court is correct in pointing out that the pleadings must present facts tending to show an agreement and concerted action. R. 1265. As set forth above, this is precisely what the Pintars plead; however, the District Court did not take into consideration material facts that the Pintars plead.

The District Court held that 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. R. 1265. This ignores the facts as plead and argued by the Pintars as set forth above, specifically, that the Pintars specifically plead that Deputy Morgan and the Houcks acted in concert to have Lewis J. Pintar wrongfully arrested in violation of his constitutional right to be free thereof. R. 5. Since there is no dispute as to the Pintars' contention that the elements of malicious prosecution pursuant to Title 42 U.S.C. §1983 are satisfied, the Pintars submit that the analysis regarding whether a trier of fact could reasonably conclude concerted action and an agreement between Deputy Morgan and the Houcks given the facts as plead and argued by the Pintars is the same as that for the conspiracy causes of action. The Pintars will therefore not repeat those arguments here. However, those arguments demonstrated that the Trial Court erred in dismissing the Pintars' cause of action for malicious prosecution pursuant to Title 42 U.S.C. §1983 as to the Houcks.

CONCLUSION

Based on the foregoing reasons, this Court should reverse and remand the District Court's decisions to:

(1) Dismiss the Second Cause of Action for Malicious Prosecution pursuant to Title 42 U.S.C. §1983 and Third Cause of Action for Conspiracy pursuant to Title 42 U.S.C. §1983 as to Utah County;

(2) Dismiss the Second Cause of Action for Malicious Prosecution pursuant to Title 42 U.S.C. §1983 and Third Cause of Action for Conspiracy pursuant to Title 42 U.S.C. §1983 as to Deputy Morgan;

(3) Deny the Pintars leave to file their proposed Second Amended Complaint;

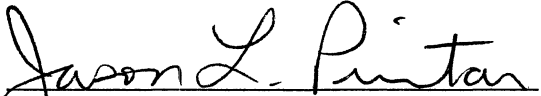
(4) Dismiss the First Cause of Action for Declaratory Relief as to the Houcks;

(5) Dismiss the Second Cause of Action for Malicious Prosecution pursuant to Title 42 U.S.C. §1983, Third Cause of Action for Conspiracy pursuant

to Title 42 U.S.C. §1983 and Fourth Cause of Action for Civil Conspiracy as to the Houcks.

DATED this 1st day of October, 2010

Law Offices of Jason L. Pinter,



Jason L. Pinter,
Attorney for the Pintars

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2010, two true and correct copies
of the foregoing **BRIEF OF APPELLANTS** were served upon the
following by United States Mail:

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Addenda

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 Pintar, 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 Pintar for disorderly conduct. Plaintiff Lewis Pintar was served with the summons by substitute service on November 2, 2006. The commencement of the criminal matter required the appearance of Plaintiff Lewis Pintar 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 Pintar's picture and booking information on the Utah County Jail website. Plaintiff Lewis Pintar 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

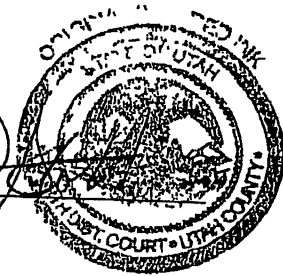
Based upon the court's decision to grant Utah County Defendants' motions to dismiss, the Motion to Bifurcate is rendered moot.

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

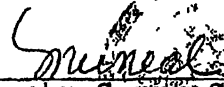
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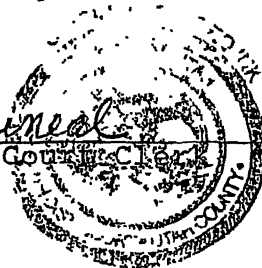
CERTIFICATE OF NOTIFICATION

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
Mail	KATHLEEN M LIUZZI Attorney DEF 505 E 200 S 2ND FLR SALT LAKE CITY, UT 84102
Mail	PETER C SCHOFIELD Attorney DEF PINEHURST OFFICE COMPLEX 518 W 800 N STE 204 OREM UT 84057
Mail	JASON L PINTAR Attorney PLA 2021 The Alameda Suite 310 San Jose CA 95126

Dated this 20th day of August, 2008.


