

2011

# Jon Van De Grift v. Utah : Brief of Appellee

Utah Supreme Court

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No. 20110994

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**IN THE UTAH SUPREME COURT**

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JON VAN DE GRIFT, et al.,

Plaintiffs - Appellants,

vs.

STATE OF UTAH, et al.,

Defendants - Appellees.

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**APPELLEES' ANSWER BRIEF**

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Appeal from a final judgment and order of the Third Judicial District  
Court, Honorable Paul G. Maughan, Presiding

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UTAH APPELLATE COURTS

APR 04 2012

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## LIST OF ALL PARTIES

The Plaintiffs and Appellants:

Jon Van de Grift, Sharon Van de Grift, The Jon Howard Van de Grift and Sharon Ann Dudek Van De Grift Family Trust, Texas Lubbock Square VDG, LLC, Oklahoma Sunnyview Apartments VDG, LLC, Roger Mauer, Cynthia Mauer, Tim Lewis, Sylvia Haskvitz, Haskvitz Sunnyview, LLC, Lewis Sunnyview, LLC, Marlene Walshin, Matthew Walshin, The Marlene J. Walshin Trust, Rancho Lane, LLC, MW Lubbock, LLC, and MRW Lubbock, LLC.

The Defendants and Appellees:

The State of Utah, the Utah Board of Pardons and Parole, and the Utah Department of Corrections.

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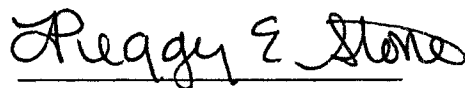


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1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 4681 words, excluding those parts of the brief exempted by Utah R. App. P. 24 (f)(10(B)).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X3 in New Century Schoolbook 14 point font (headings in 16 point, footnotes in 14 point).

Dated this 4<sup>th</sup> day of April, 2012.



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**IN THE UTAH SUPREME COURT**

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**APPELLEES' ANSWER BRIEF**

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The State of Utah, the Utah Board of Pardons and Parole, and the Utah Department of Corrections, collectively, “State,” submit the following Answer Brief.

**Jurisdiction**

This appeal arises from the Plaintiffs’, collectively referred to as “VDG Plaintiffs,” suit against the State for damages allegedly caused by the State’s negligence in supervising a parolee and in failing to warn

them about him. This Court has appellate jurisdiction over the district court's final decision pursuant to Utah Code Ann. § 78A-3-102.

## **Issues Presented**

### **I. Governmental Immunity (Deceit exception)**

The governmental immunity act preserves the State's immunity if the injury arises out of, in connection with, or results from deceit. And Utah courts construe the immunity act to preserve immunity. The VDG Plaintiffs' damages resulted from a parolee's taking their money in a Ponzi scheme, in other words, the parolee's deceit. Did the district court correctly rule that the deceit exception applied to preserve the State's immunity?

#### **A. Standard of review:**

A district court's decision whether to dismiss claims on grounds of governmental immunity is a legal determination that this Court reviews for correctness. *Hall v. Utah State Dep't of Corrs.*, 2001 UT 34, ¶ 11, 24 P.3d 958. Moreover, a district court's statutory interpretation

is a legal question that this Court also reviews for correctness.

*Blackner v. Dep't of Transp.*, 2002 UT 44, ¶ 8, 48 P.3d 949.

**B. Preservation of issue:**

The State raised this issue in its motion to dismiss and supporting memoranda. R. 32-42, 91-98. The district court granted the motion. R. 101-105. The district court's written decision is attached as Addendum A, and the final order is attached as Addendum B.

**II. Governmental Immunity (Incarceration exception)**

The immunity act also preserves the State's immunity when the injury arises out of, in connection with, or results from the incarceration of any person in prison or any other place of legal confinement. The VDG Plaintiffs' injuries were caused by Utah State prison parolee, Higgins. Higgins was in prison for securities fraud and his parole conditions included prohibitions on handling others' money and leaving the state without prior written permission from his parole officer. Can the district court's ruling on the State's immunity from suit be affirmed on this alternative ground?

**A. Standard of review:**

The standard of review for this issue is the same as that for Issue I above.

**B. Preservation of issue:**

The State raised this issue in its motion to dismiss. R. 32-42, 91-98. The district court did not reach the issue, dismissing the case on the deceit exception. But this Court may affirm the district court on any ground that is apparent from the record, even though the district court did not rely on that ground. *Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158; *Dipoma v. McPhee*, 2001 UT 61, ¶ 18, 29 P.3d 1225.

**III. Governmental Immunity (Motion to dismiss)**

The immunity act provides the State immunity from suit, not a mere liability defense. Here, the complaint's allegations, accepted as true, establish that the injury arises out of enumerated exceptions to the waiver of immunity for negligence claims. Did the district court correctly entertain the State's motion to dismiss?

**A. Standard of review:**

The standard of review for this issue is the same as that for Issue I above.

**B. Preservation of issue:**

The VGD Plaintiffs raised this issue in their opposition to the State's motion to dismiss. R. 43-90.

**Determinative Constitutional Provisions, Statutes and Rules**

The relevant portions of the immunity act, including Utah Code Ann. §§ 63G-7-301 (5)(b), 5(f), 5(j) are contained in the body of the brief and are also attached as Addendum C.<sup>1</sup>

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<sup>1</sup> The VDG Plaintiffs incorrectly use this portion of their brief to argue their case. Utah R. App. P. 24 (a)(6) requires that determinative constitutional provisions, statutes, ordinances, rules, and regulations should be part of the brief or attached as addenda to the brief. It does not allow for a discussion of cases, which is more appropriately part of the argument section.

