

2007

Lemanda Lillian Mecham v. David L. Johnson and Sean D. Frazier : Brief of Appellant

Utah Supreme Court

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No. 20070730-SC

IN THE UTAH SUPREME COURT

LEMANDA LILLIAN MECHAM,

Plaintiff and Appellee,

v.

SEAN D. FRAZIER AND DAVID L. JOHNSON,

Defendants and Appellants.

Brief of Appellants

On Order Accepting Certified Questions of Utah Law from the
United States Court of Appeals for the Tenth Circuit

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FILED
UTAH APPELLATE COURTS

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List of All Parties

To the best of Appellants' knowledge, all parties to the proceeding appear in the caption of this Brief.

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No. 20070730-SC

IN THE UTAH SUPREME COURT

LEMANDA LILLIAN MECHAM,

Plaintiff and Appellee,

v.

SEAN D. FRAZIER AND DAVID L. JOHNSON,

Defendants and Appellants.

Brief of Appellants

Statement of Jurisdiction

The United States Court of Appeals for the Tenth Circuit issued an order certifying two questions of state law to this Court. This Court accepted the certified questions in an order entered October 31, 2007. Pursuant to Utah Code Ann. § 78-2-2(1) (West Supp. 2007), this Court has original jurisdiction to answer questions of state law certified by a federal court.

Issues Presented

1. Immunity from suit

Utah's governmental immunity act requires a claimant to file a notice of claim identifying the nature of the asserted claim before filing suit. This requirement is a jurisdictional precondition to filing suit. The act also requires that, to bring a personal capacity claim against a state officer, a claimant must allege that the employee acted with fraud or malice. Where a claimant fails to identify the nature of her claim as a personal capacity claim – by not alleging fraud or malice in her notice of claim – has she failed to meet a jurisdictional precondition, thereby rendering the state officers immune from suit?

A. Standard of Review

When a federal court certifies questions of state law, this Court answers “the legal questions presented without resolving the underlying dispute.” *In re Kunz*, 2004 UT 71, ¶6, 99 P.3d 793.

2. Allegation of fraud or malice

To bring a claim against a state officer personally, a plaintiff is required to allege in her notice of claim that the state officer acted with fraud or

malice. This Court has adopted the reasoning of the Utah Court of Appeals that a notice of claim was insufficient when it merely alleged facts from which malice could be inferred but did not expressly allege fraud or malice. Should this Court follow its precedent and continue to require that an express allegation of fraud or malice be included in a notice of claim to properly identify a personal capacity claim?

A. Standard of Review

When a federal court certifies questions of state law, this Court answers “the legal questions presented without resolving the underlying dispute.” *Kunz*, 2004 UT 71 at ¶6.

**Determinative Constitutional
Provisions, Statutes and Rules**

The following provisions are attached as Addendum 2 to this Brief:

Utah Code Ann. § 63-30-4

Utah Code Ann. § 63-30-11

Statement of the Case

1. Nature of the Case

Lemanda Mecham sued Utah Highway Patrol Troopers Sean Frazier and David Johnson in federal district court. Aplt. App. at 1-2, 3, 10-19.

Mecham raised one federal claim (42 U.S.C. § 1983) and seven state law claims. Aplt. App. at 14-18.

Defendants moved to dismiss the state law claims for lack of subject matter jurisdiction. Aplt. App. at 20-37. The federal district court denied the defendants' motion, and defendants challenged that denial in an interlocutory appeal to the United States Court of Appeals for the Tenth Circuit. Aplt. App. at 4, 71-73, 74-75. The appeal was brought under the collateral order doctrine, which grants the Tenth Circuit jurisdiction to hear an interlocutory appeal of a denial of an immunity claim. From that appeal, the Tenth Circuit certified two questions of state law to this Court.

2. Course of the Proceedings in the Federal Courts

Lemanda Mecham filed this action against Utah State Highway Patrol Troopers Sean Frazier and David Johnson in 2004. Aplt. App. at 1-2.

Defendants filed a motion to dismiss. Aplt. App. at 2. While denying the motion to dismiss as to the federal claim, the district court dismissed the

plaintiff's state claims because the complaint was insufficient as to those claims. Aplt. App. at 2-3. The plaintiff was given time to file an amended complaint. Aplt. App. at 3. Mecham filed an amended complaint. Aplt. App. at 3, 10-19. The amended complaint raised one federal claim (42 U.S.C. § 1983) and seven state law claims. Aplt. App. at 14-18.

Defendants moved to dismiss the state law claims for lack of subject matter jurisdiction. Aplt. App. at 20-37. The district court denied the defendants' motion and defendants appealed. Aplt. App. at 4, 71-73, 74-75.

The Tenth Circuit entered an order on September 11, 2007, certifying two questions of state law to this Court.¹ This Court accepted the certified questions on October 31, 2007.