Deputy County Clerk



FILED

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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, KAY
BRYSON, TIMOTHY BARNES, UTAH
COUNTY, and DOES 2-50, inclusive,

Defendants.

MEMORANDUM DECISION

Date: May 7, 2010

Case No.: 070403245

Judge: David N. Mortensen

This matter comes before the court on Defendants' Motion for Summary Judgment ("Defendant's Motion"). Upon review of the entire matter, including a supplemental telephone conference with counsel, the motion is granted for the following reasons.

STATEMENT OF FACTS

These are the facts construed in favor of the plaintiffs. In reviewing plaintiffs' opposition, the following facts reflect either those facts which were expressly undisputed or facts where the alleged dispute was not material. See Utah Rule of Civil Procedure 56(c) (. . . No genuine issue as to any *material* fact . . .). Any facts to which there is a genuine dispute are stated as plaintiffs assert them to be. Plaintiffs and defendants own adjoining property in Spanish Fork, Utah. They each own rights to irrigation water, administered by the Westfield

Irrigation Company, that flows onto their respective properties. There had been a history of flooding, or at least a voluntary release, of the Pintars' irrigation water onto the Houcks' property. On July 8, 2004 Mr. Houck sent Mr. Pintar a letter stating that irrigation water from Mr. Pintar's property had been flooding Mr. Houck's corrals and driveway and asking him to contain this water. Plaintiffs maintain that the defendants have falsely asserted that plaintiffs improperly managed the irrigation water on their property in a way that caused flooding and damage to the Houck property. Because of this, plaintiffs seek a declaratory judgment concerning the management of the irrigation water between the properties.

Due to the previous flooding issues and the July 8, 2004 letter, tension developed between plaintiffs and defendants. Plaintiffs allege that on May 12, 2006 Mr. Houck entered the Pintar's property and yelled and cursed at Mrs. Pintar, accusing her of stealing his irrigation water. The Pintars' son, Nicholas Pintar, heard this altercation and confronted Mr. Houck. Following the confrontation with Nicholas Pintar, the Houcks contacted the Utah County Sheriff's Department and reported the incident. Deputy Susan Morgan went to the Houcks' house and took a report of the confrontation. She was told about the longstanding hostility between the families. Deputy Morgan later went to the Pintars' house and told Mrs. Pintar that Mr. Pintar was not to have contact with the Houcks.

On August 20, 2006, the Houcks again contacted the Utah County Sheriff's Office. They reported that on June 11, 2006 Mr. Pintar said, "There go the monkees [sic]" as they walked by and that at a 4th of July flag-raising ceremony Mr. Pintar shook his finger at them and made

derogatory remarks. Plaintiffs deny that these incidents ever happened. Based on these reports and the reports of May 12th, Deputy Morgan issued a criminal summons for disorderly conduct against Mr. Pintar. According to the plaintiffs, Mr. Pintar appeared at the Utah County jail and was booked. The criminal proceedings were eventually terminated in his favor.

Plaintiffs claim that Deputy Morgan was motivated to issue the criminal citation because of her relationship with the Houck's daughter, Tonya Houck. Tonya Houck works for the Utah County Sheriff's Office, the same law enforcement agency where Deputy Morgan works. Plaintiffs claim that the Houcks made Deputy Morgan aware of this fact when she visited them on May 12, 2006 and that the Defendants had called their daughter that same day regarding the confrontation with Nicholas Pintar. There is no specific evidence, or even a specific assertion, that Tonya Houck and Deputy Morgan ever communicated with each other in any way.