## **Statement of the Case**

### **Nature of the Case**

The VDG Plaintiffs, all out of state residents, sued the State for negligence. The complaint alleged that the State failed to properly supervise a parolee that allegedly defrauded the VDG Plaintiffs out of millions of dollars through a Ponzi scheme. The complaint also alleged that the State failed to warn the VDG Plaintiffs about the parolee, who had been in prison for securities fraud. The district court ruled that the State was immune from suit.

### **Course of the Proceedings and Disposition Below**

On April 21, 2011, the VDG Plaintiffs filed their civil suit in the third district court, *Van de Grift, et al. v. State of Utah, et al.* case No. 110909827. R. 1-24. The complaint named the state of Utah, the Board of Pardons and Parole, the Utah Department of Corrections, and several state employees as defendants.

On May 16, 2011, the State filed a motion to dismiss with supporting memoranda. R. 32-42. The VDG Plaintiffs opposed the

motion, R. 43-90, and the State replied. R. 91-98. After briefing, the district court issued its ruling dismissing the complaint. R. 101-105. Subsequently, the parties stipulated to dismiss the individual defendants from the case. R. 106-107.

The VDG Plaintiffs timely filed their notice of appeal on September 28, 2011. R. 110-111.

### **Statement of Facts**

Richard Higgins (Higgins), not a party to this action, was released from the Utah State Prison on parole in 2005, after serving a five year sentence for securities fraud and selling securities without a license. R. 5, 101. At the time of his release, Higgins entered into a parole agreement with the State. R. 6. The agreement contained conditions, which included a prohibition on Higgins leaving Utah without prior written permission from his parole officer. *Id.* In addition, Higgins was not to handle other people's money, was not to be self-employed or be principal in any company, and not knowingly associate with any person involved in criminal activity. *Id.* The complaint alleged that the State



was to supervise Higgins and ensure that he complied with his parole agreement.<sup>2</sup> *Id.*

The VDG Plaintiffs are all out-of-state residents. R. 3-4. They alleged further that between 2005 and 2009, Higgins and his partners<sup>3</sup> began to mentor investors “under fraud and pretense.” R. 6. Allegedly, Higgins and his partners began soliciting the VDG Plaintiffs, as well as others, to invest in a real estate venture through a company called Madison Group. The VDG Plaintiffs began to invest money with Higgins and his partners “under the false representations” that Higgins and his partners would manage investments, distribute proceeds, and maintain buildings. *Id.* The VDG Plaintiffs allege that Higgins and his partners began double closing on properties, diverting investors’ money for personal use, refused to pay on returns, failed to do as agreed in maintaining properties, and did not distribute proceeds. R. 7; *see also Appellants’ Opening Brief* at p. 7.

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<sup>2</sup> The individual defendants were dismissed by stipulation. R. 106-109.

<sup>3</sup> Higgins’ partners included his son Brandon Higgins and Allan Christensen.

Allegedly, Higgins' actions resulted in the loss of millions of dollars of the VDG Plaintiffs' money. R. 6. The VDG Plaintiffs alleged that the State either knew of Higgins' actions or was negligent in his supervision. R. 8. After learning of Higgins' fraudulent acts, the Board of Pardons and Parole revoked his parole. R. 9.

### **Summary of the Argument**

The State retains its immunity from suit when the injuries arise out of, in connection with, or result from numerous situations. Here, the deceit exception applies to bar the suit. The deceit exception is contained with other tortious conduct including assault and battery. Under the statute's plain meaning and cases interpreting the assault and battery exception, the status of the tortfeasor is irrelevant when determining immunity.

Moreover, if the deceit exception were to apply only in the instance when a state employee committed the deceit, another section of the statute would be rendered superfluous and without meaning. The statute expressly retains immunity for the misrepresentation of an

employee, whether negligent or intentional. Eliminating that provision violates basic statutory construction rules.

The incarceration exception also applies to retain the State's immunity from suit in this case. The tortfeasor here was on parole after being in state prison for securities fraud and other crimes. His parole agreement specifically prohibited him from leaving Utah and from handling other people's money. The loss of the VDG Plaintiffs' money is causally connected to the parolee's incarceration in prison and his later confinement to the state during parole.

Finally, the immunity act provides immunity from suit and not just a defense to liability. Immunity from suit includes immunity from the burdens of litigation, including discovery. When a complaint's allegations establish that the plaintiffs' injuries arise out of, in connection with, or result from one of the enumerated categories, a motion to dismiss the suit is appropriate. Otherwise, the State's immunity from suit is lost.

## Argument

### I. The deceit exception to the immunity waiver bars the suit.

The district court correctly ruled that the immunity act bars the VDG Plaintiffs' suit against the State. Utah courts follow the well-settled, three-step analysis to determine whether the State retains immunity from suit. *Johnson v. Utah Dep't of Transp.*, 2006 UT 15, ¶ 17, 133 P.3d 402; *Wagner v. State*, 2005 UT 54, ¶ 12, 122 P.3d 599; *Ledfors v. Emery County Sch. Dist.*, 849 P.2d 1162, 1164 (Utah 1993). Here, the challenge is limited to the third step – whether an exception to the waiver applies to retain the State's immunity. The district court ruled that the act barred the VDG Plaintiffs' suit because their injuries arose out of, in connection with, or resulted from deceit. The district court's application of the deceit exception was correct.

The VDG Plaintiffs do not dispute that their injuries resulted from the tort of deceit.<sup>4</sup> But they contend that the deceit exception is

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<sup>4</sup>In Utah, the tort of deceit consists of five elements: 1. “a false representation of fact;” 2. the defendant knew or believed the representation was false; 3. an intention to induce the plaintiff “to act or refrain from acting” in reliance on the representation; 4. justifiable reliance by the plaintiff on the representation in taking action or in

narrowly confined to only those cases where a government employee committed the tort. Their construction is not supported and should be rejected.

