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Recommended Citation
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IN THE UTAH COURT OF APPEALS

RANDALL ROY MALLORY,

Plaintiffs/Appellants,

v.

BRIGHAM YOUNG UNIVERSITY, a Utah nonprofit corp., VERN STRATTON, and DOES I-X,

Defendants/Appellees.

Court of Appeals No. 20100991

(CORRECTED) BRIEF OF APPELLANT

APPEAL FROM A FINAL JUDGMENT OF THE FOURTH DISTRICT COURT THE HONORABLE CLAUDIA LAYCOCK

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FILED
UTAH APPELLATE COURTS
JUL 13 2011

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to the provisions of *Utah Code Ann.* §78-2-2(3)(j)(Rep. Vol. 9 2007)

STATEMENT OF ISSUES PRESENTED

Did the Court below err when it granted BYU's Motion to Dismiss for Lack of Subject Matter Jurisdiction?

Did the Court below err when it denied the Mallory's request for discovery under Rule 56(f)?

Did the Court below err when it granted BYU's Motion for a Change of Venue?

STANDARD OF REVIEW

A district court's granting of a motion to dismiss for lack of subject matter jurisdiction is reviewed for correctness; viewing the facts in the light most favorable to the nonmoving party. [A]ppellate review of a trial court's determination of the law is usually characterized by the term 'correctness.'" State v. Pena, 869 P.2d 932, 935 (Utah 1994); accord State v. Jackson, 2010 UT App 136, ¶ 9, – P.3d –; Call v. Keiter, 2010 UT App 55, ¶ 14, 230 P.3d 128.

A district court's granting of a motion for change venue is reviewed for abuse of discretion. Grantsville v. Redevelopment Agency of Tooele City, 2010 UT 38, ¶ 53, 233 P.3d 461; United States Bank Nat'l Ass'n v. HMA, L.C., 2007 UT 40, ¶ 30, 169 P.3d 433.

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A district court's denial of a 56(f) affidavit is reviewed for correctness. State v. Pena, 869 P.2d 932, 935 (Utah 1994); accord State v. Jackson, 2010 UT App 136, ¶ 9, – P.3d –; Call v. Keiter, 2010 UT App 55, ¶ 14, 230 P.3d 128.

STATEMENT OF THE CASE

This is an appeal from two separate decisions in the underlying case.

After sustaining significant injuries in a motorcycle accident which occurred as Mallory was leaving a BYU parking lot under the direction of BYU student/employee Sarah Robinson, Mallory sued BYU, Robinson, and the driver of the vehicle which struck Mr. Mallory, Vern Stratton. (R. 21).

The first Court below (Third District Court) granted BYU's motion for a change of venue to the Fourth District Court. (R. 78). The Fourth District Court then granted BYU's motion to dismiss for lack of subject matter jurisdiction and denied the Plaintiff's request under Rule 56(f) for discovery. (R. 194)

Summary of the Claims

1. The Plaintiff, Randal Roy Mallory ("Mallory"), is an individual residing in Utah County, State of Utah. (R. 21)
2. Defendant, Brigham Young University ("BYU"), is a Utah Corporation, doing business in, and with offices located in, Salt Lake County, State of Utah. (R. 21)
3. Sarah Robinson was a BYU traffic cadet and was the agent and employee of BYU and was acting within the purpose and scope of this agency and employment. (R. 21)

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4. Mallory was the owner of a Harley Davidson motorcycle, Utah License no. 386 XH. (R. 22)

5. University Avenue runs past the BYU parking located south of 1850 North in Provo, Utah ("BYU Parking Lot"). University Avenue runs north and south past the west entrance/exit to the BYU Parking Lot. Said entrance/exit is approximately fifty (50) feet south of 1850 North. (R. 22)

6. On April 12, 2008, at 2:45 p.m., Mallory was operating the Harley Davidson motorcycle and was at a stop in the north exit lane of the west entrance/exit of the BYU Parking Lot facing west. (R. 22)

7. Plaintiff was stopped awaiting the directions of the BYU traffic cadet, Sarah Robinson to proceed south on University Avenue. (R. 22)

8. After Robinson negligently stopped the north and south bound traffic on University Avenue, she negligently directed Plaintiff to make his left hand turn and continue south on University Avenue. (R. 22)

9. At that time and place Stratton was proceeding south bound on University Avenue approaching the entrance/exit of the BYU Parking Lot. Stratton either disobeyed the directions of Robinson to stop as all three other lanes had stopped, or negligently proceeded past traffic that had been stopped in the inside lane and negligently, carelessly, recklessly, and unlawfully struck the Plaintiff who was following the specific instructions of Robinson. (R. 23)