3. Disposition in the Federal Courts

The Tenth Circuit appeal has been abated pending resolution of the questions certified to this Court. In a related appeal, *Mecham v. Frazier*, — F.3d —, 2007 WL 2608624 (10th Cir. 2007), Docket No. 05-4297, the Tenth

¹Footnote three of the Tenth Circuit's certification order incorrectly states that the new version of Utah's immunity act requires merely an allegation of negligence to bring a personal capacity claim against a government employee. The act, however, expressly limits personal capacity suits to only those injuries resulting from fraud or willful misconduct, the use of alcohol or drugs, or perjury. *See* Utah Code Ann. § 63-30d-202(3)(c).

Circuit reversed the federal district court's denial of qualified immunity on the 42 U.S.C. § 1983 claim, concluding that the defendants did not violate Mecham's constitutional rights.

Statement of Facts

In her amended complaint, plaintiff alleged one federal and seven state law causes of action against the defendants. Aplt. App. at 14-18. Defendants Frazier and Johnson were "troopers and/or employees of the Utah Highway Patrol." Aplt. App. at 11 ¶5. The defendants'

authority to act was derived from Utah state law and their own authority and/or commands and directives of their superiors. All of the acts of the individuals and entities listed in the preceding paragraphs were performed under color of the laws, statutes, ordinances, of the State of Utah and the regulations, policies, customs, and usages [of] defendants' respective law enforcement agencies."

Aplt. App. at 11 ¶7.

In her notice of claim, Mecham did not expressly allege that the defendants acted with either fraud or malice. Aplt. App. at 33-36 (attached as Addendum 1). She alleged that they used "unreasonable and excessive force in arresting her" and that they "were negligent in their use of force which negligence caused her permanent and chronic injury." Aplt. App. at 33. Mecham's notice of claim repeatedly stated that Frazier and Johnson had

been negligent or unreasonable, but not that they had acted with either fraud or malice. Aplt. App. at 35.

Summary of the Argument

Utah's governmental immunity act confers on state officers immunity from suit when a plaintiff fails to comply with the act's notice of claim requirements. Those requirements are a jurisdictional precondition to suit, thereby barring the lawsuit altogether when not met, not merely immunizing a state officer from liability.

To bring a claim against a state officer personally, a plaintiff's notice of claim must specifically aver that the state officer acted with fraud or malice. It is not enough to allege facts from which fraud or malice can be inferred. Because plaintiff did not specifically allege fraud or malice in her notice of claim, her state law claims are jurisdictionally barred.

ARGUMENT

1. **Because its notice of claim provision imposes a jurisdictional precondition to filing suit, Utah's immunity act confers on state officers immunity from suit, not merely immunity from liability, when that jurisdictional precondition is not met.**

This Court's order accepting certified questions of state law, asks the parties to answer this question posed by the Tenth Circuit: Does the Utah Governmental Immunity Act² confer to state officers an immunity from suit (immediately appealable) or merely an immunity from liability (not immediately appealable)?

The Tenth Circuit's use of "immediately appealable" refers to interlocutory appeals within the federal system. An interlocutory appeal may be taken as a matter of right, under the collateral order doctrine, from a federal district court's denial of a claim of immunity from suit:

Pursuant to the federal collateral order doctrine, we have subject matter jurisdiction to hear "appeals of orders denying motions to dismiss where the motions are based on immunity from suit." State law governs the scope of the immunity at issue (i.e., whether the immunity is "immunity from suit" or merely "immunity from liability").

²At the time of Mecham's alleged injury, the immunity act was codified at Utah Code Ann. § 63-30-1 through -38. Because Mecham's alleged injury arose before July 1, 2004, this action continues to be "governed by the provisions of Title 63, Chapter 30, Utah Governmental Immunity Act." 2004 Laws of Utah ch. 267, § 48.

Aspen Orthopaedics & Sports Med. v. Aspen Valley Hosp. Dist., 353 F.3d 832, 837 (10th Cir. 2003) (stating that court will look to substantive state law in determining the nature and scope of claimed immunity) (citations omitted). *See also Decker v. IHC Hosp., Inc.*, 982 F.2d 433, 436-37 (10th Cir. 1992) (stating that denial of claim for immunity from liability, as opposed to immunity from suit, is not collateral order that is immediately appealable). No such doctrine exists under state law, where interlocutory appeals are not allowed as a matter of right. *See Utah R. App. P. 5.*

Because the immunity act's notice of claim provision imposes a jurisdictional precondition to filing suit, the act confers on state officers immunity from suit, not merely immunity from liability, in cases where that jurisdictional precondition is not met. Defendants' motion to dismiss was based on Mecham's failure to strictly comply with the immunity act's notice of claim provisions. This Court has held that the immunity act should be strictly applied so as to preserve sovereign immunity:

In analyzing the parties' positions, we must keep in mind that the legislature has recognized the necessity of immunity as essential to the protection of the state in rendering the many and ever increasing number of governmental services. . . . In a prefatory section of the Act, the legislature made this abundantly clear: *Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function.* . . . This . . .

indicate[s] an intention that the act be strictly applied to preserve sovereign immunity.