**A. Plain statutory language supports the district court's interpretation of the deceit exception.**

The controlling provision here, Utah Code Ann. § 63G-7-301 (5)(b), confers immunity when the injuries arise out of several kinds of tortious conduct:

(5) Immunity from suit of each governmental entity is not waived . . . if the injury arises out of, in connection with, or results from:

...

(b) 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.

(Emphasis added). Utah's courts have consistently acknowledged the necessity of governmental immunity in protecting the delivery of vital governmental services. And statutory wording is strictly construed when necessary to preserve immunity. *Hall*, 2001 UT 34 at ¶ 14; see

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refraining from it; and 5. damages suffered a result. *Bennett v. Jones Waldo Holdbrook & McDonough*, 2003 UT 9, ¶ 74, 70 P.3d 17.

also, *Taylor v. Ogden City Sch. Dist.*, 927 P.2d 159, 162 (Utah 1996); *Epting v. State*, 546 P.2d 242, 243 (Utah 1976).

This Court has interpreted the assault and battery exception on many occasions. See e.g., *Wagner*, 2005 UT 54; *Sanders v. Leavitt*, 2001 UT 78, ¶ 29, 37 P.3d 1052; *Taylor*, 927 P.2d at 164; *SH ex rel. RH v. State*, 865 P.2d 1363 (Utah 1993); *Higgins v. Salt Lake County*, 855 P.2d 231 (Utah 1993); *Ledfors*, 849 P.2d at 1164. In some of those cases, plaintiffs made the same argument that the VDG Plaintiffs make here, that in order for the exception to apply, the government employee must have committed the tort. This Court rejected those arguments and has consistently held that “the status of the assailant who committed the assault or battery is irrelevant under our long-accepted interpretation of the Act . . . .” *Sanders*, 2001 UT 78 at ¶ 29. The conclusion is based on the statute’s plain language because subsection 301(5)(b) does not contain language that confines immunity to cases in which a government employee commits the tort. See *Taylor*, 927 P.2d at 164.

In *Taylor* this Court stated that “[i]n the codification of the assault exception, [n]othing suggests that the one committing the assault need be a governmental employee.’ Thus, applying the exception strictly to preserve sovereign immunity, its protective sweep must be applied to include assaults committed by nongovernment assailants.” *Id.*

Similarly, in *Higgins*, the plaintiff argued that the exception did not preserve immunity for injuries arising from an assault or battery if the assailant was not a government employee. *Higgins*, 855 P.2d at 240. This Court found the argument was “without merit” and that immunity was preserved by the statute’s “plain language.” *Id.* The Court held further that the “statute simply does not contain the distinction on which Higgins stakes her claim. In fact, its language suggests that *‘the legislature contemplated no such distinction.’*” *Id.* (emphasis added).

The reasoning of those cases applies equally here because the torts of deceit and battery are listed in the same provision. *See, e.g. Sill v. Hart*, 2007 UT 45, ¶ 7, 162 P.3d 1095 (statutory terms interpreted in harmony with other provisions in the same statute and as a whole).

There is simply no authority or statutory language that supports a different interpretation for deceit. Thus, under the statute's plain language, the deceit perpetrator's status is irrelevant.

To be sure, this Court has criticized the immunity act's reach from time to time. But the Court has also recognized that "the legislature has spoken with clarity on the question of immunity," and thus this Court is "constrained by the plain language of the Act and [by] prior case law on this point." *Taylor*, 927 P.2d at 169 (Durham, J., dissenting); *Sanders*, 2001 UT 78, ¶ 44, 37 P.3d 1052, 1062 (Durham, J. concurring); *Ledfors*, 849 P.2d at 1167; *see also S.H.*, 865 P.2d at 1365 and at 1366 (Hall, C.J., dissenting); *Tiede v. State*, 915 P.2d 500, 504 (Utah 1996); *Malcolm v. State*, 878 P.2d 1144, 1147 (Utah 1994). It is therefore not for the VDG Plaintiffs to tailor the State's waiver of immunity more narrowly to incorporate a condition that is not part of the statutory language. That is a task reserved for the Utah State Legislature. This Court should affirm the district court's order granting the State's motion to dismiss and dismissing the VDG Plaintiffs' complaint with prejudice.



**B. The district court’s interpretation complies with rules of statutory construction.**

The district court’s interpretation of the deceit exception comports with well-accepted rules of statutory construction. When interpreting a statute, courts “seek to give effect to the purpose and intent of the legislature.” *Hoyer v. State*, 2009 UT 38, ¶ 22, 212 P.3d 547. And when conducting a textual analysis, the court considers the literal meaning of each term and avoids constructions that would render portions of the statute superfluous or inoperative. *Id.*; *Grappendorf v. Pleasant Grove City*, 2007 UT 84, ¶ 9, 173 P.3d 166. Indeed, the statute is construed to give effect to all of the statutory terms because the Court “assumes the legislature used each term advisedly and in accordance with its ordinary meaning.” *Marion Energy, Inc. v. KFJ Ranch P’ship*, 2011 UT 50, ¶ 14, 267 P.3d 863.

