

2007

Lamanda Lillian Mecham v. Sean D. Frazier, and David L. Johnson : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

LAMANDA LILLIAN MECHAM,

Plaintiffs/Appellee,

vs.

SEAN D. FRAZIER, and DAVID L.
JOHNSON,

Defendants/Appellants.

BRIEF OF APPELLEE

Appellate Case No. 20070730-SC

Certification of Questions of State Law from the United States Court of Appeals
for the Tenth Circuit.

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Appellee requests oral argument and a published opinion.

FILED

COURTS

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LAMANDA LILLIAN MECHAM,)

)

Plaintiffs/Appellee,)

)

vs.)

)

SEAN D. FRAZIER, and DAVID L.)

JOHNSON,)

)

Defendants/Appellants.)

)

BRIEF OF APPELLEE

Appellate Case No. 20070730-SC

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Appellee requests oral argument and a published opinion.

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JURISDICTION OF THIS COURT

This matter comes before the Court on a certification of questions of law by the U.S. Court of Appeals for the Tenth Circuit. This Court issued an Order of Acceptance on October 31, 2007 accepting the questions certified to it. The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code § 78-2-2(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the Utah Governmental Immunity Act confer to state officers an immunity from suit (immediately appealable) or merely an immunity from liability (not immediately appealable)?

When a federal court certifies questions of state law, the Utah Supreme Court answers the legal questions presented without resolving the underlying dispute. *In re Kunz*, 2004 UT 71, ¶¶ 1, 8, 99 P.3d 793.

2. Does the Utah Governmental Immunity Act require that a Notice of Claim against state officials in their individual capacity expressly aver “fraud” or “malice”?

When a federal court certifies questions of state law, the Utah Supreme Court answers the legal questions presented without resolving the underlying dispute. *In re Kunz*, 2004 UT 71, ¶¶ 1, 8, 99 P.3d 793.

APPLICABLE STATUTORY PROVISIONS

The following State of Utah statutory provisions are relevant to the disposition of this appeal:

Utah Code § 63-30-3 (2000) (see Addendum 1).

Utah Code § 63-30-4 (2000) (see Addendum 2).

Utah Code § 63-30-11 (2000) (see Addendum 3).

STATEMENT OF THE CASE

This case arises out of alleged violations of Appellee's civil rights and intentional torts against her during a traffic stop in February of 2003. In January 2004, Ms. Mecham filed a Notice of Claim, as required by Utah law, with the appropriate state officials for various intentional torts including battery, abuse of process, assault, malicious prosecution, and intentional infliction of emotional distress. Ms. Mecham eventually filed a complaint in federal court alleging the common law causes of action and violations of her rights under the Fourth Amendment to the Constitution of the United States pursuant to 42 U.S.C. § 1983.

Citing Rule 12(b)(6), defendants moved for dismissal of the common law tort claims pursuant to the Governmental Immunity Act of Utah (GIA). *See* U.C.A. § 63-30-1 *et seq.* The district court disregarded the defendants' argument that the Notice of Claim was defective and allowed Ms. Mecham to amend her complaint. Defendants then moved under Rule 12(b)(1) for dismissal for alleged defect in the Notice of Claim under Utah Code Annotated § 63-30-4(4) (2000). On October 7, 2004, the district court denied this motion. Defendants filed their Notice of Appeal on November 2, 2004. In an opinion dated September 11, 2007, the United States Court of Appeals for the Tenth Circuit certified two questions of state law to this Court.

STATEMENT OF FACTS

1. On February 23, 2003, Ms. Mecham, the Plaintiff/Appellee, was pulled over by Defendant/Appellant Frazier for driving five miles per hour over the speed limit and for failing to wear her seatbelt. Aplt. App. at 11 -12.

2. During the traffic stop, Appellant Frazier was informed by dispatch that Ms. Mecham's Arizona driver's license was suspended. *Id.* Since she had only recently been pulled over and been informed that her license was valid, she became fearful that the officer was using a ruse to get her out of her car. *Id.* Appellant Frazier continued to demand that Ms. Mecham get out of her car and became angry when she refused to comply. *Id.*

3. After he called a tow truck, Defendant Frazier demanded that Ms. Mecham get out of her car and when she refused he immediately sprayed her in the face with pepper spray. *Id.* at 12 -13. He then violently dragged her out of the car, threw her to the ground, wrenched her arms behind her back, and handcuffed her. *Id.*

4. Ms. Mecham timely filed a Notice of Claim with the Utah Attorney General and other officials as required by the Utah Governmental Immunity Act. *Id.* at 33 - 36. The Appellants do not dispute that the Notice of Claim was timely filed and filed with the correct officials. *Id.* at 92.