Taylor v. Ogden City Sch. Dist., 927 P.2d 159, 162 (Utah 1996) (citations and internal quotations omitted, emphasis in original).

This strict application standard is why this Court has repeatedly ruled that strict compliance with the requirements of the Utah Governmental Immunity Act is essential to maintain a cause of action thereunder. *Rushton v. Salt Lake County*, 1999 UT 36, ¶19, 977 P.2d 1201; *Madsen v. Borthick*, 769 P.2d 245, 249-50 (Utah 1988). *Scarborough v. Granite School District*, 531 P.2d 480 (Utah 1975).

We have held that the Governmental Immunity Act must be strictly applied. As we explained in *Epting v. State*, the codification of sovereign immunity mandates stringent enforcement, since it is through the Governmental Immunity Act that the “legislature has recognized the necessity of immunity as essential to the protection of the state in rendering the many and ever increasing number of governmental services.”

Hall v. Utah State Dep’t of Corr., 2001 UT 34, ¶14, 24 P.3d 958 (citations omitted). In *Hall*, this Court held that the requirements of the notice of claim provision of the immunity act had to be precisely complied with. *Id.* at ¶23 (“In other words, where the government grants statutory rights of action against itself, any conditions placed on those rights must be followed precisely.”).

An action brought under the immunity act is a claimant's exclusive remedy and a claimant may only sue a government employee *personally* in certain circumstances:

(3)(a) Except as provided in Subsection (3)(b), an action under this chapter against a governmental entity *or its employee* for an injury caused by an act or omission that occurs during the performance of the employee's duties, within the scope of employment, or under color of authority is a plaintiff's exclusive remedy.

(b) A plaintiff *may not bring* or pursue any other civil action or proceeding based upon the same subject matter *against the employee* or the estate of the employee whose act or omission gave rise to the claim *unless*:

(i) the employee acted or failed to act through fraud or malice; . . .

Utah Code Ann. § 63-30-4(3) (emphasis added).

The act further contains a global notice of claim provision that operates as a jurisdictional precondition to bringing *any* suit. *See Rushton v. Salt Lake County*, 1999 UT 36, ¶18, 977 P.2d 1201 (holding that failure to file notice of claim that complied with all of the immunity act's requirements deprived the court of subject matter jurisdiction). The notice of claim provision applies to all claims brought against a governmental entity *or a government employee*:

Any person having a claim for injury 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.

Utah Code Ann. § 63-30-11(2) (emphasis added); *see also Thomas v. Lewis*, 2001 UT 49, ¶17, 26 P.3d 217 (“Indeed, by its terms, the notice of claim provision is global in application. It therefore applies to *all actions for any claim* it describes unless the statute or law authorizing the specific action at issue expressly, or by necessary implication, indicates otherwise.”) (emphasis added). This Court has noted that, “[w]hen applying the notice provision in the past, we have called for strict compliance to the Immunity Act before determining that the State waived its immunity. Strict compliance constitutes adherence to *all* of the relevant provisions outlined in the Immunity Act.” *Li v. Univ. of Utah*, 2006 UT 57, ¶8, 144 P.3d 1142 (emphasis added).

Among other things, the notice of claim must set forth the nature of the claim asserted: “The notice of claim shall set forth: (i) a brief statement of the facts; (ii) the *nature of the claim* asserted; and (iii) the damages incurred by the claimant so far as they are known.” Utah Code Ann. § 63-30-11(3). To properly state the nature of the claim asserted, a claimant must identify whether any claims are brought as personal capacity claims against the state employees themselves. The proper filing of a notice of claim is not merely a statute of limitation but “is a jurisdictional requirement and a precondition to suit.”

Lamarr v. Utah State Dep't of Transp., 828 P.2d 535, 540-42 (Utah App. 1992).

This court stated that “[w]e have previously addressed questions regarding . . . failure to set forth the nature of the claim asserted In each of those instances, we have dismissed claims when they fail to follow the unambiguous language of the Immunity Act.” *Li*, 2006 UT 57 at ¶15.

Defendants’ motion to dismiss was based on this jurisdictional precondition. Defendants argued that Mecham’s notice of claim did not properly identify the nature of the claim asserted – personal capacity claims against the officers – because she failed to expressly aver fraud or malice. If Mecham indeed failed to satisfy this jurisdictional precondition, she was barred from filing suit and defendants were not merely immunized from liability. As set forth below, Mecham’s notice of claim failed to satisfy this jurisdictional precondition and the interlocutory appeal was therefore proper under the collateral order doctrine as an appeal from a denial of a claim of immunity from suit.

