

2006

Kristi 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 Dept., City of St.  
George, and John Does 1 through 10 : Brief of  
Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](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; Sutter 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 Appellant, *Pace v. St. George Police Department*, No. 20060256 (Utah Court of Appeals, 2006).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/6346](https://digitalcommons.law.byu.edu/byu_ca2/6346)

This Brief of Appellant 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](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

JUL 07 2006

UTAH APPELLATE COURTS

FILED

UTAH COURT OF APPEALS

450 South State Street

P.O. Box 140230

Salt Lake City, Utah 84114-0230

<p>KRISTI PACE, individually, and for and on behalf of THE ESTATE OF WILLIAM MATTHEW PACE and ALL HEIRS OF THE ESTATE,</p> <p>Plaintiffs/Appellants,</p> <p>v.</p> <p>ST. GEORGE CITY POLICE DEPT., CITY OF ST. GEORGE, and JOHN DOES 1 through 10,</p> <p>Defendants/Appellees.</p>	<p>APPELLANT BRIEF</p> <p>Appellate Case No. 20060256 - CA</p>
--	--

JESSE C. TRENTADUE

**SUITTER AXLAND**

*Attorneys for Appellee, St. George Police Dept.*

8 East Broadway, #200

P.O. Box 510506

Salt Lake City, Utah 84151

Telephone: (801) 532-5444

Facsimile: (801) 532-7355

MATTHEW T. GRAFF (8605)

MARK H. GRAFF (10937)

**MATTHEW T. GRAFF &  
ASSOCIATES**

*Attorneys for Plaintiffs/Appellants*

1173 South 250 West, Suite 311

St. George, Utah 84770

Telephone: (435) 634-8080

Facsimile: (435) 634-9033

SHAWN M. GUZMAN

**ST. GEORGE CITY ATTORNEY**

*Attorneys for Appellee, St. George City*

175 East 200 North

St. George, Utah 84770

Telephone: (435) 634-5800

Facsimile: (435) 674-4260

FILED  
UTAH APPELLATE COURTS  
JUL 07 2006

### **LIST OF ALL PARTIES**

1. Kristi Pace, Appellant, is an individual, and the surviving spouse of the decedent, William Matthew Pace.
2. The Estate of William Matthew Pace, Appellant, is all individuals or entities that may have an interest at law or in equity in the remaining assets and obligations of the decedent William Matthew Pace.
3. St. George City Police Department, Appellee, is a governmental agency operating under the City of St. George.
4. The City of St. George, Appellee, is a governmental entity, and is an incorporated city within the State of Utah.

## **Table of Contents**

List of All Parties .....	Page 2
Table of Authorities .....	Page 4
Statement of Jurisdiction .....	Page 5
Statement of Issues .....	Page 5
Standard of Review .....	Page 5
Constitutional or Statutory Provisions.....	Page 6
Statement of Case .....	Page 6
Statement of Facts .....	Page 7
Summary of Argument .....	Page 7-8
Argument .....	Page 8-16
Conclusion .....	Page 16
Signature of Counsel of Record .....	Page 17
Proof of Service .....	Page 18
Addendum .....	Page 19

## **Table of Authorities**

*Gurule v. Salt Lake County*, 2003, 69 P.3d 1287, 474 Utah Adv. Rep. 3, 2003 UT 25.

*Larson v. Park City Mun. Corp.*, 1998, 955 P.2d 343, 339 Utah Adv. Rep. 17.

*Youren v. Tintic School Dist.*, 343 F.3d 1296 (10th Cir. 2003).

*Goeble v. Salt Lake City S. R.R. Co.*, 2004 UT 80 §§ 38-40, 104 P.3d 1185).

*Kamdar & Co. v. Laray Co., Inc.*, 815 P.2d 245 (Utah App. 1991).

*Madsen v. State*, 583 P.2d 92 (Utah 1978).

*Shafer v. State*, 79 P.3d 936 (Utah 2003).

*Busch v. Salt Lake Intern. Airport*, 921 P.2d 470 (Utah 1996).

*Cooper v. Holder*, 21 Utah 2d 40, 440 P.2d 15 (1968).