10. The negligent actions of Robinson and Stratton proximately caused Stratton's vehicle to collide with Mallory's motorcycle and to proximately cause the injuries and damages suffered by Mallory. (R. 23)

11. As a proximate result of the negligence, carelessness, and unlawfulness of defendants, and each of them, and the resulting collision, as herein alleged, Mallory was injured in his health, strength, and activity, sustaining injury to his body and shock and injury to his nervous system and person, and among others, sustained the

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following personal injuries: severe skull fracture and intracranial hemorrhage, all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering. These injuries have resulted in a permanent disability to Mallory, and he is and will continue to be unable to be gainfully employed. (R. 23)

12. As a further proximate result of the negligence of defendants, Mallory was required to employ physicians and surgeons for medical examination, treatment, and care of his injuries. Mallory incurred substantial medical expenses and he will incur further medical expenses for the care and treatment of these injuries. (R. 23)

13. Mallory had been gainfully employed as a salesman for dental laboratories, and was earning an average monthly income in excess of $10,000.00. As a result of the accident he has been prevented from being so employed. (R. 23)

14. As a result of the accident Mallory (as of the filing of the amended complaint) had seen five (5) treating physicians that would be witnesses in the case. (R. 50) Of those five (5) physicians, three (3) are in Utah County and two (2) are in Salt Lake County. (R. 50).

15. Since the accident, Mallory's sister and his mother were handling his day to day financial affairs. In fact his social security disability checks are written jointly to Mallory and his mother. (R. 50). They would also be witnesses in the case and they live in Salt Lake County. (R. 50)

16. After the filing of the Complaint, BYU moved to have the venue transferred to the Fourth District Court in Provo. The motion was granted. (R. 78)

17. After the case was moved to Provo, Judge Laycock granted BYU's motion to dismiss on the basis that BYU was immune from suit under the Governmental Immunity Act. (R. 194).

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SUMMARY OF ARGUMENT

Although BYU styled their motion as one to dismiss, the inclusion of facts outside the four corners of the complaint either requires a denial of their motion or the motion should have been treated as one for summary judgment.

There is one Utah case on point: Smith v. Four Corners Mental Health Center, Inc., 70 P.3d 904, 473 Utah Adv. Rep. 50, 2003 UT 23.

As is shown below, as a Motion to Dismiss, the motion should have been denied; it should have been treated as a motion for summary judgment, Mallory should have been given the opportunity to conduct discovery into the the relevant areas; the motion should have been denied because, at most, Ms. Robinson was an independent contractor.

ARGUMENT

I. THE MOTION TO DISMISS SHOULD HAVE BEEN DENIED BECAUSE THE FACTS AS ALLEGED IN THE AMENDED COMPLAINT DEMONSTRATED SUBJECT MATTER JURISDICTION.

In determining whether it is proper for a trial court to grant a party's motion to dismiss for lack of subject matter jurisdiction, the factual allegations in the complaint must be taken as true and the court must consider all reasonable inferences to be drawn there from in a light most favorable to the plaintiff. In re Uintah Basin, 133 P.3d 410, 548 Utah Adv. Rep. 22, 2006 UT 19, rehearing denied. A motion to dismiss is properly granted only in cases in which, even if the factual assertions in the complaint were

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correct, they provided no legal basis for recovery. Mackey v. Cannon, 996 P.2d 1081, 389 Utah Adv. Rep. 3, 2000 UT App 36, rehearing denied; Utah R. Civ. P. Rule 12(b)(6).

Because dismissal of a complainant's action is a severe measure, it should be granted by the trial court only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim. Id.

Further, raising an affirmative defense, like a qualified privilege, for the first time in a motion to dismiss for failure to state a claim is not generally appropriate since dismissal under governing rule is justified only when the allegations of the complaint itself clearly demonstrate that the plaintiff does not have a claim. Zoumadakis v. Uintah Basin Medical Center, Inc., 122 P.3d 891, 530 Utah Adv. Rep. 28, 2005 UT App 325.

Here, the BYU Defendants' arguments all rely upon facts not found in the complaint. On its face, the amended complaint states that Ms. Robinson acted negligently in directing the traffic which caused Mr. Mallory's injuries. There are no facts in the first amended complaint that allege any relationship with Provo City. Thus, taking the complaint on its face the motion to dismiss should have been denied.