5. After filing her initial Complaint, the Defendants moved to dismiss pursuant to 12(b)(6), the Court granted the Motion but gave Ms. Mecham an opportunity to amend her complaint. Aplt. App. at 2. Ms. Mecham filed her Amended Complaint on July

20, 2004. Aplt. App. at 3. Defendants then moved the district court to dismiss again pursuant to 12(b)(1). *Id.* The motion was denied at hearing on September 16, 2004. *Id.* The Appellants filed a notice of appeal with the United States Court of Appeals for the Tenth Circuit which certified two questions of state law to this Court.

SUMMARY OF ARGUMENTS

POINT I

In Point I, the Appellee contends that the Utah Legislature has waived immunity from suit for government employees where a claim is brought against them in their individual capacities pursuant to the provisions of Utah Code Annotated § 63-30-4. That section states that a civil action against the individual employee is the exclusive remedy for injuries where it is “established” that the state employee acted or failed to act due to “fraud” or “malice.” By making civil suit the exclusive remedy and requiring a claimant to “establish” that the state employee’s action was due to fraud or malice, the legislature waived immunity from suit that was generally granted to state employees in § 63-30-3 (2000). In response to the first question certified to it, the Court should answer that the Utah legislature has waived immunity from suit for state employees sued in their individual capacities.

POINT II

In Point II, the Appellee contends that the Governmental Immunity Act of Utah has never required a claimant to specifically plead “malice” or “fraud” in her notice of claim. Using accepted standards of statutory construction, the Court should find that plain language of Utah Code Annotated § 63-30-11 (2000) does not require specific pleading of “malice”

where the claim is against an individual employee. Utah courts have repeatedly ruled that strict compliance with § 63-30-11 is all that is required for claimants in filing their notice of claim. The strict compliance standard is a two-way street in that the claimant does not have to provide information or perform beyond the plain meaning of § 63-30-11. In response to the second question certified to it, the Court should answer that the Governmental Immunity Act did not require a claimant to expressly aver “fraud” or “malice” in a notice of claim.

ARGUMENTS

POINT I

**THE COURT SHOULD RULE THAT THE UTAH LEGISLATURE
WAIVED IMMUNITY FROM SUIT FOR EMPLOYEES SUED IN
THEIR INDIVIDUAL CAPACITIES PURSUANT TO UTAH CODE
ANNOTATED § 63-30-4 (2000).**

Relying on established rules of statutory construction the Court must find that the Utah legislature has waived immunity from suit for state officials sued in their individual capacities pursuant to U.C.A. § 63-30-4 (2000). Following accepted rules of statutory interpretation, the Court must find that the specific requirements of § 63-30-4 (3) and (4) waive the general immunity from suit granted to the State in § 63-30-3.

A. When Considering Two Conflicting Statutory Provisions, the Specific Provision Governs Over the General Provision. When interpreting statutory provisions, a court must determine legislative intent, and the best evidence of legislative intent is the plain language of the statute. *Craftsman Builder’s Supply, Inc. v. Butler Mfg. Co.*, 1999 UT 18, ¶ 30, 974 P.2d 1194, 1203. The courts presume that the legislature used each particular

word advisedly, and give effect to each word according to its commonly accepted meaning. *Versluis v. Guar. Nat'l Cos.*, 842 P.2d 865, 867 (Utah 1992). It is a general tenet of statutory construction that “[W]hen two statutory provisions conflict in their operation, the provision more specific in operation governs over the more general provision.” *Thomas v. Color Country Mgmt.*, 2004 UT 12, ¶ 9, 84 P.3d 1201.

B. The Legislature Waived The General Immunity From Suit By Making Civil Suit Against Individual Employees The Exclusive Remedy In § 63-30-4(3). The Utah legislature has granted the State and its employees a general immunity from suit in Utah Code Annotated § 63-30-3 (2000). However, the legislature expressly acknowledged that the general grant of immunity from suit is waived under certain circumstances. In Utah Code Annotated § 63-30-4(1)(b), it states:

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.