2. A claimant must specifically aver fraud or malice in her notice of claim to satisfy the immunity act’s notice of claim requirements.

The second question posed by the Tenth Circuit is: Does the Utah Governmental Immunity Act require that a Notice of Claim against state

officials in their individual capacity expressly aver “fraud” or “malice”?

This Court held in *Thomas v. Lewis*, 2001 UT 49, ¶20, 26 P.3d 217, that, to bring a personal capacity claim, a claimant must expressly allege fraud or malice. Moreover, in *Thomas* this Court expressly agreed with the reasoning of the Utah Court of Appeals in *Straley v. Halliday*, 2000 UT App 38, 997 P.2d 338, where a notice of claim was deemed insufficient for failing to allege fraud or malice, even though the notice of claim contained facts from which malice might have been inferred. *Thomas* at ¶14.

Straley involved a statutory claim against a state judge. The statute authorized a forfeiture action against any judge who wrongfully and willfully refused to allow a writ of habeas corpus. Straley’s notice of claim alleged that the judge had violated the statute by *wrongfully and willfully* denying plaintiff’s petition for a writ. The notice did not, however, include an express allegation that the judge had acted with fraud or malice. *Id.* at ¶15. A second, untimely and defectively served, notice of claim did expressly allege that the judge acted with fraud or malice. *Id.* at ¶16. The Court of Appeals concluded that the failure of first notice of claim to expressly allege that the judge acted with fraud or malice was jurisdictional in nature and deprived the courts of subject matter jurisdiction over Straley’s claims.

Straley's first notice of claim *failed to assert that Judge Halliday acted with fraud or malice* in denying his petition. As mentioned above, Straley's action *cannot be maintained against Judge Halliday personally absent the allegation of fraud or malice*. Thus, although the first notice of claim was sufficient in terms of the first complaint, Straley's action as framed in that complaint must fail. . . . Because no action may be maintained against Judge Halliday personally absent the allegation of fraud or malice, this variance "is much more than a mere expansion or amplification of what was alleged in the notice," and the first notice of claim is insufficient for the action as framed in the amended complaint.

Id. (emphasis added) (quoting *Yearsley v. Jensen*, 798 P.2d 1127, 1129 (Utah 1990)).

Significantly, it was not enough that Straley's first notice of claim had alleged facts from which malice may have been inferred – that the judge acted *wrongfully* and *willfully*. Those allegations were insufficient absent an express allegation of malice. Without an allegation that a state employee acted with fraud or malice, the causes of action against the employee are in a representative capacity, and not against the employee personally. Such a claim is the equivalent of suing the government and not the employee. Straley's second notice of claim "rectified this problem" by asserting that the judge had "acted with fraud or malice." *Straley* at ¶16. And though Straley's second notice would have been sufficient simply by adding an express allegation of fraud or malice, it was untimely and improperly served and therefore also deficient. *Id.*

In *Thomas*, this Court expressly stated its agreement with the Utah Court of Appeals' reasoning in *Straley*. See *Thomas*, 2001 UT 49 at ¶14 (stating that “[w]e agree with the reasoning of that case”). Further, in reiterating that a claimant “must additionally allege fraud or malice” to bring a personal capacity claim,³ this Court again cited to *Straley. Thomas* at ¶20 n.11 (also citing Utah Code Ann. § 63-30-4(3)).

Unless Mecham can demonstrate that *Thomas* and *Straley* should be reversed, a claimant's notice of claim must expressly allege fraud or malice to adequately state the nature of her asserted claim. *State v. Menzies*, 889 P.2d 393, 398-99 (Utah 1999) (“[t]hose asking us to overturn prior precedent have a substantial burden of persuasion”). Mecham's claims are jurisdictionally barred because she did not specifically allege that the Troopers acted with fraud or malice. Because Mecham's notice of claim failed to strictly comply with the requirements of Utah's immunity act, the federal district court was without subject matter jurisdiction to consider Mecham's state law claims.

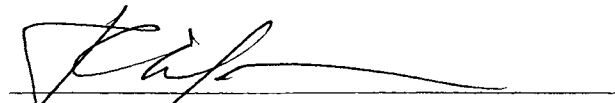
³ This is as opposed to being sued in a representative capacity where the actual party in interest would be the government entity. Utah Code Ann. § 63-30-4(3) (West 2004).

CONCLUSION

Utah's immunity act confers on state officers an immunity from suit when a plaintiff fails to comply with the act's notice of claim requirements. When a plaintiff fails to comply with those requirements, her lawsuit is barred because she has failed to meet a jurisdictional precondition to bring suit. The state officers plaintiff seeks to sue are therefore immune from suit and not merely immune from liability.

To bring a claim against a state officer personally, a plaintiff's notice of claim must specifically aver that the state officer acted with malice, not merely allege facts from which malice can be inferred. Because plaintiff did not specifically allege fraud or malice in her notice of claim, her state law claims are jurisdictionally barred under Utah's governmental immunity act.