II. MALLORY WAS ENTITLED TO A CONTINUANCE OF THE MOTION PENDING FURTHER DISCOVERY.

Under Utah R. Civ. P. 56(f), if it appears from an affidavit opposing a motion for summary judgment that the party cannot by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance

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to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Here, the BYU Defendants relied upon facts not set forth in the pleadings. They submitted the affidavit of Arnold Lemmon which purported to set forth facts which the Court could rely upon to grant BYU's motion.

Because the case was still in the preliminary stages of discovery, Mallory had not yet developed the factual record relating to the relationship between Ms. Robinson and Provo City. A Rule 56(f) affidavit accompanied Mallory's memorandum requesting time to conduct discovery into that relationship through the depositions of BYU, Mr. Lemmon, and Provo City.

Although Mallory could find no case stating that a motion to dismiss for lack of subject matter jurisdiction could be converted to a motion for summary judgment or any case explicitly allowing a 56(f) affidavit in that situation, the granting of the motion without allowing Mallory to conduct discovery was clearly in error.

BYU simply named a motion for summary judgment a motion to dismiss for lack of subject matter jurisdiction. Certainly the rules should be interpreted to preserve Mallory's right to due process. Allowing BYU to submit any evidence outside the complaint, without allowing Mallory the time to gather controverting evidence was unfair, prejudicial, and a denial of Mallory's due process.

III. EVEN TREATED AS A MOTION FOR SUMMARY JUDGMENT, WITHOUT GRANTING A CONTINUANCE TO DEVELOP THE FACTUAL RECORD, ON ITS FACE THE MOTION SHOULD HAVE BEEN DENIED.

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For a moving party to be entitled to summary judgment, it must establish a right to judgment based on the applicable law as applied to the undisputed facts. See, Utah R. Civ. P. 56(c); Transamerica Cash Reserve, Inc. v. Dixie Power & Water, Inc., 789 P.2d 24, 25 (Utah 1990). Summary judgment "should be granted only when all the facts entitling the moving party to a judgment are clearly established or admitted." Sorenson v. Beers, 585 P.2d 458, 460 (Utah 1978). For summary judgment to be appropriate, these undisputed facts provided by the moving party must "preclude [ ], as a matter of law, the awarding of any relief to the losing party." FMA Acceptance Co. v. Leatherby Ins. Co., 594 P.2d 1332, 1334 (Utah 1979); see also Staker v. Ainsworth, 785 P.2d 417, 419 (Utah 1990) ("[T]here must exist undisputed facts in the evidence before the trial court relating to each of the elements of [the legal doctrine upon which the trial court rests its decision to grant summary judgment] in order for us to affirm the ruling.")

The BYU Defendants argument required that they show all of the following:

1. traffic direction on public roads is a governmental function.
2. authorization to perform a governmental function makes the actor an agent of the government granting the authorization; and
3. All agents are automatically employees of the authorizing government under the UGIA.

The BYU Defendants' arguments failed under the second and third requirements to their argument.

A. THE SUPREME COURT'S RULING IN SMITH v. FOUR CORNERS PROHIBITS A FINDING THAT SARAH ROBINSON WAS AN EMPLOYEE UNDER THE UGIA

Smith v. Four Corners Mental Health Center, Inc. concerned the liability of a health care provider and foster parents for injuries one foster child inflicted on another foster child. The

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Plaintiff sued Four Corners Mental Health Center, Inc. and his foster parents, Larry and Carolyn Randall, claiming damages for injuries he received when he was purportedly sexually assaulted by another foster child placed with the Randalls. Smith alleged that Four Corners' negligence stemmed from its failure to supervise the Randalls and properly provide foster care services, and the Randalls' negligence stemmed from their failure to properly supervise Smith's activities with another foster child. Four Corners and the Randalls filed separate motions for summary judgment. The district court granted both motions and the Supreme Court reversed as to the Randalls and remanded the case.

The Randalls' argued in their motion for summary judgment that they were immune from suit under the doctrine of governmental immunity.

The district court had determined that the Randalls were entitled to the same immunity as DHS. The Supreme Court ruled that the Randalls would be entitled to summary judgment only if they established a relationship sufficient to entitle them, as a matter of law, to the same immunity enjoyed by DHS.

The Randalls argued that they were qualified to receive the same treatment as DHS because they were employees of DHS for purposes of the UGIA and that the UGIA grants immunity to such employees. Utah Code Ann. §§ 63-30-2(2)(a)(1997 & Supp.2002). According to Utah Code Ann. § 63-30-4, a governmental employee may not "be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under color of authority." Id. § 63-30-4(4). "Employee" is defined by statute as governmental entity's officers, employees, servants, trustees, commissioners, members of a governing body, ... educational aides, students engaged in providing services to members of the

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public in the course of an approved medical, nursing, or other professional health care clinical training program, volunteers, and tutors. Employee specifically does not include an independent contractor. Id.§ 63-30-2(2)(a) (Supp.2002) (emphasis added).