Defendants quote the depositions of both Tonya Houck and Deputy Morgan in their motion, and plaintiffs affirm that these quotes are true recitations. In the depositions, both Deputy Morgan and Tonya Houck are asked if they know one another. They both state that they have heard of one another in connection with their employment, but they have not ever spoken with one another or met face to face. Plaintiffs do not contest the veracity of the representations made in the depositions, they simply state that these representations are evidence that Tonya Houck and Deputy Morgan know one another. This is the totality of the facts available on the issue. Plaintiffs insist that the court can infer a conspiracy from these facts and that on this meager evidentiary basis the matter should be submitted to a jury.

On November 1, 2007, Plaintiffs filed a complaint against Martin, Darlene, and Tonya Houck; Deputy Morgan; Utah County; and Utah County Attorney Kay Bryson and Deputy County Attorney Timothy Barnes, alleging eleven causes of action under federal and state law.¹ The claims against defendants Kay Bryson, Timothy Barnes, Utah County, Deputy Morgan, and Tonya Houck were dismissed by prior order of the court, Judge Gary Stott presiding. Plaintiffs sought leave to file a second amended complaint October 20, 2009. This request was denied

Plaintiffs also allege that during the pendency of these proceedings, years after the initial and first amended complaints were filed, Mrs. Houck again called the Utah County Sheriff's Office to report that someone in a grey Nissan had sped toward her and then turned into the Pintars' driveway and that she was afraid that the Pintars were trying to "take her out." Also while this suit has been pending, Mrs. Houck has filed complaints with the Utah Bar Office of Professional Conduct against plaintiffs' counsel. Plaintiffs allege that Mrs. Houck made several false and defamatory statements in these complaints in regard to the Pintars.

Plaintiffs request a declaratory judgment regarding the management and distribution of irrigation waters between the two properties. They bring federal claims of malicious prosecution and conspiracy pursuant to 42 U.S.C. § 83. Their state law causes of action include civil conspiracy, negligent and intentional infliction of emotional distress, defamation, negligent

¹The initial complaint was amended shortly after it was filed by a three paragraph pleading which purported to substitute Utah County as a named defendant in lieu of a John Doe and asserting that notice of claim had been filed by plaintiffs. As these amendments are irrelevant to the issues presented in this motion, the focus of the court is on the initial complaint.

misrepresentation and intentional misrepresentation concerning the Houcks' statements to the Utah County Sheriff's Office and the Utah county Attorney's Office, and negligent and intentional misrepresentation concerning the Houcks' assertion in the July 8, 2004 letter. Defendants move for summary judgment on all of these causes of action.

DISCUSSION AND ANALYSIS

I. SUMMARY JUDGMENT STANDARD

Pursuant to Utah Rule of Civil Procedure 56, "Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Oman v. Davis School Dist*, 2008 UT 70, ¶ 14. This court must view "all facts and inferences in the light most favorable to the nonmoving party." *Robinson v. Mount Logan Clinic, LLC*, 2008 UT 21, ¶ 2. However, to successfully defend against a motion for summary judgment, the nonmoving party must present sufficient facts to meet the essential elements of that party's case. *Christiansen v Union Pac. R R. Co.*, 2006 UT App 180, ¶ 6. In other words, when a motion for summary judgment is brought and properly supported, the party against whom the motion is made is called upon to bring forth all the evidence they are aware of, or at least sufficient evidence to show a genuine issue of material fact. When the opposing party proffers either no evidence or insufficient evidence in the face of a summary judgment motion, the court may fairly conclude that no such evidence exists or would exist at trial.

II. DECLARATORY RELIEF

Plaintiffs' declaratory judgment cause of action presents a quandary for the court. While

this court cannot dismiss this cause of action on summary judgment on the basis alleged by the defendants; the review of this matter left the court with serious doubts as to whether a trial will serve any purpose on this issue. For this reason, the court conducted a supplemental telephonic hearing with counsel in order to examine counsel (or “interrogate” as the rule states) within the purview of rule 56(d) of the Utah Rules of Civil Procedure. Having done so, this court concludes—as the parties expressly stated on the record in the telephonic hearing—that no issue of fact exists. Further, this court concludes that plaintiffs are not entitled to the relief they seek as a matter of law. Accordingly, summary judgment must be granted on this claim.