Utah Code Ann. § 63-30-4(1)(b) (2000) (emphasis added). By making civil suit the exclusive remedy, the Legislature waived immunity from suit for employees in their individual capacities in § 63-30-4(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 an 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)(b) (2000). The exception to the general rule that employees may not be sued as individuals is where the employee acted or failed to act due to fraud or malice. This interpretation makes sense, because where the employee acts due to either of these motivations, he or she no longer acts within the scope of their employment with the State and the State would no longer be liable for their actions. Waiving the immunity for suit for employees in these circumstances also denies sovereign immunity from those state employees who would use the power of the State to injure or defraud its citizens. The Court should interpret § 63-30-4(3) as a waiver of the general immunity from suit for employees who act due to fraud or malice.

C. In § 63-30-4(4), The Legislature Waived Immunity From Suit By Requiring A Claimant To “Establish” That The Individual Employee Acted Through “Fraud” or “Malice.” Even though the Legislature made a general grant of immunity from suit in § 63-30-3, the provisions of § 63-30-4(4) constitute a specific waiver of that immunity by requiring that allegations of fraud or malice be “established” or rendered to a verdict. Section 63-30-4(4) reads:

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 government 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;

U.C.A. § 63-30-4(4) (2000) (emphasis added). As noted above, the grant of immunity from suit in § 63-30-3 is a broad, general provision applicable to the “all governmental entities.” U.C.A. § 63-3-3(1). In the following section, however, the Legislature expressly states that the chapter may provide waivers or exceptions to the general immunity from suit. U.C.A. § 63-3-4-(1)(b) (“If immunity from suit is waived by this chapter, consent to be sued is granted, *Id.*). The Legislature continues in § 63-30-4, setting out a waiver of the general immunity from suit by requiring that fraud or malice be “established” for claims against individual employees. Of course, it is impossible for a claimant to “establish” that the employee “acted or failed to act due to fraud or malice,” without bringing suit and obtaining some sort of finding by a court to that effect. U.C.A. § 63-30-4(4). By using the word “established,” the legislature signaled its intent to allow suits against individual employees to proceed. If a verdict or capitulation resulted on the issue of fraud or malice, then the employee became individually liable.

D. Finding That § 63-30-4 Governs Over § 63-30-3 Harmonizes The Two Provisions And Gives Each Of Them Effect. Even though the Governmental Immunity Act generally grants immunity from suit in § 63-30-3, if the Court were to apply that rule to § 63-30-4(4), the general rule would eviscerate the specific waiver of immunity for individual employees. To harmonize the two provisions and give each effect, the Court must find that § 63-30-4(3) and (4) constitute a specific waiver of the general immunity from suit found in § 63-30-3. This rule preserves the general immunity granted to the State and gives

effect to the specific waiver where an employee acts with fraud or malice. Thus both provisions are rendered meaningful and effective and upholds the legislature's intent to allow individual employees to be sued where they act with fraud or malice.

POINT II

THE PLAIN LANGUAGE OF THE UTAH GOVERNMENTAL IMMUNITY ACT DID NOT REQUIRE EXPRESS PLEADING OF THE WORDS "MALICE" OR "FRAUD" IN THE NOTICE OF CLAIM.

A. The Utah Governmental Immunity Act Has Never Required That a Claimant Specifically State "Malice" or "Fraud" in the Notice of Claim.

The Utah Governmental Immunity Act, encoded at Utah Code Annotated § 63-30-11, has never required a claimant to expressly plead "malice" or "fraud" in her notice of claim. When interpreting statutory provisions, a court must determine legislative intent, and the best evidence of legislative intent is the plain language of the statute. *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 1999 UT 18, ¶ 30, 974 P.2d 1194, 1203. The courts presume that the legislature used each particular word advisedly, and give effect to each word according to its commonly accepted meaning. *Versluis v. Guar. Nat'l Cos.*, 842 P.2d 865, 867 (Utah 1992). In determining whether a notice of claim required by the Utah Governmental Immunity Act meets the statutory requirements, the courts must view the notice in a light most favorable to the plaintiff. *Baker v. Angus*, 910 P.2d 427, 432 (Utah Ct. App. 1996) (when considering defendants' motion to dismiss all facts are viewed in a light most favorable to the plaintiff and defendants' actions may be "construed to rise to the level of malice." *Id.*)

Section 63-30-11 of the Utah Governmental Immunity Act (the Act) contained all of the requirements for the Notice of Claim.¹ The Act required that the notice set forth the following:

- (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.