The facts presented by the Randalls to establish that they were employees were as follows: they were licensed, approved, and controlled by DHS as foster parents; DHS placed Smith in their home.

Despite the fact that DHS licensed, approved and controlled the Randalls, the Supreme Court found that there was not sufficient evidence to show that they were employees of DHS and not independent contractors.

The Supreme Court stated that DHS employees would be entitled to immunity but that DHS independent contractors would not be entitled to immunity. The Court further stated that "in general, an independent contractor is one who is engaged to do some particular project or piece of work, usually for a set total sum, who may do the job in his [or her] own way, subject to only minimal restriction or controls and is responsible only for its satisfactory completion." (citing Utah Home Fire Ins. Co. v. Manning, 1999 UT 77, ¶ 11, 985 P.2d 243 (citing Harry L. Young & Sons v. Ashton, 538 P.2d 316, 318 (Utah 1975)).

In this case the relationship between Sarah Robinson and Provo City was substantially less than that of the Randalls to DHS. In the Smith case, the governmental agency, DHS, selected and hired the Randalls. Here, BYU selected and hired Ms. Robinson. In the Smith case, DHS licensed and controlled the Randalls. Here, there was absolutely no evidence whatsoever that Provo City approved, licensed or exercised any control over Ms. Robinson. In fact, the only

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relationship between Ms. Robinson and Provo City is the Provo City code section which authorized Ms. Robinson and persons like her to direct traffic.

Provo did not pay Ms. Robinson. Provo did not give her any instructions. Provo did not tell her where or when to direct traffic. Provo did not control Ms. Robinson. Under those facts, Ms. Robinson is not even an independent contractor, let alone an employee.

Clearly, under the reasoning of Smith, the BYU Defendants have not established that Ms. Robinson was an employee under the UGIA.

Despite the fact that it is the only case on point, BYU ignored the case in its opening memorandum. Despite the fact that Mallory centered his opposition on the case, BYU did not even mention the case in its reply.

B. THE ACTIONS OF MS. ROBINSON, EVEN IF AUTHORIZED, DID NOT CLOTHE HER OR BYU WITH GOVERNMENTAL IMMUNITY.

The BYU Defendants' argue that because a Provo City ordinance authorized Ms. Robinson to direct traffic on a public street that she was therefore an employee of the authorizing entity under the UGIA.

While Mallory could not find any case discussing the relationship between statutory authority to perform what is usually a governmental action and governmental immunity, by analogy, Mallory showed the flaw in the argument of the BYU Defendants.

The analogy is to the governmental function of arrest.

Utah Code Ann.§ 77-7-3, is the Utah code section authorizing any member of the public to effect a citizen's arrest. It reads as follows:

> A private person may arrest another:
> (1) For a public offense committed or attempted in his presence; or

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(2) When a felony has been committed and he has reasonable cause to believe the person arrested has committed it.

Clearly the act of arresting is one that is a governmental function. Nonetheless, the State Legislature has enacted section 77-7-3, to explicitly state that private persons, and not government employees, may make an arrest in certain circumstances. Were this Court to adopt the reasoning of the BYU Defendants, then every time that a citizen made a citizen's arrest under the conditions set forth under the code, the citizen would have the same governmental immunity sought by BYU in this case.

By linking authority with immunity, the BYU Defendants' argument and reasoning would result in an untenable expansion of the scope of governmental immunity.

C. THERE WAS NOT SUFFICIENT EVIDENCE THAT THE BYU DEFENDANTS COMPLIED WITH SECTION 9.10.060 OF THE PROVO CITY CODE.

Provo City Code §9.10.060 authorizes Provo city employees and college and university employees who are not peace officers to direct traffic on public streets. It reads as follows:

9.10.060. Traffic Control by Non-Peace Officers.

(1) Subject to the limitations described in Subsection (3) of this Section a person who is employed by Provo City and is not a peace
(2) Subject to the limitations described in Subsection (3) of this Section a person who is employed by a college or university and is not a peace officer may direct traffic on public streets while under the supervision of a peace officer employed by the same college or university.
(3) A non-peace officer may direct traffic as described in Subsections (1) and (2) of this Section only in cases of public emergency or to aid in the orderly movement of traffic related to public gatherings in excess of 5,000 people.
(4) It shall be unlawful for the driver of a motor vehicle to fail or refuse to obey the directions of a non-peace officer directing traffic as permitted in this Section. (Enacted 1990-20)

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In support of their motion the BYU Defendants made the legal conclusion that Arnold Lemmon was supervising Sarah Robinson. The affidavit does not state that he was in the presence of Ms. Robinson at the time of the accident. The affidavit does not state that he was giving directions or observing the actions of Ms. Robinson at the time of the accident.