Significantly here, in addition to providing immunity for injuries caused by deceit, the act provides immunity when injuries result from “a misrepresentation by an employee whether or not it is negligent or intentional. Utah Code Ann. § 63G-7-301(5)(f). Deceit is the “action or

practice of deceiving someone by concealing or misrepresenting the truth.” Oxford English Dictionary, available at [www.oxforddictionaries.com](http://www.oxforddictionaries.com). If the deceit exception is limited to only circumstances where the government employee commits the tort, subsection (f)’s exception for misrepresentation by an employee is superfluous and has no meaning. A narrow construction of the deceit exception violates that basic rule of statutory construction.

**C. Interpretation of other sections does not undermine the district court’s interpretation of the deceit exception.**

The district court did not err in its interpretation of the deceit exception. And interpretation of other immunity sections does not undermine the court’s ruling. Notably, this Court held that for a correct interpretation of the permit exception to the immunity waiver, the “government entity claiming immunity must have” acted to issue or failed to issue the permit, or license or other order. *Francis v. State*, 2010 UT 62, ¶ 15, 248 P.3d 44. But that case was construing § 63G-7-301(5)(c), not subsection (b). The VDG Plaintiffs cite no authority for the proposition that *Francis*’s construction of subsection 301(5)(c)

applies to subsection 301(5)(b). Nor do they identify language in subsection 301(5)(b) that would justify a similar interpretation. To the contrary, as discussed above, the cases interpreting subsection 301(5)(b) have consistently held that the status of the actor is irrelevant under subsection 301(5)(b) and that the plain language of subsection 301(5)(b) warrants this result. Nothing in *Francis* indicates that those decisions have been overruled.

**D. The district court’s application of the act to preclude all of the claims was correct.**

The district court correctly dismissed all of the VDG Plaintiffs’ claims based on the immunity act. It matters not the theory of liability pleaded or the number of alternative theories or grounds of liability that the VDG Plaintiffs make. The governmental immunity act specifically states that immunity is retained if the “*injury* arises out of, in connection with, or results from” an enumerated category. *Id.* § 63G-7-301(5) (emphasis added).

The legislature’s use of the term injury, instead of claim, is significant. “The determinant of immunity is the type of conduct that

produces the **injury.**” *Ledfors*, 849 P.2d at 1166 (emphasis added). Unlike the Federal Torts Claim Act, which immunizes the federal government from claims that arise out of categories, Utah’s immunity act immunizes the state for injuries. *See id.* Thus, if there is a “but for” causation between one of the exceptions and plaintiffs’ injury, the state’s immunity is retained. And this Court has consistently rejected attempts to circumvent immunity by careful pleading or crafting of theories of liability, or by pleading alternative claims. *Id.* at 1166; *Taylor*, 927 P.2d at 164. In other words, the allegations of negligence – theories of liability – against the government entity are immaterial. “Such allegations [are] merely ‘attempts to evade the statutory categories by recharacterizing the supposed cause of the injury.’” *Taylor*, 927 P.2d at 164 (quoting *Tiede*, 915 P.2d at 502).

Even if a particular claim is in no way related to an exception to the immunity waiver, that claim may still be precluded, if the injury for which the plaintiff seeks redress is causally related to the exception. The district court correctly recognized this. Thus, although the VDG Plaintiffs’ “failure to warn” and “failure to supervise” claims may have

nothing to do with the deceit exception,<sup>5</sup> the injury for which they seek redress, the loss of their investments, does. Therefore all of the claims are barred.

The VDG Plaintiffs cite *Doe v. Argueles*, 716 P.2d 279 (Utah 1985), to support their contention that the district court erred. But that decision does not apply here because it addressed only discretionary function immunity and did not mention, much less construe, the immunities at issue here. Thus, *Argueles* may be instructive on discretionary function immunity, but it offers nothing to support the VDG Plaintiffs here. The district court correctly applied an exception to the waiver of immunity to dismiss all of the VDG Plaintiffs' claims.

## **II. The incarceration exception also bars the suit.**

The district court dismissed the case based on the deceit exception and did not reach the incarceration exception. But this Court may affirm the district court on this alternative ground. *Bailey*, 2002 UT 58 at ¶ 10.

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<sup>5</sup> The same is true of the incarceration exception, discussed below in section II.

Section 301(5)(j) retains the State's immunity if the injuries arise out of, in connection with, or result from "the incarceration of any person in any state prison . . . ." The VDG Plaintiffs' injuries are the loss of their investment money due to parolee Higgins' fraud. Higgins was in the Utah State Prison for securities fraud and related charges. R. 5, 101. When he was paroled in 2005, he was prohibited from handling other people's money and from leaving the state without prior written permission from his parole officer. R. 6.

Those allegations show that the VDG Plaintiffs' claims are also barred by the incarceration exception. This Court has broadly interpreted the phrase "arises out of" and has found that it plainly requires "only that there be some causal nexus between the risk and the resulting injury." *Blackner*, 2002 UT 44, ¶ 15 (citing *Taylor*, 927 P.2d at 163). In another case involving the incarceration exception, this Court reiterated that the phrase "arising out of" is "very broad, general, and comprehensive," and that the phrase "imports a concept of causation" which this Court has long since concluded means "originating from, incident to, or connected with the item in question." *Peck v. State*, 2008

UT 39, ¶ 11, 191 P.3d 4 (citing *Taylor*, 927 P.2d at 163 and quoting *Nat'l Farmers Union Prop. & Cas. Co. v. W. Cas. & Sur. Co.*, 577 P.2d 961, 963 (Utah 1978) (internal quotation marks omitted)). The *Peck* court examined the other terms set out in the statute's "broad introductory phrase," *id.* ¶ 12, and determined that "in connection with" and "results from" . . . similarly connote a causal link between the injury and the government activity for which sovereign immunity has not been waived." *Id.* ¶ 11. The Court concluded that "any injury that is caused by or originates from [the enumerated conduct] falls within the . . . exception." *Id.*