The prayer for relief in plaintiff’s complaint is silent on the issue of a declaratory judgment action. Unlike most declaratory judgment actions, plaintiffs’ complaint does not state anywhere with any particularity what judgment plaintiff wants declared. The declaratory judgment action, denominated as the first cause of action, first incorporates paragraphs 1 through 32 of the complaint. However, the majority of paragraphs 1 through 32 have little relationship to the declaratory judgment action. Paragraph 3 indicates that the plaintiffs and defendants share a boundary line and both have certain rights to irrigation water administered by Westfield Irrigation Company. Paragraph 13 alleges that the plaintiffs and the defendants, as adjoining landowners and shareholders in Westfield Irrigation Company, are required to cooperate in regard to the use and management of irrigation water. Plaintiffs maintain they have cooperated at all times in managing irrigation water under their control and allowing defendants the use of the irrigation water at appropriate and designated times.

Paragraph 14 of the complaint alleges that Defendants have falsely asserted that Plaintiffs have improperly managed irrigation water causing flooding and damage to the defense property. Plaintiffs have denied these assertions and claimed that any problems, or the various problems, that the Defendants have had with flooding or the management of irrigation water have resulted in the failure of the Defendants to comply with the established procedures of the water company for the water shareholders in the area. Paragraph 34 of the complaint alleges the plaintiffs and defendants "have certain rights and obligations under the statutes and laws of the state of Utah. In addition, plaintiffs and defendants..., as shareholders in the Westfield Irrigation Co., have certain rights, obligations and duties with regard to the management and distribution of irrigation water between them."

Paragraph 35 of the complaint maintains: "A bona fide dispute has arisen between plaintiffs and defendants Martin and Darlene Houck regarding the matters set out herein and pursuant to U.C.A. § 78-331 et. seq. (1953, as amended), Plaintiffs are entitled to a 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."

Paragraph 36 then states: "Plaintiffs request declaratory judgment adjudging their specific responsibilities and duties to Defendants Martin and Darlene Houck regarding the use and management of irrigation water between the properties."

The complaint upon close review does not indicate exactly what the 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

Utah Rule of Civil Procedure 56(d) provides, as to a case not fully adjudicated by a motion:

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked in the trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specified in the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just.

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 problems with plaintiff’s assertion is that such a conclusion is not supported by Utah law.

The defendants have moved that because the factual basis has changed between the initial complaint and the second amended complaint which plaintiffs attempted to advance under that

summary judgment should be granted based on an inconsistency between the pleadings. Defendants cite no law, rule, or statute in support of this theory. When a pleading is amended the amended pleading takes precedence over the former. The fact that pleadings are inconsistent does not entitle a party to summary judgment. It should be noted that the Rules of Civil Procedure and case law allow pleading in the alternative. Even if the theories presented are mutually exclusive as a matter of law, parties are entitled to press inconsistent theories and await trial and a factual determination before electing which theory actually applies to the case. 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.

Nevertheless, 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.

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. It inquired of the Pintars' counsel as to the law upon which the Pintars were relying. That law purported to include the Utah cases of *Wayment v. Howard*, 144 P.3d 1147, 1151 (Utah 2006) and *Salt Lake City v. Gardner*, 114 P. 147, 152 (Utah 1911). However, neither of these cases has any

relevance to the issues presented in the declaratory judgment action. Particularly, neither of these cases has anything to do with the issue identified by the Pintars' counsel at oral argument; that is, whether the Pintars are entitled to allow irrigation water to run onto the defendants' property. 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 the doctrine of reasonable use for the discharge of surface waters.² 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

² It could be argued that the court recognized and applied the reasonable use doctrine, albeit to subsurface waters, in *MacKay v. Breeze*, 72 Utah 305, 269 P. 1026 (1928) where the court held that when one uses an irrigation ditch one must use reasonable efforts to prevent seepage water from escaping.