Dated this 16th day of January, 2008.

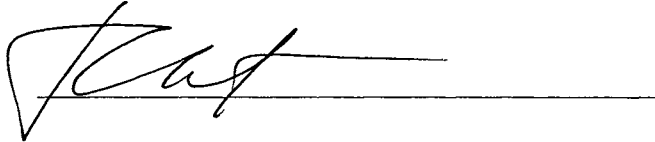


J. CLIFFORD PETERSEN
Assistant Attorney General
Attorney for Appellants

CERTIFICATE OF SERVICE

This is to certify that I mailed TWO copies of the foregoing **BRIEF OF DEFENDANTS/RESPONDENTS** to the following this 16th day of January, 2008:

Cory B. Mattson
9677 South 700 East, #D
Sandy, UT 84070

A handwritten signature in black ink, appearing to read 'Cory', is written over a horizontal line.

ADDENDUM 1

Mecham's Notice of Claim (Aplt. App. 33)

Cory B Mattson (#9292)
480 East 400 South, #200
Salt Lake City, UT 84111
801-983-0093
Attorney for Claimant

NOTICE OF CLAIM

**TO: THE UTAH HIGHWAY PATROL, THE UTAH DEPARTMENT OF PUBLIC SAFETY,
and THE STATE OF UTAH:**

This letter serves as a Notice of Claim against the State of Utah and the above listed agencies pursuant to Utah Code Ann. §§ 63-30-11 and 12.

IDENTITY OF CLAIMANT

Name: Lamanda Lillian Mecham

Address: 1457 East 11245 South
Sandy, UT 84092

TIME AND LOCATION OF INCIDENT

The incident or loss occurred on SR 15 (Interstate Highway 15) near mile post 322 on the southbound side of the highway. The date was February 23, 2003. The time was between the hours of 12:00 p.m. and 2:00 p.m. The citation number assigned is U67766279. The case number is 03-03-0344.

NATURE OF CLAIMS

This is a claim for the torts of assault, battery, intentional infliction of emotional distress, false imprisonment, abuse of process, and malicious prosecution against Trooper Sean D. Frazier and Trooper David L. Johnson. Ms. Mecham asserts that the troopers used unreasonable and excessive force in arresting her. Ms. Mecham asserts that the troopers were negligent in their use of force which negligence caused her permanent and chronic injury. Ms. Mecham also asserts her claim for violation of her right to be free of unreasonable seizure of her person under Article 1, Section 14 of the Constitution of the State of Utah. Though Ms. Mecham disputes that she is required by the laws of the State of Utah to give notice of claims brought under § 1983 of the federal Civil Rights Act, Ms. Mecham also asserts her claim for violation of her civil rights guaranteed under the Fourth Amendment to the United States Constitution to be free from unreasonable search and seizure of her person.

PERSONS INVOLVED

The persons involved were Trooper Sean D. Frazier, Trooper David L. Johnson, and Lamanda Lillian Mecham. Ms. Mecham's mother, Tisha Mecham, witnessed parts of the conversations between Lamanda and Trooper Frazier over the cell phone. A witness of the battery and arrest was Sean Scheer, a tow truck operator.

At all times material hereto, Troopers Frazier and Johnson were employees of the Utah Highway Patrol, an agency of the Utah Department of Public Safety which is a department of the State of Utah. Troopers Frazier and Johnson were acting within the course and scope of their employment as state highway patrol troopers when committing all acts herein alleged

CIRCUMSTANCES

On February 23, 2003, Ms. Mecham was driving southbound on Interstate 15 near mile marker 322 when she was pulled over by a car which appeared to be a highway patrol vehicle. An individual later identified as Trooper Frazier approached her car and told her that she was being pulled over for driving 5 miles per hour over the speed limit and for failing to wear her seatbelt.

Ms. Mecham was surprised at this charge because she felt she was operating her vehicle at a reasonable speed and noticed that she was being passed by many other vehicles during the time that she was pulled over. Trooper Frazier then requested her license and registration for her car. She produced her Arizona driver's license and the registration for the car. Trooper Frazier then went back to his vehicle to check the license and registration.

Some moments later, Trooper Frazier again approached Ms. Mecham's car and told her that her license was suspended and that he was going to impound the car. She became very distraught and feared for her safety. She began to doubt the identity of the officer because she knew of no basis for her license to be suspended and feared that Trooper Frazier may have been using a pretext to get her out of her car. During the time that she was speaking with Trooper Frazier, she was contacted on her cell phone by her mother, Tisha Mecham, who she had called earlier. Ms. Mecham was very fearful for her safety and worried that she would lose the connection with her mother if she hung up so she continued to speak with her mother while the Trooper Frazier waited. During the conversation, Trooper Frazier left and went back to his car.