In *Peck*, the plaintiff sued the state for negligently allowing him to fall on his face while he was being physically restrained by a Utah Highway Patrol trooper. *Id.* ¶ 1. Peck fell after he had been arrested and handcuffed, but before the trooper could place him in a police cruiser to be transported to jail. *Id.* This Court held that Peck's claim was barred because there was a causal connection between Peck's injury and his incarceration in a place of legal confinement; that Peck's injury arose out of his incarceration; and that his claim therefore fell

within the “plain language of Utah Code section 63-10-10(10) (1997).”<sup>6</sup>

*Id.*

The incarceration exception requires that a person be under the state’s control when the injury occurs. In *Epting v. State*, 546 P.2d 242, 243 (Utah 1976), the court held that the State would be immune if a convict who escaped a work release program was “still under the control of the prison authorities so that his conduct would ‘arise out of the incarceration of any person in (the) state prison . . . .’” *Accord, Kirk v. State*, 784 P.2d 1255, 1257 (Utah 1989) (holding that death caused by an escaped prison inmate arose out of incarceration in a state prison).

Most recently in *Whitney v. Div. of Juv. Justice Servs.*, 2012 UT 12, ¶ 20, – P.3d –, this Court held that a juvenile placed in a non-secure community-based proctor home was not incarcerated in a “place of legal confinement” for purposes of the incarceration exception. The Court held that the exception requires some kind of physical or spacial restriction. *Id.* at ¶ 17.

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<sup>6</sup> The exception was formerly codified in that section.



The VDG Plaintiffs here all live in states other than Utah. R. 3-4. They alleged that the parolee who defrauded them was under the State's supervision and control. R. 6. He was in prison for securities fraud. And a specific condition of his parole prohibited him from leaving Utah without prior written permission from his parole officer. R. 6. Applying *Peck*, *Epting*, and *Whitney* to the complaint's allegations here, the VDG Plaintiffs' injuries arose out of, in connection with, or resulted from Higgins' incarceration because he was confined in prison and then allegedly continued to be under the State's control, through parole conditions and spacial restrictions, when he defrauded them.<sup>7</sup> This Court may affirm the district court's order dismissing the case on this alternative ground.

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<sup>7</sup> Below, the VDG Plaintiffs cited a failed amendment as evidence that incarceration immunity does not apply to injuries caused by parolees. But that reliance is misplaced. *See*, 2A *Sutherland Statutory Construction*, 48:18 (7th ed.). Because “[a]ction on a proposed amendment is not a significant aid to interpretation of an act that was passed years before,” *id.*, the failed amendment should not carry any weight. Moreover, legislative history is irrelevant because the plain language of the incarceration provision is unambiguous.

### **III. The district court properly considered the immunity act in the State's motion to dismiss.**

The district court did not err by entertaining the State's motion to dismiss. And this Court should reject the argument that the motion to dismiss was premature. Governmental immunity is an immunity from suit and not just a defense to liability. *Mecham v. Frazier*, 2008 UT 60, ¶ 13, 190 P. 3d 630. That kind of immunity gives the State the right to avoid the "burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985). The State would lose that right if an immunity-based motion to dismiss could be deemed premature.

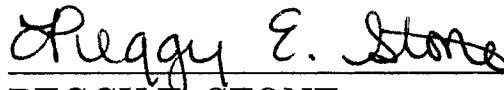
Moreover, a motion to dismiss properly raises an affirmative defense if "the complaint itself set[s] forth everything necessary to satisfy the affirmative defense. . . ." *Zoumadakis v. Uintah Basin Med. Ctr., Inc.*, 2005 UT App. 325, ¶ 6, 122 P.3d 891. If a complaint alleges facts showing that the State is immune, the case should be dismissed under Utah R. Civ. P. 12(b)(6). *See also S.H.*, 865 P.2d at 1364, 1365; *Peck*, 2008 UT 39, ¶ 2 (state's interlocutory appeal from denial of a motion to dismiss). Here, it was proper for the district court to

entertain the State's motion to dismiss because the immunity arguments were based solely on the complaint's allegations.

### **Conclusion**

The district court's order dismissing the VDG Plaintiffs' complaint was correct. The suit is barred by both the deceit and incarceration exceptions to the State's waiver of immunity for negligence. This Court should affirm the district court in all respects.

Dated this 4th day of April, 2012.



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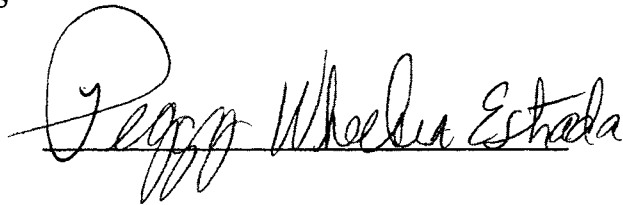
PEGGY E. STONE

Assistant Utah Attorney General  
Attorney for State of Utah, Board of  
Pardons and Parole, and Department of  
Corrections

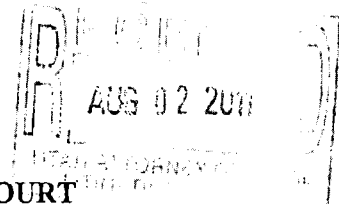
## Certificate of Service

This is to certify that two copies of the foregoing,  
**APPELLEES' ANSWER BRIEF**, and an electronic copy of the brief on  
computer disk were mailed by U.S. Mail, postage paid, to the following  
this 4<sup>th</sup> day of April, 2012:

Marcus R. Mumford  
Mumford West & Snow  
15 West Temple Ste 1000  
Salt Lake City UT 84101  
Attorney for the VDG Plaintiffs

A handwritten signature in black ink, reading "Peggy Wheeler Estrada". The signature is written in a cursive style with a large initial "P" and a long horizontal stroke at the end.

