

2006

Kristie Pace individually and for and on behalf of
the Estate of William Matthew Pace and all heirs of
the estate v. St. George City Police Department,
City of St. George, John Does 1 through 10 : Brief
of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jesse C. Trentadue; Michael W. Homer; Switter Axland; Shawn M. Guzman; St. George City Attorney; Attorneys for Appellees.

Matthew T. Graff; Mark H. Graff; Matthew T. Graff & Associates; Attorneys for Appellants.

Recommended Citation

Brief of Appellee, *Pace v. St. George Police Department*, No. 20060256 (Utah Court of Appeals, 2006).
https://digitalcommons.law.byu.edu/byu_ca2/6345

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

KRISTIE PACE individually and for and on
behalf of THE ESTATE OF WILLIAM
MATTHEW PACE and ALL HEIRS OF THE
ESTATE,

V.

Defendants/Appellees.

Case No. 20060256-CA

COPY

Jesse C. Trentadue
Michael W. Homer
SUITTER AXLAND
8 East Broadway, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 532-7300
Attorneys for
Defendants/Appellees

Shawn M. Guzman
ST. GEORGE CITY
ATTORNEY
175 East 200 North
St. George, Utah 84770
Telephone: (435) 634-5800
Facsimile: (435) 674-4260
Attorneys for
Defendants/Appellees

Matthew T. Graff
Mark H. Graff
MATTHEW T. GRAFF &
ASSOCIATES
1173 South 250 West,
Suite 311
St. George, Utah 84770
Telephone: (435) 634-8080
Facsimile: (435) 634-9033

Attorneys for
Plaintiffs/Appellants

UTAH COURT OF APPEALS

KRISTIE PACE individually and for and on
behalf of THE ESTATE OF WILLIAM
MATTHEW PACE and ALL HEIRS OF THE
ESTATE,

Plaintiffs/Appellants,

v.

ST. GEORGE CITY POLICE DEPARTMENT,
CITY OF ST. GEORGE, JOHN DOES 1
through 10,

Defendants/Appellees.

**APPELLEES' NOTICE OF
*ERRATUM***

Case No. 20060256-CA

**APPEAL FROM THE FIFTH DISTRICT COURT IN AND
FOR WASHINGTON COUNTY, STATE OF UTAH
JUDGE JAMES L. SCHUMATE**

Jesse C. Trentadue
Michael W. Homer
SUITTER AXLAND
8 East Broadway, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 532-7300
Attorneys for
Defendants/Appellees

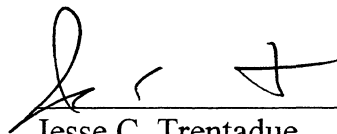
Shawn M. Guzman
ST. GEORGE CITY
ATTORNEY
175 East 200 North
St. George, Utah 84770
Telephone: (435) 634-5800
Facsimile: (435) 674-4260
Attorneys for
Defendants/Appellees

Matthew T. Graff
Mark H. Graff
MATTHEW T. GRAFF &
ASSOCIATES
1173 South 250 West,
Suite 311
St. George, Utah 84770
Telephone: (435) 634-8080
Facsimile: (435) 634-9033
Attorneys for
Plaintiffs/Appellants

In accordance with § 63-30d-401(5) of the *Governmental Immunity Act of Utah*, the City of St. George designated - registered City Recorder Gay Cragun as the person to whom *Notice of Claim* were to be directed at the St. George City Hall, 175 East 200 North, St. George, Utah 84770. In their *Appellate Brief*, however, St. George Appellees incorrectly stated that this designation - registration occurred on "June 6, 2005".¹ **The correct designation - registration date was June 11, 2004.** A certified copy of the Utah Department of Commerce, Division of Corporations and Commercial Codes, Registration of Recorder Gay Cragun as St. George, Utah's designated agent for service was included in the *Addendum* to St. George Appellees' brief, **and it shows the correct designation - registration date of June 11, 2004.** St. George Appellees respectfully request that this correction be noted by the Court.

DATED this 30th day of October 2006.

SUITTER AXLAND



Jesse C. Trentadue

Michael W. Homer

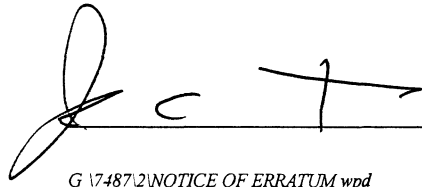
Attorneys for Defendants/Appellants

¹ The incorrect June 6, 2005, date appears on pages 9, 10 and 16 of *Appellees' Brief*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of October, 2006, I caused a two true and correct copy of the foregoing **ST. GEORGE APPELLEES' NOTICE OF ERRATUM** to be served via, first class United States mail, postage prepaid, upon the following:

Matthew T. Graff, Esq.
MATTHEW T. GRAFF & ASSOCIATES
1173 South 250 West, Suite 311
St. George, Utah 84770



A handwritten signature in black ink, appearing to read 'M. T. Graff', is written over a horizontal line.

G \7487\2\NOTICE OF ERRATUM wpd

UTAH COURT OF APPEALS

KRISTIE PACE individually and for and on
behalf of THE ESTATE OF WILLIAM
MATTHEW PACE and ALL HEIRS OF THE
ESTATE,

Plaintiffs/Appellants,

v.

ST. GEORGE CITY POLICE DEPARTMENT,
CITY OF ST. GEORGE, JOHN DOES 1
through 10,

Defendants/Appellees.