Had Mr. Lemmon been "supervising" Ms. Robinson, it should be presumed that he would have seen the accident and would have provided a statement on the police report. He did not, in fact, provide any statement and, presumably, when he says he was "supervising" he was doing so in the broadest possible definition of the word "supervising."

D. THE BYU DEFENDANTS PROVIDED NO NOTICE THAT THEY WERE GOVERNMENTAL AGENTS.

Both the United States Constitution and the state constitution require due process. For a BYU employee and BYU to claim that they are entitled to governmental immunity, the potential plaintiffs in suits like this must have some notice that in certain circumstances a private (church owned) entity is an agent of the government. Further, the statutes cited by the BYU Defendants authorizing traffic direction from the state to municipalities and the ordinance of Provo City do not put a potential plaintiff on notice that the statute and ordinance are creating governmental employees. Additionally, since multiple statutes, rules and ordinances create or allow the actions above, which governmental entity is supposed to get the UGIA notice?

Due process and open courts require that the potential plaintiff be provided a fair opportunity to be heard. Absent notice, he has no opportunity.

E. IF THE ORDINANCE CONFLICTS WITH STATE LAW, IT IS THE ORDINANCE WHICH MUST BE STRUCK DOWN.

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The BYU Defendants make the conclusion that because a Provo City ordinance authorizes college employees to direct traffic and because the Utah Supreme Court has stated that regulation of vehicular traffic on public streets is non-delegable, then Ms. Robinson had to be a state employee. This argument completely ignores the possibility that the ordinance is in violation of state law. This Court can certainly find that the ordinance, if it violates state case law or statute, is not legal.

Further, an ordinance that clothes a religious institution with governmental immunity would appear to violate the separation of church and state. Were there numerous colleges and universities in Provo, the argument would not be persuasive. But where there is a school the size of BYU that is owned by the church which is attended and supported by a large majority of the residents of the enacting body (Provo), the ordinance appears to unconstitutionally violate the separation of church and state.

IV. THE THIRD DISTRICT COURT ERRED WHEN IT GRANTED BYU'S MOTION FOR A CHANGE OF VENUE ON THE SOLE BASES OF DEFENDANT'S RESIDENCE AND SITE OF THE ACCIDENT.

On October 19, 2009, Judge Robert Faust granted BYU's motion to transfer venue because: "all Defendant's (sic) reside in Utah County and the place of the accident was Utah County.

The general transfer of venue statute, Utah Code Ann. § 78-13-9, provides:

> The court may, on motion, change the place of trial in the following cases:
> (1) when the county designated in the complaint is not the proper county.
> (2) when there is reason to believe that an impartial trial cannot be had in the county, city, or precinct designated in the complaint.
> (3) when the convenience of witnesses and the ends of justice would be promoted by the change.
> (4) when all the parties to an action, by stipulation or by consent in open court entered in the minutes, agree that the place of trial may be changed to another county. Thereupon the court must order the change as agreed upon.

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The venue statute, Utah Code Ann. §78B-3-307 provides as follows:

(1) In all other cases an action shall be tried in the county in which:
(a) the cause of action arises; or
(b) any defendant resides at the commencement of the action.
(2) If the defendant is a corporation, any county in which the corporation has its principal office or a place of business shall be considered the county in which the corporation resides.
(3) If none of the defendants resides in this state, the action may be commenced and tried in any county designated by the plaintiff in the complaint.
(4) If the defendant is about to depart from the state, the action may be tried in any county where any of the parties resides or service is had.

BYU argued for an order changing venue for two reasons. First they argued that Salt Lake County is not a proper county. Second, they argued that "convenience of witnesses in the ends of justice" make Utah County an appropriate location for the case.

All laws that have to do with the removal of action from one local jurisdiction to another for trial have one definite purpose, that is to promote justice by avoiding local matters of a prejudicial nature that might be detrimental to the rights of one of the parties. The authority of a court to order a change of place of trial existed at common law as part of its inherent power to assure a fair and impartial trial in dispensing justice. Anderson v. Johnson, 1 Utah 2d 400, 268 P.2d 427 (Utah 1954)(*citations omitted*).