(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 provides: “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* . . . [.]”³

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

³ 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.

circumstances

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.

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.”

If the question before the court were one of water drainage due to rainfall and that the Plaintiffs were seeking declaratory relief that they could allow rainfall to run from their property along natural courses the answer arrived at might be entirely different. However, here, the water on the Plaintiffs’ property did not arrive there under natural conditions, instead the water was diverted from an irrigation system, and, therefore, the declaratory relief is not one connected with natural runoff.

“The owner of land on which surface waters were wrongfully diverted by [a neighbor] is not required by law to permit [that neighbor] to dig a ditch through the land, or to dig the ditch himself in order to lessen the damages caused by the wrongful diversion.” *Waters v. Kear*, 168 N.C. 246, 84 S.E. 292 (1915). Or, as the Utah Supreme Court stated in *Northpoint Consolidated Irrigation Co. v. Utah & S.L. Canal Co.*, 16 Utah 246, 266-267, 52 P. 168, 173 (1898):

Undoubtedly a proprietor of higher land is entitled to the benefit of the natural

flow therefrom, onto the lands of another, of surface or other water not brought there by artificial means. But, when water is brought on to the higher land by artificial means, the proprietor is not entitled to such natural flow onto the land of another, to his injury. The proprietors of higher lands have not the right to the natural flow of water brought onto their lands by artificial means. If natural forces alone bring water onto a man's land, he may allow natural forces to take it off, though it may be deposited on the land of another, to his injury. Seepage from lands, caused by irrigation water brought in canals or other artificial ditches, cannot be regarded as natural seepage or drainage. It is not brought there alone by natural laws, as water from rain, snow, or springs is.

The defendants have no right to conduct water through their canals on to lands irrigated by them; and then, by means of draining ditches, conduct the seepage and surplus water therefrom, rendered unfit for irrigation or domestic uses, into the Surplus canal; out of which the plaintiff has a right to take water for useful purposes.

Accordingly, the Houcks are under no duty to perform any act or effort to keep water from running onto their property.

Thus, Utah law answers the questions put forth by Plaintiff in discussing this matter with opposing counsel and the court. The law is that the Pintars do have a duty to use their water reasonably. The court perceives the request for declaratory relief to be one where they have no duty which Utah law does not support. The second question is likewise answered by Utah law, that is, that the Houcks are under no duty to undertake activities to prevent water from coming onto their property. Since Utah law holds the opposite of the declaratory relief sought by the plaintiffs, this court cannot grant the relief that plaintiffs seek as a matter of law and accordingly summary judgment must be granted.

III. SECTION 1983 CONSPIRACY AND CIVIL CONSPIRACY CLAIMS

As stated, defendants move for summary judgment on plaintiffs' 1983 conspiracy and civil conspiracy claims. Plaintiffs base these claims on the following facts: (1) that there is great hostility between the parties; (2) that the defendants' daughter and Deputy Morgan, who initiated the charges, both work for the Utah County Sheriff's Office; (3) that the Defendants called their daughter on the same day they spoke to Deputy Morgan; (4) that the Defendants told Deputy Morgan where their daughter worked when she arrived; and (5) that Deputy Morgan's investigation was haphazard and incomplete. 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.

"To prove civil conspiracy, five elements must be shown: '(1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof.'" *Peterson v. Delta Airlines*, 2002 UT App 56, ¶ 12 (quoting *Alta Indus. v. Hurst*, 846 P.2d 1282, 1290 n. 17 (Utah 1993)). It is not necessary to show that the parties came together and made a formal agreement to do the acts by direct evidence. *Israel Pagan Estate v. Cannon*, 746 P.2d 785, 791 (Utah Ct. App. 1987). Conspiracy may be inferred from circumstantial evidence, "including the nature of the act done, the relations of the parties, and the interests of

the alleged conspirators.” - *Id.*

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 (10th Cir. 2007) (citing *Tonkovich v. Kansas Board of Regents*, 159 F.3d 504, 533 (10th 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 (10th 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 (10th 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). “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. The 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, the 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.