U.C.A. § 63-30-11(3)(a) (2000). Noticeably, the plain language of 63-30-11 did not require that the notice of claim delineate between negligence and intentional torts. It did not require different elements when the claims are being made against individual employees and the State of Utah. The plain language of the statute did not require the use of “malice” or “fraud” when the claimant is suing an individual employee. It is little surprise then that section 63-30-11 has been strictly construed by the Utah courts which have declined to heap on additional requirements beyond what the Legislature required.

B. “Malice” Need Not Be Expressly Pleaded in a Notice of Claim – *Baker v. Angus*. In *Baker v. Angus*, 910 P.2d 427 (Utah Ct. App. 1996), the Utah Court of Appeals ruled that a claimant’s allegations were sufficient under the Act where the facts alleged, if proven, would establish that the individual employees acted with malice. In *Baker*, the plaintiffs, Bill and Patricia Baker had placed their troubled teenage daughter Amy Baker in the custody of the Utah Division of Family Services (DFS). *Id.* at 429. While in custody,

¹ Section 63-30-11 has been amended several times since Ms. Mecham was required to file her notice in February, 2004. A copy of the provision is included as Addendum 3.

Amy had a tumultuous experience which culminated in her being admitted to a local hospital and her parents being informed that she had been raped. *Id.* The Bakers sued under § 1983 and state law claims for “intentional, malicious, deliberately indifferent and/or grossly negligent deprivation of Amy Baker’s substantive rights to reasonable and adequate conditions of confinement, care and treatment.” *Id.* The defendants made a Motion to Dismiss, which was granted by the trial court. The trial court concluded that the claims were barred by the notice requirements of the Act. *Id.*

On appeal, the Bakers contended that they had “sufficiently pleaded that the state defendants in their individual capacities as opposed to their official capacities, acted maliciously so as to exempt application of the Government Immunity Act.” *Id.* at 432. The Utah Court of Appeals reversed, ruling that the allegations “when viewed in a light most favorable to the Bakers, allege[d] several instances in which the state defendant[‘s] . . . actions could be construed to rise to the level of malice.” *Id.* The Court of Appeals found that the Bakers satisfied the Notice requirement by alleging that the individual employee threatened to terminate state care for Amy if the parents investigated, that the employee did not report a suicide attempt by Amy and seemed hostile, and that the employee told others that Amy was lying about being raped. *Id.*

Like the notice of claim in *Baker v. Angus*, Ms. Mecham’s Notice alleges facts such that, if proven, would establish that the Appellants acted with malice in spraying her in the eyes with pepper spray, assaulting her, and maliciously prosecuting her. Ms. Mecham’s

Notice describes how she was pulled over and found to have a suspended driver's license. Aplt. App. 34. It further alleges that Ms. Mecham feared for her safety after the Trooper told her that her license was suspended and that he was going to have her car towed and impounded. *Id.* It describes how Ms. Mecham's mother called her during her conversation with Trooper Frazier to check on her. Trooper Frazier ordered her to put the phone down and when she did not comply he walked back to his car. *Id.* The Notice details how Trooper Frazier returned to her car sometime later and demanded that she get out so that it could be towed. Aplt. App. at 35. Ms. Mecham was still afraid and asked Trooper Frazier to speak with her mother on the phone to explain what was going on. Trooper Frazier refused and sprayed her in the eyes and face with pepper spray. He then violently dragged her out of the car, and threw her to the pavement. The Notice alleges as follows:

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.*

Aplt. App. 35. Conduct "calculated to physically injure intimidate, and terrorize "is clearly due to malice. Such conduct is unquestionably "a wrongful act intentionally done without cause or excuse."

There can be no doubt that if Ms. Mecham can prove the facts as alleged in the Notice, that she can establish that the Troopers acted with malice toward her. That is all the Act required.