General policy of law is that where plaintiff has commenced lawsuit and acquired jurisdiction over defendant, he should be allowed to pursue his remedy, and that motion to dismiss on grounds of improper forum should be granted only with great caution and under compelling circumstances, as in cases where it appears either that plaintiff has selected inconvenient forum for purpose of harassing or annoying defendant or where applicable factors preponderate so strongly against trying case where it is filed, and in favor of greater convenience

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of trying it somewhere else, that denying motion would work hardship upon defendant. Summa Corp. v. Lancer Industries, Inc., 559 P.2d 544 (Utah 1977).

A. SALT LAKE COUNTY IS A PROPER COUNTY .

The Amended Complaint, at paragraph 2, states that BYU is a Utah Corporation, doing business in, and with offices located in, Salt Lake County, State of Utah.

In its brief BYU incorrectly states that venue is proper "in any county in which the corporation has its principle office or place of business." The missing "a" between "or" and "place of business" makes the statute read that a principal place of business is required. It clearly is not. Venue is proper in the county of its principle office or in a county where it has a place of business.

The Complaint properly alleged that BYU does business in and has offices in (i.e. a place of business) Salt Lake County. BYU did not dispute that fact.

Thus the venue chosen by the Plaintiff was a proper venue.

B. CONVENIENCE OF WITNESSES AND THE ENDS OF JUSTICE MADE SALT LAKE COUNTY A PROPER VENUE.

Contrary to the assertions of BYU, convenience of witnesses did not mandate a change of venue. As set forth in the affidavit of Mr. Mallory, 40% of his physicians are in Salt Lake County, and his two family members who would be witnesses are in Salt Lake County. While the accident took place in Utah County, that does not mean the venue is proper in the face of the Plaintiff's election to bring suit in another county where venue is proper.

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Moreover, BYU is one of the largest employers in Utah County and enjoys substantial support from the residents of Utah County. For that, and other reasons, Mallory was rightfully concerned about receiving an unbiased forum in Utah County.

In fact, he found out at the hearing on the motion to dismiss that the judge sitting on his case was a graduate of BYU and BYU's law school and her husband was employed at BYU.

Neither of the reasons for granting the motion were based upon any statute or case law. In fact neither reason appears or could be construed to appear in the governing law.

Mr. Mallory was entitled to pursue his claims in Salt Lake County. Four of his seven witnesses reside in Salt Lake County and he was rightfully concerned about bias in Utah County. It is not a case about real property. It was a case about a motorcycle accident. Mr. Mallory as plaintiff was entitled to choose the forum.

CONCLUSION

As a motion to dismiss, the motion must be denied. If it is treated as a motion for summary judgment it would only appropriate to grant it where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). Here, Mallory requested the time necessary to take the depositions of Mr. Lemmon, Ms. Robinson and Provo City. However, even though he was denied such discovery, the motion on its face did not show that the BYU Defendants were entitled to dismissal.

The change of venue was improper and unfair to Mr. Mallory. It too should be overturned.

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Respectfully, the Appellant requests that both the Motion to Dismiss Order and the Order granting the change of venue and the Judgment be vacated and reversed and the case remanded for trial in the Third District Court.

STATEMENT REGARDING ADDENDUM

Attached as an addendum are:

1. Supplemental Affidavit of Arnold Lemmon.
2. First Amended Complaint.

Dated this 13 day of July, 2011

Curtis L. Wenger,
Attorney for Plaintiff/Appellant

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PROOF OF SERVICE

I am a citizen of the United States and employed in Salt Lake County, Utah. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 30 East Broadway, Suite 204 Salt Lake City, UT 84111. On July 13 2011, I placed for delivery via U.S. Mail two true and correct copies of the within document, APPELLANT'S BRIEF in a sealed envelope, to the following:

STEVEN M. SANDBERG
BRIGHAM YOUNG UNIVERSITY
Office of General Counsel
ASB A-357
Provo, UT 84602-1333
Attorneys for BYU

JOSEPH J. JOYCE
J. JOYCE AND ASSOCIATES
10813 South River Front Pkwy,
Suite 460
South Jordan, UT 84095
Attorney for Vern Stratton

And, one original and eight copies of APPELLANT'S BRIEF were served to the Clerk of the Utah Court of Appeals

Executed on July 13 2011 at Salt Lake City, Utah.