*Civil Actions Against State and Local Government § 3:16*, Police and Fire Protection.

*Civil Actions Against State and Local Government § 3:17*, Operation of Prisons.

*Adamson v. City of Provo*, 819 F.Supp. 934 (Utah 1993).

*Sandberg v. Lehman, Jensen & Donahue, L.C.*, 76 P.3d 699, 478 Utah Adv. Rep. 29,  
2003 UT App 272 (2003).

*Renn v. Utah State Bd. of Pardons*, 1995, 904 P.2d 677 (1995).

*Ross v. Schackel*, 920 P.2d 1159 (Utah 1996).

*Kirk v. State*, 784 P.2d 1255 (Ut. Ct. App. 1989).

*Lancaster v. Utah State Prison*, 740 P.2d 261 (Utah 1987).

*Johnson v. City of Bountiful*, 996 F.Supp. 1100 (D. Utah 1998).

### **STATEMENT OF JURISDICTION**

Jurisdiction before this court is proper pursuant to the Appellate Jurisdiction of the Court of Appeals over the decisions of the trial court of the State of Utah. Const. Art. 8, § 1; U.C.A.1953, 78-2a-1; *Renn v. Utah State Bd. of Pardons*, 1995, 904 P.2d 677; U.C.A.1953, 78-2a-1.

### **STATEMENT OF ISSUES**

Appellant asserts that the service of the Notice of Claim by prior counsel for the Appellant was proper pursuant to the Utah Governmental Immunity Act. U.C.A. 1953 § 63-30d-401. As such, Plaintiffs/Appellants maintain that the Trial Court improperly dismissed this suit for lack of subject matter jurisdiction.

Plaintiffs/Appellants assert that the governmental entities waived their sovereign immunity, pursuant to U.C.A. § 63-30-10(10) (2003), and that the sovereign immunity of the State was not maintained due to an alleged “incarceration” of the decedent at the time of the incident.

### **STANDARD OF REVIEW**

Reviewed for correctness without any deference to the trial court’s determination of law. *Gurule v. Salt Lake County*, 69 P.3d 1287, 474 Utah Adv. Rep. 3, 2003 UT 25 (Utah, 2003).

### **CONSTITUTIONAL OR STATUTORY PROVISIONS**

1. U.C.A. 1953 § 63-30d-401.
2. U.C.A. 1953, § 63-30-11.
3. U.C.A. 1953, § 63-30-10.
4. U.C.A.1953, 63-30-11.
5. U.C.A.1953, 78-2a-1.
6. Const. Art. 8, § 1; U.C.A.1953, 78-2a-1.
7. Rules Civ.Proc., Rule 12(b)(6).

### **STATEMENT OF CASE**

The Utah Legislative changes to the Utah Governmental Immunity Act went into effect July 1, 2004.

Appellant's Notice of Claim was filed July 2, 2004, upon "City of St. George, 175 East 200 North, St. George, Utah 84770," by Appellant's prior counsel, Braunberger, Boud & Draper, P.C. There was no "City Clerk" within the City of St. George that could be served. The City Recorder is Gay Cragun, who works for the City of St. George located at the same address.

Suit was filed in the Fifth Judicial District Court and service of Summons and Complaint was effectuated March 4<sup>th</sup>, 2005, and was served upon Gay Cragun at the same address listed above.

Defendants/Appellees filed a Motion to Dismiss July 11<sup>th</sup>, 2005, alleging improper filing of the Notice of Claim by Plaintiffs/Appellants' prior counsel, Braunberger, Boud & Draper, P.C. After the filing of several responsive memorandum by both sides, the

Court issued the Defendants/Appellees' Order of Dismissal Without Prejudice, of the Plaintiffs/Appellants' lawsuit on January 18, 2006. The Defendants/Appellees' grounds for dismissal were (1) lack of subject matter jurisdiction due to an improper filing of the Notice of Claim, and (2) because the governmental entities had not waived their sovereign immunity surrounding actions with regard to the "incarceration" of William Matthew Pace.

From this order, Plaintiffs/Appellants respectfully appeal.