C. The Utah Court of Appeals Has Declined To Impose Additional Requirements Beyond The Plain Language of § 63-30-11. The Utah Court of Appeals has strictly construed § 63-30-11 in determining when the form and contents of a Notice of Claim meet the statutory requirements. Even though the strict compliance standard often favors the State or its employees, it is not a one-way street. “A claimant is not required to do more than the Act plainly requires.” *Peeples v. State*, 2004 UT App 328, ¶9. A notice is sufficient so long as it complies with the plain language of the Act. *Id.*

In *Peeples v. State*, 2004 UT App 328, 100 P.3d 254, 257, the Utah Court of Appeals held that strict compliance with the Act did not require a claimant’s notice of claim to contain more than the plain elements in § 63-30-11. *Id.* at ¶¶ 9-10. In *Peeples*, the plaintiff sued for injuries she suffered after falling on an icy sidewalk outside a state owned liquor store. *Id.* at ¶ 2. She timely filed a notice of claim with the Utah Attorney General but failed to identify the liquor store in question, either by address or in any other manner. *Id.* at ¶ 4. After Ms. Peeples brought suit, the State moved to dismiss under 12(b)(6) contending that Ms. Peeples’ notice did not contain a sufficient “brief statement of the facts” as required by § 63-30-11. *Id.* at ¶ 5. The trial court dismissed the claim because the notice of claim failed to list the address of the liquor store and thus failed to comply with the § 63-30-11.

The Utah Court of Appeals reversed, holding that one sentence from the notice was sufficient as a “brief statement of the facts” -- “On December 5, 2001, Ms. Peeples fell in front of a Utah State Liquor Store on ice, which was allowed to accumulate on the sidewalk, from a poorly designed rain gutter that drains onto the top of the sidewalk, rather than underneath it.” *Id.* at ¶ 10. The court found that this statement strictly complied with the requirements of the Act. The court also noted that the notice of claim requirement does not bar a claim simply because the state would like more information than the Act requires. Regarding alleged defects or omissions in the Notice of Claim, the court stated:

As such, factual notice under the Act need not “meet the standards required to state a claim for relief,” and factual defects in the notice will not bar a claim so long as the claim gives “general notice of an intent to sue.”

Id. at ¶ 11 quoting *Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1179, 1183 (Utah 1983).

Hence, a notice of claim which strictly complies with the requirements of § 63-30-11 and which provides “a general notice of an intent to sue” is sufficient to satisfy the Act.

Likewise, in *Nuñez v. Albo*, 53 P.3d 2 (Utah Ct. App. 2002), the Utah Court of Appeals also considered the sufficiency of a Notice of Claim and ruled that the notice satisfied the act where it advised the State of the key facts, the nature of the claims, and the identity of the parties.

In her Notice of Claim, Ms. Mecham complied with all of the requirements of § 63-30-11 including a brief statement of the facts, the nature of the claims asserted, and a description of the damages she suffered. *Aplt. App.* at 33 - 36. In fact, considering the

ruling in *Peeples*, the Notice exceeds the requirements of § 63-30-11 by describing the exact location, date and time of the incident, and by listing the citation and criminal case number. Aplt. App. at 33. The Notice gives a thorough factual account of the incident comprising at least one page of single-spaced typewritten text describing the conduct of the troopers and the surrounding circumstances. Aplt. App. at 34 - 35. The Notice also gives a detailed list of claims being asserted which reads as follows:

This claim is for the torts of assault, battery, intentional affliction of emotional distress, false imprisonment, abuse of process, and malicious prosecution against Trooper Sean D. Frazier and Trooper David L. Johnson.

Aplt. App. 33. Under the heading “Specific Allegations of Misconduct and Negligence,” all of the above intentional torts are again listed with the allegation that, “Ms. Mecham alleges that the troopers’ actions were unreasonable and were calculated to physically injure, intimidate, and terrorize her.”² Aplt. App. at 35. Finally, the Notice sets forth a description of Ms. Mecham’s injuries so far as they were known at the time. Aplt. App. at 35 - 36. Ms. Mecham’s Notice of Claim met or exceeded the requirements of § 63-30-11 in every respect. Without question, it gave “general notice of an intent to sue,” as required by the rule in *Peeples*. *Peeples v. State*, 2004 UT App 328, ¶ 11.

D. *Straley v. Halliday* Is Readily Distinguishable. Before the Tenth Circuit Court of Appeals, Appellants’ sole contention was that the rule in *Straley v. Halliday*,

²While the Notice also alleges negligence on the part of the troopers, Ms. Mecham determined that she would not pursue those claims when she filed her Complaint.