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Steven M. Sandberg (12421)
BRIGHAM YOUNG UNIVERSITY
Office of the General Counsel
ASB A-357
Provo, UT 84602-1333
Telephone: (801) 422-3089
Facsimile: (801) 422-0265
steve_sandberg@byu.edu

Attorneys for Defendants Brigham Young University and Sarah Robinson

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

RANDAL ROY MALLORY, Plaintiff, v. BRIGHAM YOUNG UNIVERSITY, a Utah nonprofit corporation, VERN STRATTON, and DOES I-X, Defendants.	**SUPPLEMENTAL AFFIDAVIT OF ARNOLD LEMMON** Civil No. 090403834 Judge Claudia Laycock

STATE OF UTAH)
ss.
COUNTY OF UTAH)

1. I, Arnold Lemmon, am over the age of 18 and have personal knowledge of the matters set forth herein.

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2. I am currently employed by University Police, a division of Brigham Young University, as a peace officer at the rank of lieutenant. My specific peace officer authority is as a law enforcement officer, under Utah Code Ann. Section 53-13-103(1)(b)(xi).

3. Under Special Event Directive No. SE2008-028, I was designated as the event supervisor for the Spring Football Blue and White Game on Saturday, April 12, 2008 (the "Game").

4. My supervision responsibilities extended to all pre-event, event, and post-event security, crowd control, and traffic direction at the Game. I directed the deployment of each sworn officer and each student traffic cadet to their various posts either directly or via delegation to the senior officer or senior student traffic cadet under my supervision.

5. Three sworn officers—Officers Bennett, Strong, and Soakai—assisted me by barricading Canyon Road prior to the Game, patrolling the stands and premises during the Game, and providing crowd control after the Game.

6. Five student traffic cadets—Cadets Castellano, Crowe, Nomiyama, Robinson, and Beeseley—assisted me by maintaining road closures on Canyon Road during the Game and maintaining those same closures and assisting traffic out of Lot 45 onto Canyon Road and University Avenue after the Game.

7. I and all other officers and student traffic cadets assisting with security, crowd control, and traffic direction carried University Police-issued radios and maintained radio contact with each other via the "Events" radio frequency.

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8. Prior to the Game, I personally opened the gate from Lot 45 onto University Avenue to allow traffic to exit Lot 45 to the west and onto University Avenue.

9. When student traffic cadet Robinson radioed that an accident had occurred on University Avenue, I responded and took hands-on direction of all aspects of responding to the crash.

DATED this 29 day of March, 2010.

SUBSCRIBED AND SWORN to before me this 29 day of March, 2010.

BETTY MAE JOHNSON
NOTARY PUBLIC-STATE OF UTAH
A-357 ASB
PROVO, UTAH 84602
COMM. EXP. 5-21-2012

Notary Public

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Curtis L. Wenger (7013)
Attorney for Plaintiff
30 East Broadway, Suite 204
Salt Lake City, Utah 84111
(801) 870-0453

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

RANDAL ROY MALLORY, Plaintiff, vs. BRIGHAM YOUNG UNIVERSITY, a Utah Corporation, VERN STRATTON, and DOES I-X, Defendants	FIRST AMENDED COMPLAINT Civil No. 090902577 Judge Robert P. Faust

Plaintiff complains and for causes of action alleges as follows:

GENERAL ALLEGATIONS

1. The Plaintiff, Randal Roy Mallory ("Mallory"), is an individual residing in Utah County, State of Utah.
2. Defendant, Brigham Young University ("BYU"), is a Utah Corporation, doing business in, and with offices located in, Salt Lake County, State of Utah.
3. Defendant, Vern Stratton ("BYU"), is an individual residing in Utah County, State of Utah.
4. Defendant, Sarah Robinson, was a student and an employee and/or agent of Defendant BYU.

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5. Plaintiff is informed and believes and thereon alleges that, at all times herein mentioned, each of the DOE defendants I-V sued herein was the agent and employee of BYU and was at all times acting within the purpose and scope of such agency and employment.
6. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES VI through X, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.

FIRST CAUSE OF ACTION

(For Negligence Against BYU, ROBINSON, STRATTON, and DOES I-X)