APPELLEE'S BRIEF

Case No. 20060256-CA

**APPEAL FROM THE FIFTH DISTRICT COURT IN AND
FOR WASHINGTON COUNTY, STATE OF UTAH
JUDGE JAMES L. SCHUMATE**

Jesse C. Trentadue
Michael W. Homer
SUITTER AXLAND
8 East Broadway, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 532-7300
Attorneys for
Defendants/Appellees

Shawn M. Guzman
ST. GEORGE CITY
ATTORNEY
175 East 200 North
St. George, Utah 84770
Telephone: (435) 634-5800
Facsimile: (435) 674-4260
Attorneys for
Defendants/Appellees

Matthew T. Graff
Mark H. Graff
MATTHEW T. GRAFF &
ASSOCIATES
1173 South 250 West,
Suite 311
St. George, Utah 84770
Telephone: (435) 634-8080
Facsimile: (435) 634-9033
Attorneys for
Plaintiffs/Appellants

TABLE OF CONTENTS

I.	PARTIES	1
II.	STATEMENT OF JURISDICTION	2
III.	STATEMENT OF ISSUES	2
IV.	STANDARD OF REVIEW	3
V.	DETERMINATIVE STATUTES	3
VI.	STATEMENT OF THE CASE RE: NATURE OF THE CASE	6
VII.	STATEMENT OF THE CASE RE: COURSE OF PROCEEDINGS	7
VIII.	STATEMENT OF FACTS	8
IX.	SUMMARY OF ARGUMENT	10
X.	PLAINTIFFS' FAILURE TO PROPERLY SERVE THE NOTICE OF CLAIM IN ACCORDANCE WITH THE <i>UGIA</i> AND/OR <i>GIAU</i> DEPRIVED THE DISTRICT COURT OF SUBJECT MATTER JURISDICTION	12
XI.	ST. GEORGE DEFENDANTS ARE ALSO IMMUNE FROM SUIT UNDER THE <i>UGIA</i>	18
XII.	ADDITIONAL GROUNDS EXIST IN THE RECORD TO SUPPORT THE DISTRICT COURT'S DISMISSAL OF PLAINTIFF'S COMPLAINT	19
XIII.	CONCLUSION	21
XIV.	CERTIFICATE OF SERVICE	23
	ADDENDUM	24

TABLE OF AUTHORITIES

Case Law

<i>Basso v. Utah Power & Light Co.</i> , 495 F.2d 906 (10 th Cir. 1974)	12
<i>Bischel v. Merritt</i> , 907 P.2d 275 (Utah App. 1995)	12
<i>Brown v. Utah Transit Authority</i> , 40 P.3d 638 (Utah 2002)	14
<i>Burns Chiropractic Clinic v. Allstate Insurance Co.</i> , 851 P.2d 1209 (Utah App. 1993)	12
<i>Busch v. Salt Lake International Airport</i> , 921 P.2d 470 (Utah 1996)	12
<i>Commercial Union Ins. Co. v. City of Wichita</i> , 536 P.2d 54 (Kan. 1975)	21
<i>Diploma v. McPhie</i> , 2001 UT. 61, ¶ 18, 29 P.3d 1225	3, 19
<i>Emery v. State</i> , 483 P.2d 1296 (Utah 1971)	19
<i>Goebel v. Salt Lake City S.R.R. Co.</i> , 2004 UT. 80, ¶¶ 38-40, 104 P.3d 1185	1, 12
<i>Green v. Utah Transit Authority</i> , 201 UT 109, 37 P.3d 1156 (Utah 2001)	13
<i>Gurule v. Salt Lake County</i> , 69 P.3d 1287, 2003 UT 25	3
<i>Higgins v. Salt Lake County</i> , 855 P.2d 231 (Utah 1993)	21
<i>Kirk v. State</i> , 784 P.2d 1255 (Utah App. 1989)	20
<i>Madsen v. State</i> , 583 P.2d 92 (Utah 1978)	18
<i>Neiberger v. Hawkins</i> , 70 F.Supp.2d 1177 (D.Colo. 1999)	20
<i>Nielson v. Gurley</i> , 888 P.2d 130 (Utah App. 1994)	12

<i>Scarborough v. Granite School District</i> , 531 P.2d 480 (Utah 1975)	12, 13
<i>Shafer v. State</i> , 79 P.3d 936 (Utah 2003)	15
<i>Smith v. Frandsen</i> , 2004 UT. 55, ¶ 14; 29 P.3d 919	20
<i>State of Utah v. Brown</i> , 856 P.2d 358 (Utah App. 1993)	15
<i>Wills v. Heber Valley Historic Railroad Authority</i> , 2003 UT 45, 79 P.3d 934	15

Statutes

<i>Governmental Immunity Act of Utah</i>	<i>passim</i>
<i>Utah Governmental Immunity Act</i>	<i>passim</i>
<i>Utah Code Ann.</i> § 63-30-3(1)	20
<i>Utah Code Ann.</i> § 63-30-4(3)	18
<i>Utah Code Ann.</i> § 63-30- 4(4)	18
<i>Utah Code Ann.</i> § 63-30-10(4)	6
<i>Utah Code Ann.</i> § 63-30-13	12
<i>Utah Code Ann.</i> § 63-30-10(4)	20
<i>Utah Code Ann.</i> § 63-30-10(10)	6, 10, 18
<i>Utah Code Ann.</i> § 63-30-11(3)(b)(ii)(a)	4, 9
<i>Utah Code Ann.</i> § 63-30d-101 to 904 (2004)	1
<i>Utah Code Ann.</i> § 63-30d-201(1)	20
<i>Utah Code Ann.</i> § 63-30d-301	6, 11

<i>Utah Code Ann.</i> § 63-30d-301(5)(d)	20
<i>Utah Code Ann.</i> § 63-30d-301(5)(j)	18, 20
<i>Utah Code Ann.</i> § 63-30d-401(3)(b)(ii)(A)	4, 10, 13
<i>Utah Code Ann.</i> § 63-30d-401(3)(b)(ii)(G)	4, 13
<i>Utah Code Ann.</i> § 63-30d-401(3)(b)(ii)	5
<i>Utah Code Ann.</i> § 63-30d-401(5)	5, 10, 15
<i>Utah Code Ann.</i> § 63-30d-401(5)(a), (e)	5
<i>Utah Code Ann.</i> § 63-30d-401(5)(a), (7)	5
<i>Utah Code Ann.</i> § 63-30d-402	4, 13
<i>Utah Code Ann.</i> § 63-30d-407(5)	2
<i>Utah Code Ann.</i> § 63-30-13	4
<i>Utah Code Ann.</i> § 63-3010(10)	11
<i>Utah Code Ann.</i> § 78-2-2(4)	2
<i>Utah Code Ann.</i> § 78-2a-3(j)	2
<i>Utah R. Civ. P.</i> 12(b)(1)	2
<i>Utah R. Civ. P.</i> 12(b)(6)	2