Tisha Mecham could hear the conversation on the other end of the line between Lamanda Mecham and Trooper Frazier. She began to worry for her daughter's safety and began driving toward the location of the stop. Mrs. Mecham advised her daughter to stay in her car and ask the officer to call for backup so that she would be reassured of the trooper's identity.

When Trooper Frazier returned to the car again, he told Ms. Mecham that he was going to have her car towed to impound and that he was going to arrest her for interfering with an officer. Ms. Mecham was speaking with her mother at the time of this conversation with Trooper Frazier and repeatedly asked him to speak with her mother. It was at that point that Trooper Frazier demanded that she get out of her car so that he could put her under arrest. She again asked him to speak with her mother to explain the charges. He refused and deployed his pepper spray in her face. He then forcibly and violently dragged her out of the car and threw her down on the road surface to the rear of her car. He handcuffed her and then dragged her farther off the road. Lamanda was very scared and, at one point, lost consciousness.

Trooper Frazier requested an ambulance and Lamanda was taken to the hospital where she was treated for pepper spray and released. She was later booked into the Davis County Jail.

In the weeks and months after the incident, Lamanda had severe pain and discomfort in her neck and upper shoulders. She has sought medical attention and has been told that her condition is a result of being thrown to the ground and handcuffed during the arrest. She continues to experience chronic discomfort and pain from this condition.

All charges against her arising from the incident were later dropped.

SPECIFIC ALLEGATIONS OF MISCONDUCT & NEGLIGENCE

Troopers Frazier and Johnson unreasonably arrested Ms. Mecham which constituted an unreasonable seizure of her person in violation of the 4th Amendment to the United States Constitution. They also committed the civil torts of assault, battery, malicious prosecution, abuse of process, intentional infliction of emotional distress, and false imprisonment. Ms. Mecham alleges that the troopers' actions were unreasonable and were calculated to physically injure, intimidate, and terrorize her. The troopers were negligent in their use of force which caused permanent physical injury to Ms. Mecham. The troopers violated Lamanda Mecham's state and federal civil rights to the extent that they seized her person contrary to law.

NATURE OF INJURIES AND OTHER DAMAGES

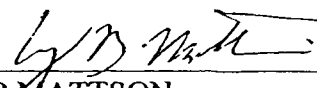
Lamanda Mecham has suffered chronic orthopedic injury to her neck and back as a result of the excessive and unreasonable force used against her by Troopers Frazier and Johnson. By dragging her out of her car and throwing her to the ground, the troopers injured the connective tissues in her neck, which injuries continue to cause pain and discomfort. The deployment of the pepper spray, handcuffing and other rough handling during the arrest caused pain, aching, and general discomfort.

Lamanda Mecham has also suffered mental and emotional distress as a result of the incident to the extent that she has experienced anxiety and sleeplessness.

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She also suffered lost wages as a result of missing time at her employment. Ms. Mecham was additionally had to pay the towing and impound fees to recover her vehicle. Because of the charges leveled against her by Trooper Frazier, Ms. Mecham was forced to retain a criminal defense attorney to defend her and, thereby, incurred attorney fees.

DATED this 16th day of January, 2004.



CORY B. MATTSON
Attorney for Claimant

CERTIFICATE OF FILING & MAILING

I hereby certify that a copy of the foregoing **NOTICE OF CLAIM** was sent via certified mail to the following, postage prepaid, this 17th day of January, 2004.

Mark Shurtleff, Utah Attorney General
Office of the Attorney General
of the State of Utah
236 State Capitol Building
Salt Lake City, Utah 84114

Robert L. Flowers, Commissioner
Department of Public Safety
4501 South 2700 West
Salt Lake City, UT 84119

Rick Wyss
Utah Department of Public Safety
4501 South 2700 West
Salt Lake City, UT 84119



ADDENDUM 2

Determinative Statutes

FORMER GOVERNMENTAL IMMUNITY ACT

§ 63-30-3 Immunity of governmental entities from suit

(1) Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally owned hospital, nursing home, or other governmental health care facility, and from an approved medical nursing or other professional health care clinical training program conducted in either public or private facilities

(2) Subsections (2)(a) through (c) are unique or essential core governmental functions and, notwithstanding the waiver of immunity provisions of Section 63-30-10, governmental entities political subdivisions, and their officers and employees are immune from suit for any injury or damage resulting from the implementation of or the failure to

(a) implement measures to control the causes of epidemic and communicable diseases and other conditions significantly affecting the public health or necessary to protect the public health as set out in Title 26A, Chapter 1, Local Health Departments,

(b) investigate and control suspected bioterrorism and disease as set out in Title 26 Chapter 23b Detection of Public Health Emergencies Act and

(c) respond to a national state or local emergency a public health emergency as defined in Section 26-23b-102, or a declaration by the President of the United States or other federal official requesting public health related activities