### **STATEMENT OF FACTS**

William Matthew Pace was arrested March 13, 2004 for theft. William Matthew Pace was wearing a prosthetic back brace at the time of his arrest and was searched by the arresting officers. Such search failed to produce the 9mm pistol that Mr. Pace had, on his person, underneath the back brace. While in custody, prior to the filing of any formal charges, and before interrogations were completed, William Matthew Pace was excused to use the restroom and his restraints were removed. While in the restroom, William Matthew Pace produced the 9mm pistol and fatally shot himself.

### **SUMMARY OF ARGUMENT**

1. Plaintiffs/Appellants' Notice of Claim was in strict compliance with the Utah Governmental Immunity Act pursuant to U.C.A. 1953 § 63-30d-401
2. Defendants/Appellees may not argue that the Notice of Claim was improperly served due to their failure to properly update their website with the Department of Commerce designating a City Clerk that is to receive service of the Notice of Claim. U.C.A. 1953 § 63-30d-401(7).

3. Sovereign Immunity is waived in the foregoing matter due to the nature of the claims pursuant to U.C.A. 1953 § 63d-30d-301(3)(a)(4).

4. Matthew William Pace was not “incarcerated” for the purposes of the Utah Governmental Immunity Act and “detainment” is distinguishable from the precedent in Utah that has considered “confinement” to be post-conviction. *Ross v. Schackel*, 920 P.2d 1159 (Utah 1996); *Kirk v. State*, 784 P.2d 1255 (Ut. Ct. pp. 1989); *Lancaster v. Utah State Prison*, 740 P.2d 261 (Utah 1987).

### **ARGUMENT**

#### **I. Filing of the Notice of Claim was strictly compliant with the Utah Governmental Immunity Act.**

Dismissal of a case under the Governmental Immunity Act is reviewed for correctness without deference to the trial court's determination of law, as a complaint for failure to properly file a notice of claim is a conclusion of law. *Gurule v. Salt Lake County*, 2003, 69 P.3d 1287, 474 Utah Adv. Rep. 3, 2003 UT 25; *Larson v. Park City Mun. Corp.*, 955 P.2d 343, 339 Utah Adv. Rep. 17 (1998); Rules Civ.Proc., Rule 12(b)(6). .

First and foremost, the Utah Legislature has provided a procedural protective wall around its governmental entities in the form of the Utah Governmental Immunity Act. This act represents one of only a few States that require strict compliance with the Notices of Claim filed against governmental entities. *Johnson v. City of Bountiful*, 1998, 996 F.Supp. 1100 (D. Utah 1998).

Furthermore, the strictness with which strict compliance rule applies varies, and ambiguity in the statute allows for a relaxation of the strictness of the standard. *Gurule v. Salt Lake County*, 69 P.3d 1287, 474 Utah Adv. Rep. 3, 2003 UT 25 (2003). In another example, a District Court was found to have subject matter jurisdiction over a teacher's claim under the Utah's Whistleblower Act against the superintendent in her official capacity, where the teacher served a notice of claim on the district but not on the superintendent. U.C.A. 1953, § 63-30-11(1). *Youren v. Tintic School Dist.*, 343 F.3d 1296 (10th Cir. 2003).

The essence of the dismissal in the case at hand is that the Notice of Claim was not strictly compliant with Utah Code Ann. § 63-30-11(3)(b)(ii)(A) (2003). This divested the Court of Subject Matter Jurisdiction in the foregoing matter, and as such, resulted in the non-prejudicial dismissal of suit, stating that the Utah and its political subdivisions had retained their governmental immunity under Utah Code Ann. § 63-30-10(10) (2003).

The Order Granting Dismissal is bifurcated into two separate issues. The first is that the Notice of Claim was not filed properly pursuant to the Utah Governmental Immunity Act, as required under U.C.A. 1953 § 63-30d-401. The second interwoven issue is that as such, Utah did not waive her sovereign immunity with respect to an issue of incarceration. *See* U.C.A. 1953 § 63-30-10(10).