<i>Scarborough v. Granite School District</i> , 531 P.2d 480 (Utah 1975)	12, 13
<i>Shafer v. State</i> , 79 P.3d 936 (Utah 2003)	15
<i>Smith v. Frandsen</i> , 2004 UT. 55, ¶ 14; 29 P.3d 919	20
<i>State of Utah v. Brown</i> , 856 P.2d 358 (Utah App. 1993)	15
<i>Wills v. Heber Valley Historic Railroad Authority</i> , 2003 UT 45, 79 P.3d 934	15

Statutes

<i>Governmental Immunity Act of Utah</i>	<i>passim</i>
<i>Utah Governmental Immunity Act</i>	<i>passim</i>
<i>Utah Code Ann.</i> §§ 63-30-3(1)	20
<i>Utah Code Ann.</i> §§ 63-30-4(3)	18
<i>Utah Code Ann.</i> §§ 63-30- 4(4)	18
<i>Utah Code Ann.</i> § 63-30-10(4)	6
<i>Utah Code Ann.</i> § 63-30-13	12
<i>Utah Code Ann.</i> § 63-30-10(4)	20
<i>Utah Code Ann.</i> § 63-30-10(10)	6, 10, 18
<i>Utah Code Ann.</i> § 63-30-11(3)(b)(ii)(a)	4, 9
<i>Utah Code Ann.</i> § 63-30d-101 to 904 (2004)	1
<i>Utah Code Ann.</i> §§ 63-30d-201(1)	20
<i>Utah Code Ann.</i> §§ 63-30d-301	6, 11

I.

PARTIES

This case arises out of the suicide of William Matthew Pace on March 13, 2004, after being arrested for theft. While at the St. George Police Department-Jail, Pace asked to go to the bathroom. When Pace's handcuffs were removed he pulled a pistol from beneath a back brace he was wearing and killed himself. Plaintiffs/Appellants are the heirs and the Estate of Pace. Plaintiffs' sued Defendants/Appellees St. George City Police Department and the City of St. George, Utah (collectively "St. George Defendants"), for negligence based on the failure of the arresting officers to properly search Pace and to discover the pistol with which Pace killed himself.

Plaintiffs, however, failed to serve a *Notice of Claim* in accordance with the requirements of either the *Utah Governmental Immunity Act* ("UGIA") or the *Governmental Immunity Act of Utah* ("GIAU"),¹ thereby depriving the District Court of subject matter jurisdiction. Additionally, the UGIA does not waive *sovereign immunity*

¹ The *Utah Governmental Immunity Act*, *Utah Code Ann.* §§ 63-30-1 through 38, (1997 and Supp. 2003), was repealed effective July 1, 2004 and replaced with the *Governmental Immunity Act of Utah*, *Utah Code Ann.* §§ 63-30d-101 to 904 (2004). The parties substantive rights would be determined by the UGIA while the notice provisions of the subsequently enacted GIAU would control service of the *Notice of Claim*. See *Goebel v. Salt Lake City S.R.R. Co.*, 2004 UT. 80, ¶¶ 38-40, 104 P.3d 1185. Before the District Court, St. George Defendants argued that Plaintiffs' service of the *Notice of Claim* was defective under both the UGIA and GIAU. (*Reply Memorandum*, p. 2, R. 131.)

for injury arising out of the incarceration of any person and/or for an inadequate or negligent inspection. Pursuant to *Utah R. Civ. P. 12(b)(1)* and *12(b)(6)*, St. George Defendants moved the District Court to dismiss Plaintiffs' *Complaint*. That *Motion* was granted. Plaintiffs have appealed therefrom.

II.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to *Utah Code Ann. § 78-2-2(4)* and *§ 78-2a-3(j)*.

III.

STATEMENT OF ISSUES

St. George Defendants submit that Plaintiffs' *Statement of the Issues* is much too narrow. St. George Defendants' submit that the following is a more accurate statement of the additional issues raised by this appeal: (1) Whether there are other grounds in the record sufficient to support the District Court's decision as a matter of law? (2) Whether Plaintiffs have met their burden of proof to establish the existence of subject matter jurisdiction? (3) Whether Plaintiffs can raise for the first time on appeal their claim that St. George Defendants did not comply with the registration or filing requirements of *Utah Code Ann. § 63-30d-407(5)*, which allows for the designation of an agent to receive service of a *Notice of Claim*?

IV.

STANDARD OF REVIEW

The issues presented are reviewed for correctness without any deference to the District Court's determination of law. *Gurule v. Salt Lake County*, 69 P.3d 1287, 2003 UT 25. However, this Court is free to affirm the District Court on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the District Court. *See Diploma v. McPhie*, 2001 UT. 61, ¶ 18, 29 P.3d 1225 (“an appellate court *may affirm* the judgment appeal from ‘if it is sustainable on any legal ground or theory *apparent on the record*’”) (emphasis in original).

V.

DETERMINATIVE STATUTES

The *UGIA* provided that a claim against a political subdivision, such as the City of St. George, Utah, is barred unless a *Notice of Claim* is filed with the governing body of that political subdivision according to the requirements of that *Act*:

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 Sections 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.

Utah Code Ann. § 63-30-13.

The *GIAU* equivalent provides as follows:

A claim against a governmental entity, or against an 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 person and according to the requirements of Section 63-30d-401 within one year after the claim arises regardless of whether or not the function giving rise to the claim is characterized as governmental.

Utah Code Ann. § 63-30d-402.

With respect to serving the *Notice of Claim*, the *UGIA* provided in pertinent part that:

The notice of claims shall be . . . directed and delivered to: (A) the city or town **recorder**, when the claim is against an incorporated city or town . . .

Utah Code Ann. § 63-30-11(3)(b)(ii)(a).

The *GIAU* counterpart reads as follows:

The notice of claim shall be . . . directed and delivered by hand or mail . . . to the office of: (A) the city or town **clerk**, when the claim is against an incorporated city or town . . . **or**

The **agent authorized** by a governmental entity to receive the notice of claim by the governmental entity under Subsection (5)(e).

Utah Code Ann. §§ 63-30d-401(3)(b)(ii)(A) and (G) (emphasis added).

The *GIAU* has several provisions, however, that are not found in the prior law.

These are:

Each governmental entity subject to suit under this chapter shall file a

statement with the Division of Corporations and Commercial Code within the Department of Commerce containing: (I) the name and address of the governmental entity; (ii) the office or agent **designated** to receive a notice of claim; and (iii) the address at which it is to be directed and delivered.