(3)(a) For the purposes of this chapter only the following state medical programs and services performed at a state owned university hospital are unique or essential to the core of governmental activity in this state and are considered to be governmental functions

(i) care of a patient referred by another hospital or physician because of the high risk nature of the patient's medical condition,

(ii) high risk care or procedures available in Utah only at a state owned university hospital or provided in Utah only by physicians employed at a state owned university acting in the scope of their employment

(iii) care of patients who cannot receive appropriate medical care or treatment at another medical facility in Utah, and

(iv) any other service or procedure performed at a state owned university hospital or by physicians employed at a state-owned university acting in the scope of their employment that a court finds is unique or essential to the core of governmental activity in this state

(b) If any claim under this Subsection (3) exceeds the limits established in Section

63-30-34, the claimant may submit the excess claim to the Board of Examiners and the Legislature under Title 63, Chapter 6

(4) The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities

(5) Officers and employees of a Children's Justice Center are immune from suit for any injury which results from their joint intergovernmental functions at a center created in Title 62A, Chapter 4a, Child and Family Services

Laws 1965, c 139, § 3, Laws 1978, c 27, § 2, Laws 1981, c 116, § 2, Laws 1984, c 33, § 1, Laws 1985, c 93, § 1, Laws 1991, c 15, § 1, Laws 1991, c 248, § 7, Laws 2003, c 3, § 5, eff May 5, 2003

See, now, § 63-30d-201

§ 63-30-4. Act provisions not construed as admission or denial of liability—Effect of waiver of immunity—Exclusive remedy—Joinder of employee—Limitations on personal liability

(1)(a) Nothing contained in this chapter, unless specifically provided, may be construed as an admission or denial of liability or responsibility by or for governmental entities or their employees

(b) If immunity from suit is waived by this chapter consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person

(c) No cause of action or basis of liability is created by any waiver of immunity in this chapter, nor may any provision of this chapter be construed as imposing strict liability or absolute liability

(2) Nothing in this chapter may be construed as adversely affecting any immunity from suit that a governmental entity or employee may otherwise assert under state or federal law

(3)(a) Except as provided in Subsection (3)(b), an action under this chapter against a governmental entity or its employee for an injury caused by an act or omission that occurs during the performance of the employee's duties, within the scope of employment, or under color of authority is a plaintiff's exclusive remedy

(b) A plaintiff may not bring or pursue any other civil action or proceeding based upon the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless

(i) the employee acted or failed to act through fraud or malice,

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(ii) the injury or damage resulted from the conditions set forth in Subsection 63-30-36(3)(c); or

(iii) in a judicial or administrative proceeding the employee intentionally or knowingly gave, upon a lawful oath or in any form allowed by law as a substitute for an oath, false testimony material to the issue or matter of inquiry under this section.

(4) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may 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, unless it is established that:

(a) the employee acted or failed to act due to fraud or malice;

(b) the injury or damage resulted from the conditions set forth in Subsection 63-30-36(3)(c); or

(c) in a judicial or administrative proceeding the employee intentionally or knowingly gave, upon a lawful oath or in any form allowed by law as a substitute for an oath, false testimony material to the issue or matter of inquiry under this section.

Laws 1965, c. 139, § 4; Laws 1978, c. 27, § 3; Laws 1983, c. 129, § 3; Laws 1991, c. 76, § 1, Laws 2002, c. 206, § 2, eff. May 6, 2002.

See, now, § 63-30d-202.

§ 63-30-5. Waiver of immunity as to contractual obligations

(1) Immunity from suit of all governmental entities is waived as to any contractual obligation. Actions arising out of contractual rights or obligations shall not be subject to the requirements of Sections 63-30-11, 63-30-12, 63-30-13, 63-30-14, 63-30-15, or 63-30-19.

(2) Notwithstanding Subsection (1), the Division of Water Resources is not liable for failure to deliver water from a reservoir or associated facility authorized by Title 73, Chapter 26, Bear River Development Act, if the failure to deliver the contractual amount of water is due to drought, other natural condition, or safety condition that causes a deficiency in the amount of available water.

Laws 1965, c. 139, § 5; Laws 1975, c. 189, § 1; Laws 1978, c. 27, § 4; Laws 1983, c. 129, § 4, Laws 1985, c. 82, § 1; Laws 1991, c. 251, § 1.

See now, § 63-30d-301.

§ 63-30-6. Waiver of immunity as to actions involving property

Immunity from suit of all governmental entities is waived for the recovery of any property

real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien said entity may have or claim on the property involved.

Laws 1965, c. 139, § 6.

See, now, § 63-30d-301.

§ 63-30-7. Waiver of immunity for negligent damage, destruction or loss of seized property

Immunity from suit of all governmental entities is waived as to any claim based on the negligent destruction, damage or loss of goods, merchandise or other property while in the possession of any officer or agency of state or local government, including law enforcement officers, if the property was seized for the purpose of forfeiture under any provision of state law.