The service of the Notice of Claim necessary to establish Subject Matter Jurisdiction, was mailed to the address 175 East 200 North, St. George, UT 84770. The relevant Statute, which was in force at the time of the filing (which is the applicable version of the Statute pursuant to *Goeble v. Salt Lake City S. R.R. Co.*, 2004 UT 80 §§

38-40, 104 P.3d 1185), requires the Notice of Claim to be “delivered by hand or by mail . . . to the office of . . . the city or town clerk.” U.C.A. 1953 § 63-30d-401.

Alternatively, if the City Recorder, Gay Cragun, (albeit not the Statutory “City Clerk” due to the City’s failure to appoint such a position), is the proper individual upon whom the service of the Notice of Claim was to be directed and delivered, there is no statutory definition of “directed and delivered” within the Utah Governmental Immunity Act. The term “directed” ambiguously could refer to the name of the individual, the office, the name of the department, or the address of the individual prescribed under the Statute. By addressing the Notice of Claim to the proper address of the City Recorder, to which it was then delivered, the Notice of Claim was in fact “directed and delivered” pursuant to the Statute. The naming of the entity, “The City of St. George,” on the Notice of Claim does not refute the proper direction of the postal delivery. Considering the failure of the City of St. George to designate a City Clerk, *any* addressed recipient at that address, including Gay Cragun, would only be a substitute for the non-existent position of City Clerk. The Statute itself states that it is the address to which Notices of Claim are “directed and delivered” under §§ 5(a)(iii). U.C.A. 1953 § 63-30d-401. The statutory language is clear that the office or agent is only a designation upon the letter, but it is the addresses, *not the recipients*, which must be receiving proper direction and delivery. As such, Braunberger, Boud & Draper technically “directed and delivered” the Notice of Claim properly, as it is the address that requires proper designation, whereas the position of the person for whom the letter is either statutorily fungible, (or non-existent in the City of St. George). There is no case law which supports or refutes the

address, versus the name, as being proper for the Notice of Claim under the Statute to be satisfied as “directed and delivered.”

The City of St. George had not yet updated their file with the Department of Commerce properly designating the Statutory individual to receive a Notice of Claim. Furthermore, they still have not updated the file to designate a proper City Clerk upon whom service could be proper under §§(3)(b)(a). The legislation had changed only the day before, and Defense has yet to provide evidence to the contrary. As such, if the dispute is documentary in nature, the matter must proceed to trial to determine the merits of the dispute after only a prima facie showing of personal jurisdiction. *Kamdar & Co. v. Laray Co., Inc.*, 815 P.2d 245 (Utah App. 1991). As a result of the neglect by the City of St. George in designating the proper recipient, the language of *Shafer* is controlling, stating that, “in the absence of specific delineation by the statutory recipient of the notice, the notice may be properly served upon any of the addresses through which service could be delivered.” *Shafer v. State*, 79 P.3d 936 (Utah 2003).

**II. Defendants may not argue that Notice of Claim was improperly served due to their failure to properly update the website with the Department of Commerce designating a City Clerk that is to receive service of the Notice of Claim. U.C.A. 1953 § 63-30d-401(7).**

At the time of the service of the Notice of Claim, the City of St. George *had no City Clerk*. There is still no one with that title within the City of St. George pursuant to the statement of Helen Wray, a receptionist with the City of St. George as of June 27, 2006. There was a City recorder, Gay Cragun, upon whom Appellant properly served the Complaint and Summons, and her address is the same as the address to which the Notice

of Claim was sent, 175 East 200 North, St. George, UT 84770. The suit was against the City of St. George, who has not properly designated a City Clerk who could lawfully receive service of the Notice of Claim pursuant to the Statute. The Amendment noted by Defendants/Appellees changing the Statute requiring service upon the City Clerk was enacted within 1 week of the service of the Notice of Claim by Plaintiffs/Appellants' prior counsel, Braunberger, Boud & Draper. The City failed to designate the proper individual to receive Notice of Claim which statutorily warrants the preclusion of their current assertion that the Notice was not properly served. The Defendants/Appellees failed to update the statement required under §§7. That provision reads, "(7) 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)." U.C.A. 1953 § 63-30d-401(7).