# ADDENDUM A



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

JON VAN DE GRIFT, et al,	:	RULING ON
	:	MOTION TO DISMISS
Plaintiffs,	:	
	:	Case No. 110909827
v.	:	
	:	Judge Paul G. Maughan
STATE OF UTAH, et al,	:	
	:	Date: May 2, 2011
Defendants.	:	

This matter is before the Court on the Defendants' Motion to Dismiss. Though Defendants have requested a hearing on this Motion, the Court finds that the issues have been authoritatively decided and no hearing is necessary. Having fully considered the memoranda, the Court finds that the Motion must be GRANTED.

The Plaintiffs allege that the State of Utah, its departments, officials and employees did not adequately supervise parolee Richard Higgins. Specifically, Higgins was previously incarcerated for securities fraud and selling unregistered securities without a license. He was released in March 2005. As conditions of his parole, Higgins was not to leave the State without prior written permission from his probation officer, was not to handle other people's money, was not to be self-employed or a principal in any company, and was not to knowingly associate with any person involved in criminal activity or convicted of a felony. The Defendants were to supervise Higgins. Higgins violated these conditions, orchestrating a Ponzi scheme which defrauded the Plaintiffs out of money. On or about February 7, 2008, the Plaintiffs informed the Defendants of Higgins' activities. Higgins' parole was revoked. The Plaintiffs allege that the Defendants have blocked their efforts to discover facts about Higgins' illegal activities which would suggest liability on the part of the Defendants for negligent supervision, failure

to warn, and failure of policy, customs and/or procedures of the Defendants.

The Plaintiffs have brought claims against the Defendants for (1) Negligent Supervision; (2) Gross Negligence; (3) Failure to Warn and (4) Negligent Misrepresentation.<sup>1</sup> The Defendants argue that they are immune from suit. Specifically, the Defendants say that the State of Utah, Utah Board of Pardons and Parole, and Department of Corrections are immune because the Plaintiffs' damages arise out of three immune situations - deceit, misrepresentation, and incarceration in a state prison. The remaining Defendants are allegedly immune because the Complaint alleges only that they acted in the scope of their employment.

Pursuant to Utah Code Annotated §63G-7-301(4), "[i]mmunity from suit of each governmental entity is waived as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment." All of the Plaintiffs' allegations assert that the governmental entity or agency was negligent in some manner because of the conduct of their employees. There is also no dispute that all of the employee defendants were acting in the scope of their employment when they committed these allegedly negligent acts. Thus, it appears at first blush that governmental immunity has been waived here. However, "[i]mmunity from suit of each governmental entity is not waived . . . if the injury arises out, in connection with, or results from: . . . deceit; . . . a misrepresentation by an employee whether or not it is negligent or intentional; [or] . . . the incarceration of any person in any state prison, county or city jail, or other place of legal confinement."

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<sup>1</sup> The Plaintiffs have also asserted a claim for Respondeat Superior. This does not state a separate basis for relief. Instead, it is pled as a method to hold the entity defendants liable for actions of their employees.

The Plaintiffs' first three causes of action "arise[] out" of Higgins' deceit.<sup>2</sup> "In ordinary usage, the words 'arises out of' import a concept of causation. The term 'arising out of' is ordinarily understood to mean originating from, incident to, or connected with the item in question. . . . Thus, for [the Defendants] to be immune from liability for [the Plaintiffs'] injuries, the injuries must have had some causal link to the [deceit]." *Taylor v. Ogden School Dist.*, 927 P.2d 159, 163 (Utah 1996). It is clear from the Complaint that the harm caused to the Plaintiffs has some causal link to Higgins' deceit. Though the Plaintiffs argue that the harm arose from the Defendants' failure to supervise, etc. Higgins, the appellate courts have rejected similar attempts to "recharacteriz[e] the supposed cause of injury." *See, e.g., Malcolm v. State*, 878 P.2d 1144, 1146-47 (Utah 1994).

The Plaintiffs' final cause of action is for Negligent Misrepresentation. The Plaintiffs allege that the Defendants have negligently misrepresented or withheld information regarding Higgins' supervision. This is also a claim for which the Defendants are immune from suit. As noted above, the government has not waived its immunity for misrepresentations by employees whether or not they are negligent or intentional.

The Court rejects the Plaintiffs' argument that claims of governmental immunity are affirmative defenses, not appropriately raised in a motion to dismiss. Because the Court can determine that the Defendants are immune based solely on the facts in the Complaint, it is appropriate for the Defendants to seek dismissal. Further, governmental immunity is commonly addressed in motions to dismiss. *See, e.g., Peck v. State*, 2008 UT 39, 191 P.3d 4 (reversing the district court's denial of a motion to dismiss

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<sup>2</sup> Because the Court finds that these causes of action arose from a "deceit," the Court does not consider the Defendants' alternative argument that the causes of action arose from Higgins' incarceration.

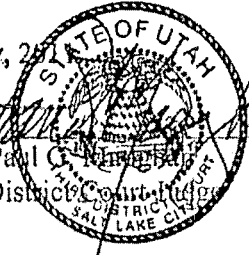


based upon governmental immunity).

For the foregoing reasons, the Defendants' Motion to Dismiss must be GRANTED.

SO ORDERED this 29 day of July, 2011

  
\_\_\_\_\_  
Judge Paul C. Hinkle  
Third District Court Judge  
SALT LAKE CITY



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 110909827 by the method and on the date specified.