2000 UT App 38, 997 P.2d 338 requires claimants to provide information beyond the plain language of § 63-30-11, when bringing claims against individual employees. Not only is this a tortured reading of the holding in that case, but, the facts in that case are readily distinguishable from the facts here. The plaintiff in *Straley*, acting *pro se*, filed two notices of claim: the first failed to allege acts which constituted malice,³ the second notice alleged malice but was untimely and was not filed with the Attorney General as required by the Act. *Straley*, 997 P.2d at 342, note 3 at 340. The trial court dismissed Straley's Amended Complaint, finding that he had failed to comply with the Governmental Immunity Act. *Id.* The Utah Court of Appeals affirmed ruling that, the variance between the notice of claim and the Amended Complaint was more than a simple expansion of what was alleged in the notice and affirmed the dismissal. *Id.*

In the present case, unlike the plaintiff in *Straley*, Ms. Mecham has not conceded that her timely filed notice is defective in any manner. By the same token, the Appellants have not contended that the notice was substantially different from the allegations in the complaint except that the word "malice" is not expressly used. The allegations in Ms. Mecham's Notice of malicious conduct, calculated to injure, intimidate, and terrorize are consistent with the allegations brought forth in the Amended Complaint. Aplt. App. 33 - 36;

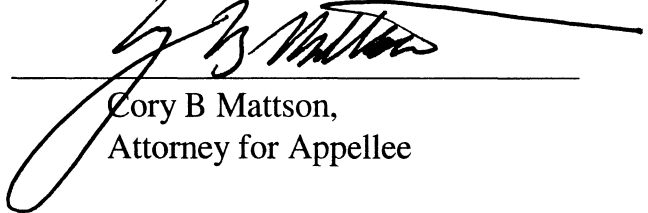
³The insufficiency of the notice in *Straley* was acknowledged by the claimant and, in fact, was the impetus for sending the second notice. *Straley v. Halliday*, 997 P.2d at 340 - 41.

10 - 18. If proven, the allegations in her Notice of Claim and in the Amended Complaint would establish that the troopers acted with malice.

CONCLUSION

In this case, the Court should answer the first certified question that the Governmental Immunity Act waives immunity from suit for individual employees pursuant to § 63-30-4. With regard to the second question, this Court should answer in the negative – that the Governmental Immunity Act, encoded in § 63-30-11, does not require a claimant to expressly aver “fraud” or “malice” in her notice of claim.

DATED AND SUBMITTED this 16th day of January, 2008.



Cory B Mattson,
Attorney for Appellee

ADDENDUM

Utah Code § 63-30-3 (2000) (see Addendum 1).

Utah Code § 63-30-4 (2000) (see Addendum 2).

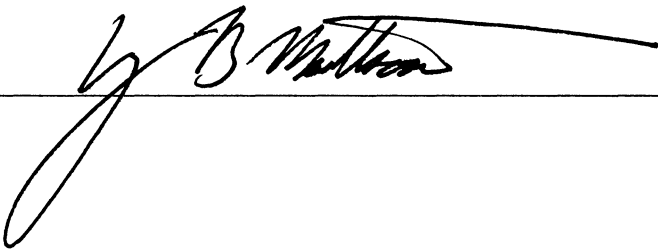
Utah Code § 63-30-11 (2000) (see Addendum 3).

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **BRIEF OF THE APPELLEE** was served upon Appellants' counsel at the address listed below, by depositing the same in the United States mail, postage pre-paid on the 16th day of January, 2008.

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Addendum 1

UTAH CODE UNANNOTATED 2000

VOLUME 3

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2000 GENERAL SESSION

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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) (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 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.

(3) 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.

(4) 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.

1991

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 (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 who act or omission gave rise to the claim, unless:

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

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

(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, under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice.

1

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.

19

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.

19

63-30-7. Repealed.

19

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.

19

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.

19

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:

(1) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;

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(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 (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 or an act or omission gave rise to the claim, unless:

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

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

(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 under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice.

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Immunity from suit of all governmental entities is waived for the recovery of any property real or personal or for 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.

1

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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 the 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.

19

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 the 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.