* * *

A governmental entity may, in its statement, identify an **agent authorized** by the entity to accept notices of claim on its behalf.

* * *

A governmental entity may not challenge the validity of a notice of claim on the grounds that it was not directed and delivered to the proper office or agent if the error is caused by the governmental entity's failure to file or update the statement required by Subsection (5).

Utah Code Ann. § 63-30d-401(5)(a), (e) and (7) (emphasis added). The foregoing statutes provide for service of the *Notice of Claim* upon a designated agent in the event there is no city or town clerk, or other office identified in *Utah Code Ann.* § 63-30d-401(3)(b)(ii). These provisions also preclude a governmental entity from challenging the validity of service of a *Notice of Claim* if an error in service is caused by the failure to file or update the statement required by Subsection (5). As will be subsequently shown, St. George Defendants timely complied with the requirements of *Utah Code Ann.* § 63-30d-401(5).

The *UGIA* did not waive sovereign immunity, however, for injury arising out of the incarceration of any person or for an inadequate or negligent inspection:

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: . . . for a failure to make an inspection or by making an inadequate or negligent inspection; . . . (10) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement . . .

Utah Code Ann. § 63-30-10(4) and (10).

The equivalent provisions of the *GLAU* read as follows:

Immunity is not waived under Subsections (3) and (4) if the injury arises out of, in connection with, or results from: (d) a failure to make an inspection or by making an inadequate or negligent inspection; . . . (j) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement . . .

Utah Code Ann. §§ 63-30d-301(5)(d)(j).

VI.

STATEMENT OF THE CASE RE: NATURE OF THE CASE

This is a wrongful death case arising out of the suicide of William Matthew Pace.

On March 15, 2004, while in custody at the St. George Police Department - Jail, Pace shot himself with a pistol concealed upon his person. Arresting officers had failed to detect the weapon. Plaintiffs claim that the arresting officers owed a duty to Pace to search for and discover that weapon and that the alleged breach of this duty resulted in Pace's death.

VII.

STATEMENT OF THE CASE RE: COURSE OF PROCEEDINGS

Plaintiffs commenced this action on March 3, 2005, with the filing of their *Complaint*. (*Complaint* R. 1.) The *Complaint* was served upon Gay Cragun, the St. George City Recorder. (*Return* R. 10-11.) St. George City does not have a town or city clerk.

St. George Defendants answered raising as affirmative defenses *sovereign immunity* and Plaintiffs' failure to comply with the provisions of the *UGIA*, including but not limited to §§ 63-30-4(3)(b), 63-30-4(4), 63-30-10(1), (2), (4), (5) and 10, 63-30-16 and 63-30-34 (2003). St. George Defendants also raised as an affirmative defense the lack of subject matter jurisdiction due to Plaintiff's improper filing/service of their *Notice of Claim*. (*Answer*, R. 41-42.)

On July 13, 2005, St. George Defendants moved to dismiss pursuant to *Utah R. Civ. P.* 12(b)(1) and 12(b)(6). The *Motion* was based upon a lack of subject matter jurisdiction and the *sovereign immunity* retained under the *UGIA* for injury arising out of the incarceration of any person and/or an inadequate or negligent inspection. (*Combined Motion to Dismiss*, R. 85.)

Plaintiffs filed a *Memorandum in Opposition* to that *Motion to Dismiss*. (*Opposition Memorandum* R. 98.) St. George Defendants filed a *Reply Memorandum* in

support of their *Motion to Dismiss* on August 10, 2005. (*Reply Memorandum*, R. 130.) Thereafter, Plaintiffs filed a *Supplemental Memorandum* in opposition to the *Motion to Dismiss*. (*Supplemental Memorandum* R. 144.)

The *Motion to Dismiss* came on for a regularly scheduled hearing on November 1, 2005 before the Honorable James L. Schumate. On January 18, 2006, the Court entered its *Order* granting St. George Defendants' *Motion to Dismiss* without prejudice. The Court granted that *Motion* based upon a lack of subject matter jurisdiction over Plaintiffs' claims due to their failure to comply with the requirements for proper service of a *Notice of Claim* and because this matter arose out of the incarceration of William Matthew Pace for which the State of Utah and its political subdivisions retain governmental immunity. The Court did not address St. George Defendants' argument that immunity had not been waived for injuries arising out of an inadequate or negligent inspection. (*Order*, R. 171.) Plaintiffs appealed on February 14, 2006. (LR.175.)

VIII.

STATEMENT OF FACTS

On March 13, 2004, William Matthew Pace was arrested for theft. (*Complaint*, ¶¶ 7 and 8, R. 2). While at the St. George Police Department-Jail, Pace stated that he needed to use the restroom. Officers removed the handcuffs from Pace's right wrist and escorted

him to the restroom. (*Id.* at ¶¶ 11, 12, and 13, R. 2-3.) In the restroom, Pace drew a 9mm Glock pistol and shot himself in the head. (*Id.* at ¶¶ 20-26, R. 2)

The pistol Pace used to kill himself was hidden beneath a back brace he was wearing at the time. Plaintiffs allege that St. George City officers were negligent in failing to properly pat down Pace or to check under the back brace for the weapon. (*Id.* at ¶¶ 20-26, R. 3-4) Plaintiffs specifically allege that St. George Defendants “owed a duty to William Matthew Pace to safeguard him and protect him while he was in their custody.” (*Id.* at ¶ 36, R. 6.)

In accordance with the *GLAU*, specifically, § 63-30d(401)(5), the City of St. George designated City Recorder Gay Cragun as the person *Notices of Claims* were to be directed to and delivered at the St. George City Hall, 175 East 200 North, St. George, Utah 84770. The registration also included an e-mail address for Cragun as well as her facsimile and telephone numbers. That registration took place on June 6, 2005. A certified copy of the Utah Department of Commerce, Division of Corporations and Commercial Codes, Registration of Recorder Gay Cragun as St. George, Utah’s designated agent for service is included in the *Addendum* to this brief.