MAIL: MARCUS R MUMFORD 299 S MAIN 13TH FL SALT LAKE CITY, UT  
84111-0857

MAIL: REED M STRINGHAM III 160 E 300 S 6TH FLR POB 140856 SALT  
LAKE CITY UT 84114-0856

Date: July 29, 2011

Amy Baughman  
Deputy Court Clerk

# ADDENDUM B

REED STRINGHAM (Utah Bar No. 4679)  
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Attorney for Defendants

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

---

Jon Van de Grift, et al.,  
*Plaintiffs*

v.

State of Utah, et al.,  
*Defendants*

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS**

Case Number: 110909827

Judge: Paul G. Maughan

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Defendants State of Utah, Utah Board of Pardons and Parole, Utah Department of Corrections, Michael R. Sibbett, Donald E. Blanchard, Jesse Gallegos, Curtis L. Garner, Cheryl Hansen, and Stephen Tebben moved to dismiss this action with prejudice. The parties filed supporting and opposing memoranda, and the motion was submitted for decision. On July 29, 2011, the Court granted the motion based on those memoranda and the applicable authority, and for the reasons stated in its July 29, 2011 Ruling on Motion to Dismiss. Since that time, the parties have additionally stipulated to dismiss with prejudice the individual defendants Michael R. Sibbett, Donald E. Blanchard, Jesse Gallegos, Curtis L. Garner, Cheryl Hansen, and Stephen Tebben during the pendency of any appeal and thereafter. That stipulation has been submitted to

the Court and will now be so ordered.

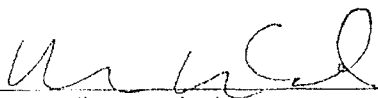
It is therefore ordered that Defendants' Motion To Dismiss is granted, and that this action is dismissed with prejudice.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

BY THE COURT

\_\_\_\_\_  
HONORABLE PAUL G. MAUGHAN  
Third District Court Judge

Approved as to form:

  
\_\_\_\_\_  
Marcus R. Mumford  
Attorney for Plaintiffs

# ADDENDUM C

§ 63G-7-202

Note 17

basis of governmental immunity, and prison officials pleaded defense of immunity in their answer to amended complaint in constitutional action. U.C.A.1953, 63-30-4(3, 4). Bott v. DeLand, 1996, 922 P.2d 732. Appeal And Error ⇨ 179(1)

18. Review

District court's order revealed the basic grounds upon which it relied to grant summary judgment to defendants, and thus included sufficient detail to permit appellate review, where

GENERAL GOVERNMENT

district court stated that it granted summary judgment to one defendant because plaintiff failed to timely file his lawsuit and it granted summary judgment to other two defendants because it determined that, like a previously dismissed defendant, they were entitled to governmental immunity. Rules Civ.Proc., Rule 52(a). Smith v. Four Corners Mental Health Center, Inc., 2003, 70 P.3d 904, 473 Utah Adv. Rep. 50, 2003 UT 23. Appeal And Error ⇨ 856(1)

§ 63G-7-203. Exemptions for certain takings actions

An action that involves takings law, as defined in Section 63L-3-102, is not subject to the requirements of Sections 63G-7-401, 63G-7-402, 63G-7-403, and 63G-7-601.

Laws 2008, c. 382, § 1495, eff. May 5, 2008.

Historical and Statutory Notes

Prior Laws:

Laws 2004, c. 267, § 50

Laws 2007, c. 306, § 70.

C. 1953, § 63-30d-203.

PART 3. WAIVERS OF IMMUNITY

§ 63G-7-301. Waivers of immunity—Exceptions

(1)(a) Immunity from suit of each governmental entity is waived as to contractual obligation.

(b) Actions arising out of contractual rights or obligations are not subject to the requirements of Sections 63G-7-401, 63G-7-402, 63G-7-403, and 63G-7-601.

(c) The Division of Water Resources is not liable for failure to deliver water from a reservoir or associated facility authorized by Title 73, Chapter 2, 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.

(2) Immunity from suit of each governmental entity is waived:

(a) as to any action brought to recover, obtain possession of, or quiet title to real or personal property;

(b) as to any action brought to foreclose mortgages or other liens on real or personal property, to determine any adverse claim on real or personal property, or to obtain an adjudication about any mortgage or other lien that the governmental entity may have or claim on real or personal property;

(c) as to any action based on the negligent destruction, damage, or loss of goods, merchandise, or other property while it is in the possession of any governmental entity or employee, if the property was seized for the purpose of forfeiture under any provision of state law;

- (f) a misrepresentation by an employee whether or not it is negligent or intentional;
- (g) riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;
- (h) the collection of and assessment of taxes;
- (i) the activities of the Utah National Guard;
- (j) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;
- (k) any natural condition on publicly owned or controlled lands;
- (l) any condition existing in connection with an abandoned mine or mining operation;
- (m) any activity authorized by the School and Institutional Trust Lands Administration or the Division of Forestry, Fire, and State Lands;
- (n) the operation or existence of a pedestrian or equestrian trail that is along a ditch, canal, stream, or river, regardless of ownership or operation of the ditch, canal, stream, or river, if:
  - (i) the trail is designated under a general plan adopted by a municipality under Section 10-9a-401 or by a county under Section 17-27a-401;
  - (ii) the trail right-of-way or the right-of-way where the trail is located is open to public use as evidenced by a written agreement between the owner or operator of the trail right-of-way, or of the right-of-way where the trail is located, and the municipality or county where the trail is located; and
  - (iii) the written agreement:
    - (A) contains a plan for operation and maintenance of the trail;
    - (B) provides that an owner or operator of the trail right-of-way or of the right-of-way where the trail is located has, at minimum, the same level of immunity from suit as the governmental entity in connection with or resulting from the use of the trail.
- (o) research or implementation of cloud management or seeding for the clearing of fog;
- (p) the management of flood waters, earthquakes, or natural disasters;
- (q) the construction, repair, or operation of flood or storm systems;
- (r) the operation of an emergency vehicle, while being driven, in accordance with the requirements of Section 41-6a-212;
- (s) the activities of:
  - (i) providing emergency medical assistance;
  - (ii) fighting fire;
  - (iii) regulating, mitigating, or handling hazardous materials or hazardous wastes;
  - (iv) emergency evacuations;
  - (v) transporting or removing injured persons to a place where emergency medical assistance can be rendered or where the person can be transported by a licensed ambulance service; or
  - (vi) intervening during dam emergencies;