Initiative B, adopted Nov. 7, 2000, eff. March 20, 2001.

§ 63-30-8. Waiver of immunity for injury caused by defective, unsafe, or dangerous condition of highways, bridges, or other structures

Unless the injury arises out of one or more of the exceptions to waiver set forth in Section 63-30-10, immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them.

Laws 1965, c. 139, § 8. Laws 1991, c. 76, § 2.

See, now, § 63-30d-301.

§ 63-30-9. Waiver of immunity for injury from dangerous or defective public building, structure, or other public improvement—Exception

Unless the injury arises out of one or more of the exceptions to waiver set forth in Section 63-30-10, immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building, structure, dam, reservoir, or other public improvement.

Laws 1965, c. 139, § 9; Laws 1991, c. 76, § 3.

See, now, § 63-30d-301.

§ 63-30-10. Waiver of immunity for injury caused by negligent act or omission of employee—Exceptions

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of, in connection with, or results from:

§ 63-30-11. Claim for injury—Notice—Contents—Service—Legal disability—Appointment of guardian ad litem

(1) A claim arises when the statute of limitations that would apply if the claim were against a private person begins to run.

(2) Any person having a claim for injury 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)(a) The notice of claim shall set forth:

- (i) a brief statement of the facts;
- (ii) the nature of the claim asserted; and
- (iii) the damages incurred by the claimant so far as they are known.

(b) The notice of claim shall be:

(i) signed by the person making the claim or that person's agent, attorney, parent, or legal guardian; and

(ii) directed and delivered to:

(A) the city or town recorder, when the claim is against an incorporated city or town;

(B) the county clerk, when the claim is against a county;

(C) the superintendent or business administrator of the board, when the claim is against a school district or board of education;

(D) the president or secretary of the board, when the claim is against a special district;

(E) the attorney general, when the claim is against the State of Utah; or

(F) a member of the governing board, the executive director, or executive secretary, when the claim is against any other public board, commission, or body.

(4)(a) If the claimant is under the age of majority, or mentally incompetent and without a legal guardian at the time the claim arises, the claimant may apply to the court to extend the time for service of notice of claim.

(b)(i) After hearing and notice to the governmental entity, the court may extend the time for service of notice of claim.

(ii) The court may not grant an extension that exceeds the applicable statute of limitations.

(c) In determining whether or not to grant an extension, the court shall consider whether the delay in serving the notice of claim will substantially prejudice the governmental entity in maintaining its defense on the merits.

(d)(i) If an injury that may reasonably be expected to result in a claim against a governmental entity is sustained by a potential claimant described in Subsection (4)(a), that government

entity may file a request with the court for the appointment of a guardian ad litem for the potential claimant.

(ii) If a guardian ad litem is appointed under this Subsection (4)(d), the time for filing a claim under Sections 63-30-12 and 63-30-13 begins when the order appointing the guardian is issued.

Laws 1965, c. 139, § 11; Laws 1978, c. 27, § 5; Laws 1983, c. 131, § 1; Laws 1987, c. 75, § 4; Laws 1991, c. 76, § 6; Laws 1998, c. 164, § 1, eff. May 4, 1998; Laws 2000, c. 157, § 1, eff. July 1, 2001.

See, now, § 63-30d-401.

§ 63-30-12. Claim against state or its employee—Time for filing notice

A claim against the state, 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, is barred unless notice of claim is filed with the attorney general within one year after the claim arises, or before the expiration of any extension of time granted under Section 63-30-11, regardless of whether or not the function giving rise to the claim is characterized as governmental.

Laws 1965, c. 139, § 12; Laws 1978, c. 27, § 6; Laws 1983, c. 131, § 2; Laws 1987, c. 75, § 5; Laws 1998, c. 164, § 2, eff. May 4, 1998.

See, now, § 63-30d-402.

§ 63-30-13. Claim against political subdivision or its employee—Time for filing notice

A claim against a political subdivision, 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, is barred unless notice of claim is filed with the governing body of the political subdivision according to the requirements of Section 63-30-11 within one year after the claim arises, or before the expiration of any extension of time granted under Section 63-30-11, regardless of whether or not the function giving rise to the claim is characterized as governmental.

Laws 1965, c. 139, § 13; Laws 1978, c. 27, § 7; Laws 1983, c. 131, § 3; Laws 1987, c. 75, § 6; Laws 1998, c. 164, § 3, eff. May 4, 1998.

See, now, § 63-30d-402.

§ 63-30-14. Claim for injury—Approval or denial by governmental entity or insurance carrier within ninety days

Within ninety days of the filing of a claim the governmental entity or its insurance carrier shall act thereon and notify the claimant in writing of its approval or denial. A claim shall be deemed to have been denied if at the end of the ninety-day period the governmental entity or