19

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:

(1) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;

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(2) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights;

(3) the issuance, denial, suspension, or revocation of or by the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization;

(4) a failure to make an inspection or by making an inadequate or negligent inspection;

(5) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;

(6) a misrepresentation by an employee whether or not it is negligent or intentional;

(7) riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;

(8) the collection of and assessment of taxes;

(9) the activities of the Utah National Guard;

(10) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;

(11) any natural condition on publicly owned or controlled lands, any condition existing in connection with an abandoned mine or mining operation, or any activity authorized by the School and Institutional Trust Lands Administration or the Division of Forestry, Fire and State Lands;

(12) research or implementation of cloud management or seeding for the clearing of fog;

(13) the management of flood waters, earthquakes, or natural disasters;

(14) the construction, repair, or operation of flood or storm systems;

(15) the operation of an emergency vehicle, while being driven in accordance with the requirements of Section 41-6-14;

(16) a latent dangerous or latent defective condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them;

(17) a latent dangerous or latent defective condition of any public building, structure, dam, reservoir, or other public improvement;

(18) the activities of:

(a) providing emergency medical assistance;

(b) fighting fire;

(c) regulating, mitigating, or handling hazardous materials or hazardous wastes;

(d) emergency evacuations; or

(e) intervening during dam emergencies; or

(19) the exercise or performance or the failure to exercise or perform any function pursuant to Title 73, Chapter 5a or Title 73, Chapter 10 which immunity is in addition to all other immunities granted by law. 1996

63-30-10.5. Waiver of immunity for taking private property without compensation.

(1) As provided by Article I, Section 22 of the Utah Constitution, immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation.

(2) Compensation and damages shall be assessed according to the requirements of Title 78, Chapter 34, Eminent Domain. 1991

63-30-10.6. Attorneys' fees for records requests.

(1) Immunity from suit of all governmental entities is waived for recovery of attorneys' fees under Sections 63-2-405 and 63-2-802.

Notwithstanding Section 63-30-11:

(a) a notice of claim for attorneys' fees under Subsection (1) may be filed contemporaneously with a petition for review under Section 63-2-404; and

(b) Sections 63-30-14 and 63-30-19 shall not apply.

(2) Any other claim under this chapter that is related to a claim for attorneys' fees under Subsection (1) may be brought contemporaneously with the claim for attorneys' fees or in subsequent action. 11

63-30-11. Claim for injury — Notice — Contents Service — Legal disability [Effective on July 1, 2001].

(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 the 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. 1998

Claim for injury — Notice — Contents — Service — Legal disability — Appointment of guardian ad litem [Effective July 1, 2001].

(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. 2000

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.

1998

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.

1998

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 its insurance carrier has failed to approve or deny the claim.

1965

63-30-15. Denial of claim for injury — Authority and time for filing action against governmental entity.

(1) If the claim is denied, a claimant may institute an action in the district court against the governmental entity or an employee of the entity.

(2) The claimant shall begin the action within one year after denial of the claim or within one year after the denial period specified in this chapter has expired, regardless of whether or not the function giving rise to the claim is characterized as governmental.

1987

63-30-16. Jurisdiction of district courts over actions — Application of Rules of Civil Procedure.

(1) The district courts shall have exclusive original jurisdiction over any action brought under this chapter.

(2) An action brought under this chapter may not be tried as a small claims action and shall be governed by the Utah Rules of Civil Procedure to the extent they are consistent with this chapter.

1999

63-30-17. Venue of actions.

Actions against the state may be brought in the county in which the claim arose or in Salt Lake County. Actions against a county may be brought in the county in which the claim arose, or in the defendant county, or, upon leave granted by a district court judge of the defendant county, in any county contiguous to the defendant county. Leave may be granted ex parte. Actions against all other political subdivisions including cities and towns, shall be brought in the county in which the political subdivision is located or in the county in which the claim arose.

1983

63-30-18. Compromise and settlement of actions.

(1) A political subdivision, after conferring with its legal officer or other legal counsel if it does not have a legal officer, may compromise and settle any action as to the damages or other relief sought.

(2) The risk manager in the Department of Administrative Services may:

(a) compromise and settle any claim of \$25,000 or less in damages filed against the state for which the Risk Management Fund may be liable;

(b) with the concurrence of the attorney general or his representative and the executive director of the Department of Administrative Services, compromise and settle any claim of \$25,000 to \$100,000 in damages for which the Risk Management Fund may be liable; and