On July 2, 2004, Plaintiffs’ served a *Notice of Claim*. Plaintiffs did not, however, direct that *Notice of Claim* to or serve that *Notice of Claim* upon the St. George, Utah City Recorder Gay Cragun as required by *Utah Code Ann.* § 63-30-11(3)(b)(ii)(A) (2003) or §

63-30d-401(3)(b)(ii)(A). Instead, the *Notice of Claim* was directed to and served upon St. George Police Department, City of St. George, Mayor Daniel McArthur, and Council Members Suzanne Allen, Larry Gardner, Rodney Orton, and Robert Whatcott at the City Hall in St. George, Utah. A copy of that *Notice of Claim* is included in the *Addendum* to this brief.

For the first time on appeal, Plaintiffs contend that St. George Defendants cannot argue that the *Notice of Claim* was improperly served due to St. George Defendants' alleged failure to properly update their website with the Department of Commerce designating a City Clerk or other person to receive service of that *Notice of Claim*. Plaintiffs did not, however, raise that argument before the District Court, nor could they have raised such an argument since St. George Defendants fully complied with the requirements of *Utah Code Ann.* § 63-30(d)-401(5).

IX.

SUMMARY OF ARGUMENT

On June 6, 2005, St. George Defendants designated City Recorder Gay Cragun as their agent for service of *Notices of Claim* pursuant to *Utah Code Ann.* § 63-30d-401(5). Almost one month later, Plaintiffs directed and delivered their *Notice of Claim* to the Mayor of St. George, Utah, the St. George Police Department and to each member of the St. George City Council. Plaintiff's failure to properly serve their *Notice of Claim* upon

Recorder Gay Cragun, deprived the District Court of subject matter jurisdiction. Although Plaintiffs contend that St. George Defendants are statutorily estopped from asserting their defective service of the *Notice of Claim* as a defense because of noncompliance with the designation/registration requirements of the *GIAU*, Plaintiffs never raised that argument before the District Court. More importantly, St. George Defendants complied with their statutorily mandated designation/registration requirements of the *GIAU*. Specifically, the City of St. George, Utah designated Recorder Gay Cragun as its agent for service. That designation was completed on June 6, 2005, almost a month prior to the service of Plaintiffs' *Notice of Claim*. Additionally, because Plaintiffs' claim arises out of the incarceration of William Matthew Pace, St. George Defendants enjoy immunity pursuant to *Utah Code Ann.* §§ 63-3010(10) and 63-30d-301(5)(j).

This Court is free to affirm the District Court on any legal ground or theory that is apparent on the record. In the instant case, additional grounds for affirm and would consist of the immunity afforded St. George Defendants for having been engaged in a governmental function and/or resulting from an inadequate or negligent inspection as well as the lack of any duty owed to Plaintiffs or William Matthew Pace.

X.

**PLAINTIFFS' FAILURE TO PROPERLY SERVE THE NOTICE OF
CLAIM IN ACCORDANCE WITH THE UGIA AND/OR GIAU DEPRIVED THE
DISTRICT COURT OF SUBJECT MATTER JURISDICTION**

“A court must have subject matter jurisdiction to have power and authority to decide a controversy. Without subject matter jurisdiction, a court cannot proceed.” *Burns Chiropractic Clinic v. Allstate Insurance Co.*, 851 P.2d 1209, 1211 (Utah App. 1993). Utah law requires strict compliance with the *Notice of Claim* provision of the UGIA and GIAU. *See Bischel v. Merritt*, 907 P.2d 275, 279 (Utah App. 1995); *Goebel*, 2004 UT. 80 ¶¶ 38-40, 104 P.3d 1185. More importantly, the burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *See Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). And this, Plaintiffs have not done.

As stated in *Nielson v. Gurley*, 888 P.2d 130, 134 (Utah App. 1994), a Plaintiff's “failure to comply with the *Notice* requirement of the *Utah Governmental Immunity Act* deprives the trial court of subject matter jurisdiction, and therefore compliance with the *Act* is a precondition to maintaining an action.” Simply put, a claim against a political subdivision of the State of Utah, such as St. George Defendants, “**is barred unless *Notice of Claim* is filed with the governing body of the political subdivision within one year after the claim arises**” *Utah Code Ann.* § 63-30-13. *See also Busch v. Salt Lake International Airport*, 921 P.2d 470, 471 (Utah 1996); *Scarborough v. Granite School*

District, 531 P.2d 480, 482 (Utah 1975)(“we have consistently held that where a cause of action is based upon a statute, full compliance with this requirement is a condition precedent to the right to maintain a suit”). As previously noted, the *GIAU* contains a similar provision codified at *Utah Code Ann.* § 63-30d-402.

Both the *UGIA* and *GIAU* specify the form in which the *Notice of Claim* must be presented and to whom the claim must be delivered. When the claim is asserted against an incorporated city or town, the *UGIA* required that “[t]he *Notice of Claim* [against a city] shall be . . . directed and delivered to the City or Town Recorder . . .” *Utah Code Ann.* § 63-30-11(3)(b)(ii)(A) (emphasis added). When the claim is asserted against an incorporated city or town, the *GIAU* requires that the claim be directed and delivered to the city or town clerk or “the agent authorized” to receive the *Notice of Claim* in the statement filed with the Division of Corporations and Commercial Code within the Department of Commerce. *Utah Code Ann.* §§ 63-30d-401(3)(b)(A)(ii)(A) and (G).

As the Court will note from Plaintiffs’ *Notice of Claim*, they did not serve Gay Cragun the St. George City “Recorder,” with their *Notice of Claim* and that is fatal to this action because Utah case law mandates strict compliance with this *Notice* requirement, even if the governmental entity has actual notice of the claim. In *Green v. Utah Transit Authority*, 201 UT 109, 37 P.3d 1156 (Utah 2001), for example, a passenger sued UTA to recover for injuries while boarding a bus. The Plaintiff in that action delivered her *Notice*

of Claim to UTA's claim adjustor. However, under the *UGIA*, a *Notice of Claim* had to be directed and delivered to UTA's President or Secretary of the Board. The *Green* Court noted that the actual knowledge of the existence of the claim by a governmental entity does not excuse a claimant's strict compliance with the requirements of the *UGIA*. *Id.* at 1159.

Although the UTA had actual knowledge of the claim in *Green*, the Utah Supreme Court ruled that the Plaintiff had failed to strictly comply with the *UGIA* notice requirements and that this failure deprived the District Court of subject matter jurisdiction to hear the claim. *See also Brown v. Utah Transit Authority*, 40 P.3d 638 (Utah 2002)(holding that mailing of a *Notice of Claim* to UTA, rather than to UTA's governing board, was insufficient to comply with the statutory notice requirement); *Wheeler v. McPherson*, 40 P.3d 632 (Utah 2002)(holding the failure to strictly comply with the *UGIA*'s notice requirement deprives the District Court of jurisdiction). Plaintiffs' *Notice of Claim* having been similarly improperly directed and delivered, the District Court lacked subject matter jurisdiction.