(d) subject to Subsection 63G-7-302(1), as to any action brought under the authority of Article I, Section 22, of the Utah Constitution, 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;

(e) subject to Subsection 63G-7-302(2), as to any action brought to recover attorney fees under Sections 63G-2-405 and 63G-2-802;

(f) for actual damages under Title 67, Chapter 21, Utah Protection of Public Employees Act; or

(g) as to any action brought to obtain relief from a land use regulation that imposes a substantial burden on the free exercise of religion under Title 63L, Chapter 5, Utah Religious Land Use Act.

(3)(a) Except as provided in Subsection (3)(b), immunity from suit of each governmental entity is waived as to any injury caused by:

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

(ii) any defective or dangerous condition of a public building, structure, dam, reservoir, or other public improvement.

(b) Immunity from suit of each governmental entity is not waived if the injury arises out of, in connection with, or results from:

(i) 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; or

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

(4) Immunity from suit of each governmental entity is waived as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment.

(5) Immunity from suit of each governmental entity is not waived under Subsections (3) and (4) if the injury arises out of, in connection with, or results from:

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

(b) 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;

(c) 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;

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

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

(t) the exercise or performance, or the failure to exercise or perform, any function pursuant to Title 73, Chapter 10, Board of Water Resources—Division of Water Resources; or

(u) unauthorized access to government records, data, or electronic information systems by any person or entity.

2008, c. 382, § 1496, eff. May 5, 2008.

**Historical and Statutory Notes**

**Prior Laws:**

- Laws 1965, c. 139.
- Laws 1991, c. 76.
- Laws 1991, c. 251.
- Laws 1995, c. 299, § 35.
- Laws 1996, c. 159, § 6.
- Laws 1996, c. 264, § 1.
- Initiative B, adopted Nov. 7, 2000.
- Laws 2001, c. 185, § 1.
- Laws 2004, c. 267, § 13.
- Laws 2005, c. 2, § 279.
- Laws 2005, c. 99, § 1.
- Laws 2007, c. 357, § 1.
- C. 1953, §§ 63-30-5 to 63-30-10.5, 63-30d-301.

**Cross References**

- Bear River development, immunity from suit, see § 73-26-403.
- Comparative negligence, see § 78B-5-818
- Eminent domain, constitutional provision, see Const. Art. 1, § 22.
- Mortgage foreclosures, see § 78B-6-901.
- Property Rights Ombudsman Act, advisory opinions, see § 13-43-206.

**Law Review and Journal Commentaries**

- Case Law Developments: The Assault and Battery Exception to Waiver of Governmental Immunity in Utah. Finch, 1994 Utah L. Rev. 1025 (1994).
- Case Law Developments: Governmental Immunity for Police Officer Negligence in High-Speed Chases. Dansie, 1999 Utah L. Rev. 1027 (1999).
- Case Law Developments: Restoration of Governmental Immunity: The Assault Exception to Immunity Waivers After *Taylor v. Odgen School District*. Kendall, 1997 Utah L. Rev. 1087 (1997).
- Case Note: Town of Castle Rock v. Gonzales and the awful truth: Utah's mandatory enforcement laws make police enforcement of a victim's protective order optional. Joshua J. Bennett, 8 J. L. & Fam. Stud. 405 (2006)
- The Only Way to Manage a Desert: Utah's Liability Immunity for Flood Control. Davis, 8 J. Energy L. & Pol'y 95 (1987).

**Library References**

- Municipal Corporations § 254, 723, 739, 755(1); 848.
- States § 112.1, 112.2(2), 112.2(3), 191.9(1), 191.9(3), 191.9(5).
- Westlaw Topic Nos. 268, 360.
- C.J.S. Municipal Corporations §§ 661 to 663, 685, 691, 696, 806, 808 to 809, 946 to 951.
- C.J.S. States §§ 233, 313, 315 to 319, 321, 533 to 535, 543 to 544, 547, 564.

**United States Supreme Court**

- Absolute immunity,**
  - Acts within scope of duties,
    - State prosecuting attorneys, civil immunity, see *Imbler v. Pachtman*, U.S. Cal. 1976, 96 S.Ct. 984, 424 U.S. 409, 47 L.Ed.2d 128.
  - Discretionary acts,
    - Federal employees, discretionary acts, see *Westfall v. Erwin*, 1988, 108 S.Ct. 580, 484 U.S. 292, 98 L.Ed.2d 619, 56 USLW 4087, 2 IER Cases 1537.
- Conflict between state and federal law,**
  - In general,
    - Eleventh Amendment immunity, waiver, voluntary removal of case to federal court, see *Lapides v. Board of Regents of University System of Georgia*, 2002, 122 S.Ct. 1640, 535 U.S. 613, 152 L.Ed.2d 806, 2002 Daily Journal D.A.R.