IV. 1983 MALICIOUS PROSECUTION CLAIM

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 (10th Cir. 2001). Plaintiffs disagree with this interpretation of *Smith* and argue that Deputy Morgan did not have probable cause under Utah Code Ann. § 76-9-102 to initiate prosecution for disorderly conduct, therefore, their claim of malicious prosecution should survive under summary judgment. 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 (10th Cir. 2007)(quoting

Pierce v. Gilchrist, 359 F.3d 1279 (10th 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 (10th 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. *Pino v. Higgs*, 73 F.3d 1461, 1465 (10th Cir. 1996)(private party reported defendant was engaging in

criminal activity); *Sykes v. California*, 497 F.2d 197 (9th Cir. 1974)(private party filed a complaint against defendant); *See also Grøw v. Fisher*, 523 F.2d 875 (7th Cir. 1975); *Brooks v. Peters*, 322 F. Supp. 1273 (DC Wis. 1971); *Kahermānes v. Marchese*, 361 F.Supp.168 (DC Pa 1973); *Weyandt v. Mason's Stores, Inc.*, 279 F. Supp. 283 (DC Pa 1968). Because Mr. Pinter'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.

V. DEFAMATION CLAIM

Defendants move for summary judgment on plaintiffs' defamation cause of action. The plaintiffs allege four incidents of defamation. First, on August 20, 2006 the Defendants complained to Deputy Morgan that Mr. Pinter had said "there goes the monkees [sic]" on June 11, 2006 and shook his finger at them and made derogatory comments when Defendants walked by on July 4, 2006. Second, on August 20, 2006 the Plaintiffs told Deputy Morgan that the Pinters had improperly flooded their property. Third, Mrs. Houck made several complaints to the Utah State Bar Office of Professional Conduct regarding the Plaintiffs and their attorney.⁴ Fourth, Mrs. Houck complained to the Utah County Sheriff's Department⁵ that someone had sped toward her and then turned into the Pinter property and that this action made her afraid that

⁴ These actions are alleged to have occurred in early 2009 through the summer of 2009.

⁵ These actions are alleged to have occurred in August 2009.

the Pintars were going "to take her out."⁶

The third and fourth allegations – statements to the Office of Professional Conduct and the speeding car – are easy to dispose of. Since those statements are alleged to have occurred long *after* the complaint was filed, they cannot possibly form the basis of the claims in plaintiffs' complaint as a matter of law. On this basis alone, summary judgment must be granted on these assertions. As will be explained hereafter, those claims suffer from other fatal deficiencies as well.

"To state a claim for defamation, [plaintiffs] must show that defendants published the statements concerning him, that the statements were false, defamatory, and not subject to any privilege, that the statements were published with the requisite degree of fault and that their publication resulted in damage." *West v. Thomson Newspapers*, 872 P.2d 999, 1007-08 (Utah 1999). "Whether a statement is capable of sustaining a defamatory meaning is a question of law: . . .[.]" *Id.* at 1008. To be defamatory under Utah law, a communication must attack an individual's honesty, integrity, virtue, or reputation or publish his or her natural defects in a way that would hurt his or her reputation or expose him or her to public hatred. *Cox v. Hatch*, 761 P.2d 556, 561 (Utah 1988)(citing Utah Code Ann. § 45-2-2(1)).

⁶In the memorandum in opposition the Pintars also claim Darlene Houck stated that the Pintar family sued Eldon Money, that neighbors run in fear of the Pintars, that the Pintars have intimidated the Westfield Irrigation Water Board, all statements which the Pintars maintain are false. None of these alleged statements can be found in plaintiffs' complaint.