Plaintiffs respond by arguing (1) that since neither the *UGIA* nor *GIAU* defines "directed and delivered," the term "directed" could refer to the name of the individual, the office, the name of the Department or the address of the individual described in this *Act*, thus the *Notice of Claim* was properly served since it was delivered to the physical address

of the City Recorder, which was City Hall;² (2) that since the City of St. George did not have a City Clerk, the *Notice of Claim* could be properly served by mailing it to City Hall and that for having failed to comply with the registration requirements of § 63-30d-401(5), St. George Defendants are statutorily precluded from asserting improper service of the *Notice of Claim*; and (3) that Plaintiffs' service of their *Notice of Claim* was effective since it was sufficient to meet the policy considerations behind both the *UGIA* and the *GIAU*. Plaintiffs' arguments, however, are unavailing.

Plaintiffs' assertion that if it is unclear to whom a *Notice of Claim* should be sent, the *Notice* may be sent to any address associated with the designated statutory recipients is contrary to existing case law. In support of this argument, Plaintiffs cite companion cases *Wills v. Heber Valley Historic Railroad Authority*, 2003 UT 45, 79 P.3d 934, and *Shafer v. State*, 79 P.3d 936 (Utah 2003), which each focused upon the *UGIA*'s "silen[ce] . . . on the matter of *where* a notice of claim must be directed and delivered." *Wills*, 2003 UT 45 at ¶ 4 (emphasis in original); *see also Shafer*, 79 P.3d at 937. In both *Wills* and *Shaeffer*, the Utah Supreme Court held that when the *Notice of Claim* is directed to the statutorily designated recipient, unless otherwise specified, service is effective upon mailing to any one of his or her offices in the event the recipient has more than one office. Plaintiffs' reliance

² Of course, Plaintiffs ignore the fact that many people and subdivisions of city government likewise occupy City Hall.

on *Wills* and *Shafer* is, therefore, inapposite here because (1) the *UGIA* and *GIAU* both stated the person to whom the *Notice of Claim* was to be sent and (2) the deficiency with Plaintiffs' *Notice of Claim* is not with the address to which it was sent. Rather, the *Notice of Claim* is deficient because it was not "directed" to the St. George City Recorder as required by both the *UGIA* and *GIAU*.

Plaintiffs' second assertion – that since the City of St. George did not have a city clerk, and had not designated an agent for service, the *Notice of Claim* could be served upon anyone at City Hall - is equally flawed. It is flawed because (1) Plaintiffs were required to strictly comply with the service requirements and (2) more importantly, City Recorder Gay Cragun had been formerly designated as the agent upon whom *Notices of Claim* were to be served.

As to the argument that St. George Defendants are precluded from challenging the validity of the *Notice of Claim* having not been directed to deliver to the City Recorder for failure to comply with the registration requirements of § 63-30d-401(5), that argument fails for two reasons. First, as previously shown, on June 6, 2005, in compliance with the *GIAU*, the City of St. George, Utah designated City Recorder Gay Cragun as the person upon whom *Notices of Claim* were to be directed and delivered. Thus, there is no factual basis for this argument. Second, Plaintiffs never raised this argument before the District Court.

Not having done so, it cannot be raised by Plaintiffs for the first time on appeal. *State of Utah v. Brown*, 856 P.2d 358, 359 (Utah App. 1993).

Finally, Plaintiffs quote *Busch v. Salt Lake Int’l Airport*, 921 P.2d 470, 472 (Utah Ct. App. 1996), wherein the court explains the “two important purposes” for the *Governmental Immunity Act*, codified at *Utah Code Ann.* § 63-30d-402 (which are allowing public authorities an opportunity to investigate, settle or deny a claim without expending public revenue for costly and unnecessary litigation, and providing an opportunity to those vested with authority to remedy a dangerous condition so that further damage or injury can be avoided) and then argues that their service of the *Notice of Claim* is effective since it fulfilled these two purposes. Notwithstanding Plaintiffs’ argument to the contrary, the Utah Supreme Court has held repeatedly that the *Notice of Claim* requirements must be strictly complied with. *See, e.g., Wheeler v. McPherson*, 2002 UT 16, ¶ 11, 40 P.3d 632; *Rushton v. Salt Lake County*, 1999 UT 36, ¶ 19, 977 P.2d 1201. In fact, in *Goebel v. Salt Lake City Southern Railroad Company*, 2004 UT 80, 104 P.3d 1185, the Utah Supreme Court held that although the plaintiffs filed their *Notice of Claim* with the mayor and city council, the trial court lacked jurisdiction because the *Notice of Claim* had not been “directed” to “the city or town recorder.” *Id.* at ¶ 38 (quoting *Utah Code Ann.* § 63-30-11(3)(b)(ii)(A) (Supp. 2003)) (emphasis in original); *see id.* at ¶¶ 36-40. Likewise here, although Plaintiffs’ directed their *Notice of Claim* to the St. George City Mayor and City Council, they did not

direct it to the City Recorder. Thus, their *Notice of Claim* was not in strict compliance with the notice requirements of the *Act*, and the District Court properly dismissed Plaintiffs' *Complaint*.

XI.

ST. GEORGE DEFENDANTS ARE ALSO IMMUNE FROM SUIT UNDER THE *UGIA*

The *UGIA* and *GIAU* define the extent to which the State of Utah, its political subdivisions and employees³ are immune from suit. Specifically, *sovereign immunity* is retained when the suit is for negligently caused injury arising out of the incarceration of any person. *See id.* § 63-30-10(10). Consequently, based upon decisional law such as *Madsen v. State*, 583 P.2d 92 (Utah 1978), the District Court dismissed Plaintiffs' *Complaint* because the claims asserted therein arose out of the incarceration of William Matthew Pace. Plaintiffs insist, however, that the District Court erred because Pace was merely a pretrial detainee and not incarcerated for the purposes of the immunity discussed in *Madsen*.