The twofold legislative motivation in enacting the standards of Notice of Claim requirements is highlighted in *Busch v. Salt Lake Intern. Airport*, 921 P.2d 470 (Utah 1996). Those motives are, first, a prerogative granted to public authorities allowing "an opportunity to investigate, settle, or deny a claim without expending public revenue for costly and unnecessary litigation." Secondly, the legislation "provides an opportunity to those vested with authority to remedy a dangerous condition so that further damage or injury can be avoided."

In light of the foregoing, how can it possibly be conceived that the legislative intent, although requiring strict compliance, was not met? In considering the roots of

strict compliance with Notice of Claim requirements, the circumstances of serving the Notice of Claim of this case are in direct alignment with what the Utah legislature intended to be effectuated through a Notice of Claim. In one of the first cases to address the issue, service upon the mayor of the city with notice of an assignment of money payable by the city to the assignor constituted notice to the city and was binding upon it. *Cooper v. Holder*, 21 Utah 2d 40, 440 P.2d 15 (1968). U.C.A.1953, 10-6-3, 10-6-5, 10-6-9, 10-6-23, 10-6-24, 10-7-77, 10-10-61.

In the case at bar, ample notice was given, in strict compliance with the Statutory parameter abiding by the requirements that have become the storm shelter for governmental agencies wishing to avoid lawful service. Through failure to update the system, they have claimed the true authorized recipient did not receive a proper Notice of Claim, and have delayed the remedy of a properly presented Plaintiff for over a year. It is the legislature's ambiguity that has presented the confusion in what "directed and delivered" means, whether a naming of the individual and office is necessary, or whether a proper address gives sufficient direction for delivery. Such an ambiguity should be interpreted to favor legislative intent, which has already been satisfied in the foregoing instance, and mandates a relaxation of the strict compliance standards. *Gurule v. Salt Lake County*, 69 P.3d 1287, 474 Utah Adv. Rep. 3, 2003 UT 25 (2003).

**III. Sovereign Immunity is waived in the foregoing matter due to the nature of the claims pursuant to U.C.A. 1953 § 63d-30d-301(3)(a)(4).**

The Court has pointed to the government's failure to waive its sovereign immunity in the foregoing matter due to the "incarceration" of the decedent. Assuming *arguendo*

that the Notice of Claim was properly served, it is the nature of the claim that waives sovereign immunity of the governmental entity. Defendants/Appellees state that “the ACT stated to whom the Notice of Claim was to be sent.” This is entirely misleading, as the website only lists a “City Recorder” which is not mentioned as compliant with the U.G.I.A. requirements. The City still has not designated a City Clerk upon whom service could be proper under the Statute. The legislation had changed within the last week prior to the filing of the Notice of Claim by Plaintiffs/Appellants’ prior Counsel, and the City of St. George had not as yet updated the listing with the Utah Department of Commerce.

Furthermore, “(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.” U.C.A. 1953 § 63d-30d-301(3)(a)(4). Defendants/Appellees’ claims that immunity is retained because client was “incarcerated” are inaccurate, as our client was not yet formally arraigned, convicted, or placed in a detention facility. At the time of the negligent act of the governmental employee, he was merely a pre-trial detainee and not incarcerated for the purposes of *Madsen v. State*, 583 P.2d 92 (Utah 1978). The Statute is not contemplating pre-trial detainment, but rather, post-sentencing confinement. Governmental immunity is not waived in connection with “(j) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement.” *Id.* at (5)(j). Were the interpretation of the Defendants to be upheld, governmental actors could arbitrarily detain any citizen, on meritless grounds, and abuse them in any way conceivable, and the form of relief available would be the cumbersome venue of sec. 1983 claims. It could not have been

the legislative intent of the U.G.I.A. to foreclose all state claims for recovery by Plaintiffs injured by the government before charges have even been filed.( For a more complete rendition of the structure of civil claims against governmental entities, see Civil Actions Against State and Local Government § 3:16, Police and Fire Protection; Civil Actions Against State and Local Government § 3:17, Operation of Prisons.)