This court holds that the statements upon which plaintiffs assert their defamation cause of action fail as a matter of law because they are not capable of conveying a defamatory meaning.

The Utah Supreme Court has explained:

Whether a publication of an alleged defamatory statement . . . is capable of conveying a defamatory message is initially a question of law.

...

The tort of defamation protects only reputation. A publication is not defamatory, simply because it is nettlesome or embarrassing to plaintiff, or even because it makes a false statement about the plaintiff. Thus, an embarrassing, even though false, statement that does not damage one's reputation is not actionable as libel or slander. If no defamatory meaning can reasonably be inferred by reasonable persons from the communication, the action must be dismissed for failure to state a claim. Only if the court first determines that a publication might be considered defamatory by a reasonable person is their effect issue for the trier of fact.

Cox v. Hatch, 761 P.2d 556, 561 (Utah 1988). This court concludes that assuming that the Houcks did in fact communicate to Deputy Morgan that Mr. Pintar had said "there go the monkees [sic]," made other derogatory comments toward the Houcks, and shook his finger at the Houcks does not convey a defamatory meaning, even where the Pintars steadfastly deny that any such thing happened. The fact that the communication is false, which this court assumes on summary judgment, does not make it defamatory.

Likewise, a statement by the Houcks that the Pintars had improperly flooded their property, even if untrue, does not impugn the Pintars' reputation. Accordingly, as a matter of law, the communication does not convey a defamatory meaning. On this basis alone, summary judgment must be granted.

alleged wrongdoing stated in Mr. Pinter's charging document. Their statements were recorded in police reports so that they could be preserved for the purpose of initiating a judicial proceeding if such a proceeding was initiated.

Because the Houck's statements to Deputy Morgan and the Utah County Sheriff's Office are part of a judicial proceeding, they are privileged and cannot be used as the subject of a defamation action. For the foregoing reasons, defendants' motion for summary judgment on the defamation cause of action is granted.

VI. CLAIMS OF INTENTIONAL AND NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS

Finally, defendants move for summary judgment on plaintiffs intentional and negligent infliction of emotional distress causes of action. They argue that plaintiffs allegations are too vague to sustain these claims. They also aver that plaintiffs cannot sustain this cause of action because they cannot sustain their other causes of action. Plaintiffs contend that they have shown that defendants have willfully and maliciously worked in concert with Deputy Morgan to have Mr. Pinter arrested and charged with a crime without the requisite probable cause. These actions, plaintiffs argue, go against generally accepted standards of decency and support a claim of intentional or negligent infliction of emotional distress.

To prove intentional infliction of emotional distress, a plaintiff must show that defendant intentionally engaged in some conduct toward plaintiff with the purpose of inflicting emotional

distress where a reasonable person would have known such would result and his actions are of such a nature as to be considered outrageous and intolerable in that they offend generally acceptable standards of decency or morality. *Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶ 55 (citing *Bennet v. Jones Waldo Holbrook & McDonough*, 2003 UT 9, ¶ 58 (2003)). To be considered outrageous, the conduct must “evoke outrage or revulsion; it must be more than unreasonable, unkind or unfair.” *Franco v. Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, ¶ 28 (quoting 86 C.J.S. *Torts* § 70 at 722). It is not outrageous “merely because it is tortious, injurious, malicious, or because it would give rise to punitive damages, or because it is illegal.” *Id.* (quoting 86 C.J.S. *Torts* § 70 at 722-23).

Because of the “highly subjective and volatile nature of emotional distress . . . the courts have historically been wary of dangers in opening the door to recovery.” *Samms v. Eccles*, 11 Utah 2d 289, 291 (1961). Therefore, “the sufficiency of [the] pleadings must be determined by the facts pleaded rather than the conclusions stated.” *Franco*, 2001 UT 25 at ¶ 25 (quoting *Ellefsen v. Roberts*, 526 P.2d 912, 915 (Utah 1974)).