According to Plaintiffs, the statute does not contemplate pretrial detainment, but rather, only post sentencing confinement. Thus, Plaintiffs insist the District Court erred in finding St. George Defendants immune from suit under either the *UGIA* or *GIAU*. Again, Plaintiffs are without firm footing in the law. Both the *UGIA* and *GIAU* retain immunity

³ Immunity is extended to government employees, such as the individual Defendants pursuant to *Utah Code Ann.* § 63-30-4(3) and (4).

for injuries arising out of “the incarceration of any person in any state prison, county or city jail, **or other place of legal confinement . . .**” *Utah Code Ann.* §§ 63-30-10(10) and 63-30d-301(5)(j) (emphasis added). The essence of the statute is confinement against one’s will. In other words, the immunity applies in those situations when the individual is legally restrained and not otherwise free to leave. Consequently, this immunity has even been recognized and applied to a voluntary patient in a state mental hospital. *See Emery v. State*, 483 P.2d 1296 (Utah 1971). And so, too, does it apply in the instant case to all claims arising out of William Matthw Pace being held under arrest at the St. George City Jail.

XII.

ADDITIONAL GROUNDS EXIST IN THE RECORD TO SUPPORT THE DISTRICT COURT’S DISMISSAL OF PLAINTIFF’S COMPLAINT

As previously noted, this Court may affirm the District Court if it is sustainable on any legal ground or theory apparent on the record. *Dipoma* 2001 UT. 61, ¶ 18, 29 P.3d 1225. And there are numerous grounds for doing so. For example, the *UGIA* and *GIAU* provide that governmental entities and their employees are immune from suit for

any injury which results from the exercise of a governmental function.”⁴ *Utah Code Ann.* §§ 63-30-3(1) and 63-30d-201(1).

The *UGIA* and *GIAU* also provide that immunity is not waived for injuries caused as a result of “**making an inadequate or negligent inspection . . .**” *Utah Code Ann.* § 63-30-10(4), 63-30d-301(5)(j) (emphasis added). This provision of the *UGIA* and *GIAU* would likewise make St. George Defendants immune from suit in this instance. Accordingly, this Court should affirm the dismissal Plaintiff’s *Complaint* based upon the *sovereign immunity* retained under the §§ 63-30-10(4) and 63-30d-301(5)(d) .⁵

Finally, there is the matter of duty or, rather, the lack of duty. Plaintiffs insist that St. George Defendants owed and breached a duty of care with respect to William Matthew Pace. That being a duty to search for and discover the weapon with which Pace committed suicide. The issues of whether a duty exists is entirely a question of law to be determined by the Court. *Smith v. Frandsen*, 2004 UT. 55, ¶ 14; 29 P.3d 919. The existence of a duty is determined from the totality of the circumstances. *See Id.* And

⁴ “Governmental Function” would certainly include law enforcement. *See Kirk v. State*, 784 P.2d 1255 (Utah App. 1989). St. George Defendants, therefore, are likewise immune from suit for having been engaged in law enforcement activities at the time of Pace’s death.

⁵ A *Motion to Dismiss* based on *sovereign immunity* is treated as a *Motion to Dismiss* for the lack of subject matter jurisdiction. *See Neiberger v. Hawkins*, 70 F.Supp.2d 1177, 1181 (D.Colo. 1999).

under the totality of the circumstances in this case, there was no duty owed to William Matthew Pace. There is, for instance, no allegation in the *Complaint* that the arresting officers were aware of any suicidal potential on behalf of Pace. The general rule is: law enforcement officers owe a duty to the public as a whole, not to an individual.

Commercial Union Ins. Co. v. City of Wichita, 536 P.2d 54, 63 (Kan. 1975).

As a matter of law, because people are inherently less controllable than physical things, common law has imposed no duty to control the conduct of others except in certain circumstances, as when a special relationship exists. *See Higgins v. Salt Lake County*, 855 P.2d 231, 236 (Utah 1993). But, a special relationship does not necessarily exist merely because one has control over another person. The question is whether the arresting officers knew Pace to be uniquely dangerous to himself so as to appreciate the unique threat Pace presented to himself. Without such knowledge, the requisite “special relationship” does not exist. *Id.* at 236-38. Under the test articulated in *Higgins*, therefore, St. George Defendants did not owe Pace a duty of care, which is an equally good basis for affirming the District Court.

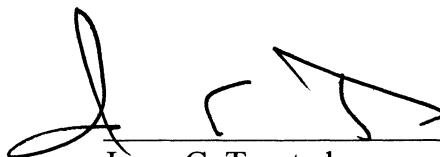
XIII.

CONCLUSION

The District Court’s dismissal should be affirmed.

DATED this 7th day of August, 2006.

SUITTER AXLAND

Handwritten signatures of Jesse C. Trentadue and Michael W. Homer. The signature of Jesse C. Trentadue is on the left, and the signature of Michael W. Homer is on the right. Both signatures are written in black ink.

Jesse C. Trentadue

Michael W. Homer

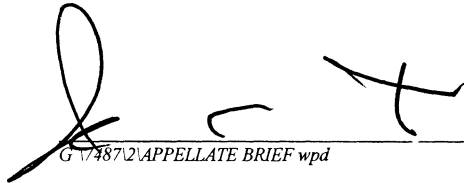
Attorneys for Defendants/Appellants

XIV.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of August, 2006, I caused a true and correct copy of the foregoing **ST. GEORGE DEFENDANTS' APPELLATE BRIEF** to be served via, first class United States mail, postage prepaid, upon the following:

Matthew T. Graff, Esq.
MATTHEW T. GRAFF & ASSOCIATES
1173 South 250 West, Suite 311
St. George, Utah 84770



G:\74872\APPELLATE BRIEF.wpd

ADDENDUM

1. Utah Department of Commerce, Division of Corporations and Commercial Codes, Registration
2. *Notice of Claim*



Utah Department of Commerce
Division of Corporations & Commercial Code
160 East 300 South, 2nd Floor, S.M. Box 146705
Salt Lake City, UT 84114-6705
Phone: (801) 530-4849
Toll Free: (877)526-3994 Utah Residents
Fax: (801) 530-6438
Web Site: <http://www.commerce.utah.gov>