7. The Plaintiff hereby incorporates his prior allegations herein.
8. At all times herein mentioned, defendant Stratton was the owner of a certain 1999 Lincoln Towncar automobile, Utah License No. 626 K2E.
9. At all times herein mentioned defendant ROBINSON was a BYU traffic cadet and was the agent and/or employee of BYU and in doing the things herein alleged, was acting within the purpose and scope of this agency and employment.
10. At all times herein mentioned Plaintiff was, and is, the owner of a certain Harley Davidson motorcycle, Utah License no. 386 XH.
11. At all times herein mentioned University Avenue runs past the BYU parking located south of 1850 North in Provo, Utah ("BYU Parking Lot"). University Avenue runs north and south past the west entrance/exit to the BYU Parking Lot. Said entrance/exit is approximately fifty (50) feet south of 1850 North.
12. On or about April 12, 2008, at or about the hour of 2:45 p.m., Plaintiff was operating the Harley Davidson motorcycle and was at a stop in the north exit lane of the west entrance/exit of the BYU Parking Lot facing west.
13. Plaintiff was stopped awaiting the directions of the BYU traffic cadet, ROBINSON, to proceed south on University Avenue.
14. After ROBINSON negligently stopped the north and south bound traffic on University Avenue, ROBINSON negligently directed Plaintiff to make his left hand turn and continue south on University Avenue.

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15. At that time and place Stratton was proceeding south bound on University Avenue approaching the entrance/exit of the BYU Parking Lot. Stratton either disobeyed the directions of ROBINSON to stop as all three other lanes had stopped, or negligently proceed past traffic that had been stopped in the inside lane and negligently, carelessly, recklessly, and unlawfully struck the Plaintiff who was following the specific instructions of ROBINSON.
16. The negligent, careless, reckless, and/or unlawful actions of ROBINSON and Stratton proximately caused Stratton's vehicle to collide with Plaintiff's motorcycle and to proximately cause the injuries and damages hereinafter described.
17. As a proximate result of the negligence, carelessness, and unlawfulness of defendants, and each of them, and the resulting collision, as herein alleged, Plaintiff was injured in his health, strength, and activity, sustaining injury to his body and shock and injury to his nervous system and person, and among others, sustained the following personal injuries: severe skull fracture and intracranial hemorrhage, all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering. These injuries have resulted in a permanent disability to plaintiff, and he is and will continue to be unable to be gainfully employed and entitle the Plaintiff to general damage in a sum according to proof.
18. As a further proximate result of the negligence of defendants, and each of them, as herein alleged, plaintiff was required to and did employ physicians and surgeons for medical examination, treatment, and care of these injuries and did incur medical and incidental expenses. As a further proximate result of the negligence of defendants, and each of them, plaintiff has incurred other and will incur further medical and incidental expenses for the care and treatment of these injuries, the exact amount of which is unknown at the present time.
19. Prior to the time of the events described herein plaintiff was gainfully employed as a salesman for dental laboratories, and was earning an average monthly income in excess of $10,000.00. As a further proximate result of the negligence of defendants, and each of them, as herein alleged, plaintiff was prevented from attending to his usual occupation and has been damaged thereby in the amount of at least $2,000,000.00.

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20. Immediately prior to and at the time of the collision, Plaintiff's motorcycle was in good mechanical condition. As a further proximate result of the negligence of defendants, and each of them, as herein alleged, Plaintiff's motorcycle was damaged and depreciated to the extent of at least $10,000.00, which sum is a reasonable amount for the necessary repairs to the motorcycle.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof.

2. For all medical and incidental expenses according to proof.

3. For all loss of earnings according to proof.

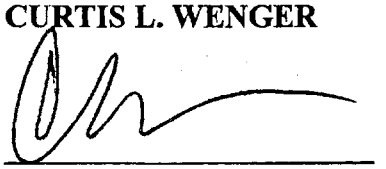
4. For repairs to plaintiff's automobile in the sum of $10,000.00.

5. For costs of suit herein incurred.

6. For such other and further relief as the court may deem proper.

DATED this 8th day of July, 2009.

CURTIS L. WENGER



Attorney for the Plaintiff

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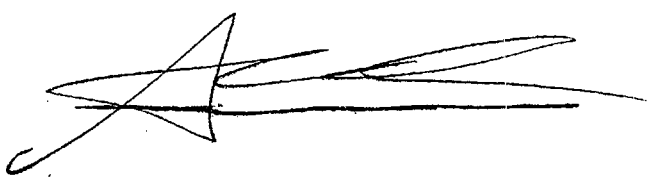
CERTIFICATE OF SERVICE

I hereby certify that on the 09 day of July, 2009, a true and correct copy of the foregoing FIRST AMENDED COMPLAINT was served on the following via United States mail, postage prepaid, addressed as follows:

Third District Court
450 South State St,
POB 1860
Salt Lake City, UT 84114

Joseph J. Joyce
J. Joyce & Associates
10813 South Ricer Front Parkway, Ste 460
South Jordan, UT 84095

Thomas W. Seiler, Esq.
Robinson, Seiler & Anderson, LC
2500 North University Avenue
PO Box 1266
Provo, UT 84603-1266



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