Plaintiffs cite the following facts as evidence of defendants’ intent to cause Plaintiffs emotional distress: (1) defendants have hostility toward the Plaintiffs; (2) defendants’ daughter-in-law is employed with the Utah County Sheriff’s Department; (3) defendants contacted the Utah County Sheriff’s Department regarding Plaintiffs; (4) defendants told Deputy Morgan of the Utah County Sheriff’s Department that their daughter-in-law worked for that Department; (5)

based on the actions of Defendants and Officer Morgan acting in concert Mr. Pinter was arrested without any investigation or having committed any crime

As stated above, this court concludes that a reasonable jury could not find that there was a conspiracy or a meeting of the minds between defendants and Deputy Morgan based on the factual allegations presented by plaintiffs. The court will proceed with its analysis looking at the alleged facts on their face without inferring a conspiracy, as plaintiffs claim.

The court holds that the plaintiffs' asserted facts are insufficient to support a claim for intentional infliction of emotional distress. It is dubious that a jury would find the defendants' statements to the Utah County Sheriff's Office and Deputy Morgan regarding Mr. Pinter to be outrageous, intolerable, or so cruel as to evoke revulsion. However, even if a jury made such a finding, each of these statements is protected by the judicial proceeding privilege. "The judicial proceeding privilege extends not only to defamation claims but to all claims arising from the same statements" including a claim of intentional infliction of emotional distress. *DeBry v. Godbe*, 1999 UT 111, ¶ 25. *See also Bennett*, 2003 UT 9, ¶ 67 and *Alderink v. Bardin*, 2004 UT App 330. Because the defendants' statements to the Utah County Sheriff's Office and Deputy Morgan were made for the purpose of initiating a judicial proceeding, they are exempted from being the subject of a suit for intentional infliction of emotional distress.

Plaintiffs also allege negligent infliction of emotional distress. The elements for negligent infliction of emotional distress are: the actor causes emotional distress to another

resulting in illness or bodily harm where the actor should have realized his conduct involved an unreasonable risk of causing the distress, other than by knowledge of harm of a third person, and he should have realized the distress might result in illness or bodily harm. *Anderson*, 2005 UT 36 at ¶57. A claim for negligent infliction of emotional distress doesn't require proof of outrageous conduct.


Debry presumably applies to this type of claim as well. Thus, defendants' statements to the police are a part of a judicial proceeding and cannot be considered. Even if they could be considered, however, the plaintiffs have not shown that they have received illness or bodily harm which would entitle them to damages for negligent infliction of emotional distress. Therefore, Plaintiffs causes of action for intentional and negligent infliction of emotional distress are dismissed.

Plaintiffs causes of action for negligent and intentional misrepresentation have been dismissed by stipulation, so they will not be addressed.

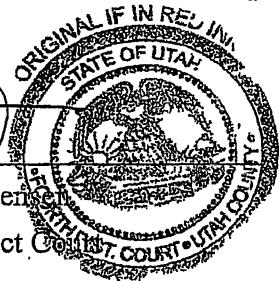
CONCLUSION

Based on the foregoing, the Defendant's Motion for Summary Judgment is granted in its entirety. The trial is hereby stricken. Counsel for the defendants shall prepare an order adopting this memorandum decision by reference and submit it as provided in the rules of civil procedure.

Dated this 7th day of May, 2010.



Judge David N. Mortensen
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.

MAIL: KATHLEEN M LIUZZI 505 E 200 S 2ND FLR SALT LAKE CITY, UT 84102

MAIL: JASON L PINTAR 2021 The Alameda Suite 310 San Jose CA 95126

MAIL: CRAIG CARLILE RAY QUINNEY & NEBEKER 86 N UNIVERSITY AVE NO 430 PROVO UT 84601

Date: 5-10-10

Smuneal
Deputy Court Clerk