August 3, 2006

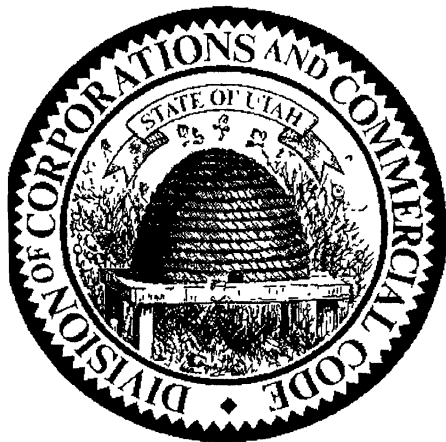
Business Name: ST. GEORGE CITY
Registered Date: JUNE 11, 2004

CERTIFIED COPY FOR ST. GEORGE CITY

THE UTAH DIVISION OF CORPORATIONS AND COMMERCIAL CODE ("DIVISION") HEREBY CERTIFIES THAT THE ATTACHED DOCUMENT IS A TRUE, CORRECT, AND COMPLETE RECORD WITHIN THE GOVERNMENTAL IMMUNITY ACT (GIA) DATA BASE FOR

ST. GEORGE CITY

AS APPEARS OF RECORD IN THE OFFICE OF THE DIVISION.



Kathy Berg

Kathy Berg
Director
Division of Corporations and Commercial Code

Dept. of Professional Licensing
(801)530-6628

Real Estate
(801)530-6747

Public Utilities
(801)530-6651

Securities
(801)530-6600

Consumer Protection
(801)530-6601

DATE	TIME	FUNCTION	DETAILS	IP ADDRESS
2004-06-11	11:42:26	Logged In		208.186.106.177
2004-06-11	11:43:36	Profile Updated	Contact changed from: Daniel McArthur to Gay Cragun Title set to: City Recorder Phone changed from: (435) 673-4975 to (435) 674-4203 Fax set to: (435) 674-4261 Email set to: sgadmin@infowest.com	208.186.106.177
2004-06-11	11:43:45	Logged Out		208.186.106.177
2005-06-09	11:45:28	Logged In		209.33.214.146
2005-06-09	11:46:04	Profile Updated	Email changed from: sgadmin@infowest.com to gay.cragun@sgcity.org	209.33.214.146
2005-06-09	11:46:16	Logged Out		209.33.214.146

The following physical address has not changed since it was originally listed:

St. George City
175 East 200 North
St. George, Washington County, UT 84770

BRAUNBERGER, BOUD & DRAPER, P.C.

ATTORNEYS AT LAW

Wayne H. Braunberger

James R. Boud

Tad D. Draper

Troy K. Walker

765 East 9000 South, Suite A-1

Sandy, Utah 84094

Phone (801) 562-3200

Fax (801) 562-5250

Of Counsel

Richard I. Ashton

[Inactive]

NOTICE OF CLAIM

July 2, 2004

VIA CERTIFIED MAIL AND REGULAR MAIL

St. George Police Department

200 East 265 North

St. George, Utah 84770

City of St. George

175 East 200 North

St. George, Utah 84770

Mayor Daniel McArthur

175 East 200 North

St. George, Utah 84770

City Council Member - Suzanne Allen

175 East 200 North

St. George, Utah 84770

City Council Member- Larry Gardner

175 East 200 North

St. George, Utah 84770

City Council Member- Rodney Orton

175 East 200 North

St. George, Utah 84770

City Council Member- Robert Whatcott

175 East 200 North

St. George, Utah 84770

Re: Our Client:

Kristy Pace, widow to Matthew Pace

Date of Incident: March 13, 2004

TO WHOM IT MAY CONCERN:

This letter shall serve as Notice of Claim upon the City of St. George pursuant to Utah Code Ann. § 63-30-1 et. seq. Further, governmental immunity is deemed waived in this matter.

SECTION I

Statement of Facts

On March 13, 2004, an officer at the St. George Police Department, believed to be Officer Collard arranged for Matthew Pace to come into the police department for an interview regarding an alleged theft. At the time of the interrogation, the police department performed a pat down search on Matt Pace to check for weapons and presumably other potentially dangerous objects. It is also believed that Mr. Pace again underwent a second pat down search while in police custody. Subsequent to these searches, Mr. Pace asked to use the restroom. Accordingly, two St. George police officers escorted Mr. Pace to the restroom and stood, in presence, approximately 12 feet away while he was in the restroom facilities. At this time, he pulled a hand gun from his belt region and shot himself in the head. Mr. Pace died immediately. Mr. Pace was not searched with a magnetometer.

SECTION II

Nature of the Claim

This claim is against the City of St. George, and more particularly the St. George Police Department for the wrongful death of William Matthew Pace, who, while under worry and duress while being in police custody, was not properly searched either manually, or through the use of a magnetometer for a dangerous weapon. The negligence of improperly searching and securing the safety of Mr. Pace directly resulted in his death, and the endangerment of other individuals in the police facility. The claim is brought by and through Kristy Pace, Mr. Pace's wife, and personal representative to his estate, both in her individual and personal representative capacity. The claim is asserted under one or more of the provisions of Utah Governmental Immunity Act.

SECTION III

Injuries and Damages Sustained

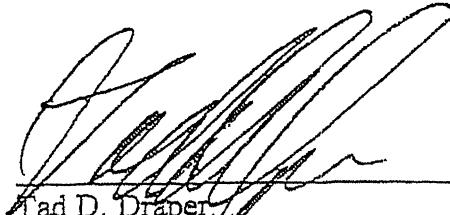
The injuries are, loss of support, companionship, society and other losses and injuries pertaining to a wrongful death action on behalf of Kristy Pace and the heirs of Matthew Pace. The compensable loss and damages resulting from the wrongful acts of the St. George Police Department include, but are not limited to the necessary and reasonable cost and loss associated with Mr. Pace's wrongful death, including funeral expenses and the economic loss, both present and future. The full value of this has not currently been determined, but would include a

calculation for present and future wage loss as well as general damages for pain, suffering, loss of society and companionship, which is not currently known, but will be established upon further discovery and investigation.

SECTION IV
Acknowledgment

This Notice of Claim is intended to comply with the provisions set forth in Utah Code Ann. § 63-30-12 et seq. The undersigned is a duly authorized attorney of the Claimants by written agreement.

DATED this 2 day of July, 2004



Tad D. Draper
Attorney for Plaintiff