**IV. The Decedent was not “incarcerated” for the purposes of the Utah Governmental Immunity Act and “detainment” is distinguishable from the precedent in Utah that has considered “confinement” to be post-conviction.**

Incarceration, as it has been considered in every case considered within the annotations of the pertinent statute, has only extended to those who have been convicted and sentenced. See U.C.A. 1953 § 63-30d-301 Annotations. *Ross v. Schackel*, 920 P.2d 1159 (Utah 1996); *Kirk v. State*, 784 P.2d 1255 (Ut. Ct. App. 1989); *Lancaster v. Utah State Prison*, 740 P.2d 261 (Utah 1987), *Lancaster v. Utah State Prison*, 740 P.2d 261 (1987); *Sheffield v. Turner*, 21 Utah 2d 314, 445 P.2d 367 (1968). The immunity for a governmental entity only extends inasmuch as the claim is for “recovery for injury arising out of incarceration of person in state prison or other place of legal confinement.” U.C.A. 1953 § 63-30d-301. Legal confinement contemplates a post-conviction akin to state prison under the statutory language. It does not mention places of pre-trial detention, nor has any Utah case considered pre-trial detention as an extension of the already-broad immunity held by governmental entities.

The question on the horizon of this Appeal of whether or not the action by the employees of the Defendants/Appellees were discretionary such that the governmental

immunity could properly be invoked. To ascertain whether policy-making decision by governmental entity was "discretionary," and thus not subject to governmental immunity, the court must consider whether act involves basic governmental policy, programs, or objectives, and whether the acts or omissions are essential to a realization of policy. Also, it must be determined whether the act or omission required the exercise of basic policy evaluation and expertise, and whether government agency involved possessed required the constitutional, statutory, or lawful authority and duty to negligently perform the search on William Matthew Pace. U.C.A.1953, 63-30-10(1). *Adamson v. City of Provo*, 819 F.Supp. 934 (Utah 1993). (It must also be remembered that the determination of whether a governmental entity exercised a discretionary function, such that entity is entitled to governmental immunity, is a fact-intensive inquiry that, by its very nature, is not particularly amenable to summary judgment. U.C.A.1953, 63-30-10(1). *Sandberg v. Lehman, Jensen & Donahue, L.C.*, 76 P.3d 699, 478 Utah Adv. Rep. 29, 2003 UT App 272 (2003)). However, these are decisions that are not being considered within the scope of this appeal.

### **CONCLUSION**

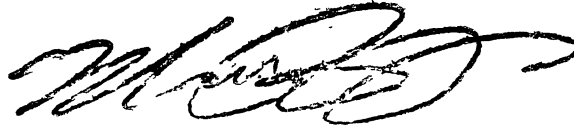
Notice of Claim was properly served pursuant to statute, and was directed and delivered to the proper address as needed for strict compliance. Furthermore, Defendants/Appellees failed to comply with the Department of Commerce update as statutorily required, and as such, cannot claim that notice was improperly served.

Defendants/Appellees also waived their sovereign immunity due to the nature of the claims against them, and due to the fact that decedent was not “incarcerated” for the purposes of the U.G.I.A.

For the foregoing reasons, the Trial Courts Dismissal for lack of jurisdiction should be REVERSED.

DATED this 3<sup>rd</sup> day of July 2006.

**MATTHEW T. GRAFF & ASSOCIATES**

A handwritten signature in black ink, appearing to read 'Matthew T. Graff', with a stylized flourish at the end.

---

Matthew T. Graff, *Attorney for Plaintiffs/Appellants*

**PROOF OF SERVICE**

I, Jennifer Taylor, Legal Assistant, hereby certify that on the 3<sup>rd</sup> day of July, 2006, I caused to be mailed, U.S. first-class postage prepaid, true and correct copies of the above and foregoing *Appellant's Brief*, to the following:

JESSE C. TRENTADUE

**SUITTER AXLAND**

*Attorneys for Appellee, St. George Police Dept.*

8 East Broadway, #200

P.O. Box 510506

Salt Lake City, Utah 84151

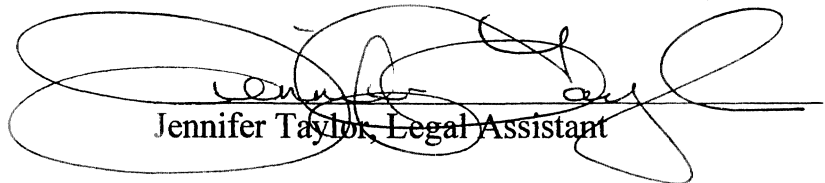
SHAWN M. GUZMAN

**ST. GEORGE CITY ATTORNEY**

*Attorneys for Appellee, St. George City*

175 East 200 North

St. George, Utah 84770

  
Jennifer Taylor, Legal Assistant

## **ADDENDUM**

## **ADDENDUM**

Jesse C. Trentadue (#4961)  
Michael W. Homer (#1535)  
**SUITTER AXLAND, PLLC**  
8 East Broadway, Suite 200  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7300  
Facsimile: (801) 532-7355

Shawn M Guzman (#7392)  
**ST. GEORGE CITY ATTORNEY**  
175 East 200 North  
St. George, Utah 84770  
Telephone: (435) 634-5000  
Facsimile: (435) 674-4260

*Attorneys for City of St. George, Utah and St. George City Police Dept.*

**FIFTH JUDICIAL DISTRICT COURT**

**IN AND FOR WASHINGTON COUNTY, STATE OF UTAH**

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

Plaintiffs,

v.

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

Defendants.

**ST. GEORGE DEFENDANTS'  
COMBINED MOTION TO DISMISS  
AND MEMORANDUM IN SUPPORT**

Case No. 050500378

Judge Eric A. Ludlow

**RECEIVED**

JUL 14 2005

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' have sued St. George City Police Department and the City of St. George, Utah (collectively "St. George Defendants"), for negligence based on the alleged failure of the arresting officers to properly search Pace and discover the pistol with which he killed himself.

Plaintiffs, however, failed to serve a *Notice of Claim* in accordance with the requirements of the *Utah Governmental Immunity Act* ("UGIA"), thereby depriving this Court of subject matter jurisdiction over this case. Additionally, the *UGIA* does not waive *sovereign immunity* for injury arising out of the incarceration of any person and/or an inadequate or negligent inspection. Wherefore, pursuant to *Utah R Civ P 12(b)(1)* and *12(b)(6)*, the *UGIA* and the *Doctrine of Sovereign Immunity*, St. George Defendants hereby move to dismiss Plaintiffs' *Complaint* with prejudice. St. George Defendants' *Memorandum in Support* is set forth below.

### **STATEMENT OF FACTS**

The facts the Court needs to rule upon the pending *Motion* are as follows:

1. On March 13, 2004, William Matthew Pace was arrested for theft. (*Complaint*,

¶¶ 7 and 8).

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).

3. In the restroom, Pace drew a 9mm Glock pistol and shot himself in the head. (*Id.* at ¶¶ 20-26).

4. 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).

5. On July 2, 2004, Plaintiffs' served a *Notice of Claim* under the *UGIA*. Plaintiffs did not, however, serve that *Notice of Claim* upon the St. George, Utah City Recorder as required by *Utah Code Ann.* § 63-30-11(3)(b)(ii)(A).<sup>1</sup> A copy of that *Notice of Claim* is attached hereto as Exhibit A.

**PLAINTIFFS FAILURE TO PROPERLY SERVE THE NOTICE OF CLAIM IN  
ACCORDANCE WITH THE UGIA DEPRIVES THIS COURT OF SUBJECT  
MATTER JURISDICTION**

“A court must have subject matter jurisdiction to have power and authority to decide

---

<sup>1</sup>The *Utah Governmental Immunity Act*, *Utah Code Ann.* §§ 63-30-1 to 38 (1997 & 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 prior act, in effect during 2003, applies to this action.

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*. See *Bischel v. Merritt*, 907 P.2d 275, 279 (Utah App. 1995). 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 (10<sup>th</sup> Cir. 1974).

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, the *UGIA* provides that 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”).

The *UGIA* specifies the form in which the claim must be presented and to whom the

claim must be delivered. “Any person having a claim for injury against a governmental entity . . . shall file a written *Notice of Claim* with the entity before maintaining an action.” (*Utah Code Ann.* § 63-30-11(2)) (emphasis added). More importantly, however, 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).<sup>2</sup>

As the Court will note from Plaintiffs’ *Notice of Claim*, they did not serve the St. George City “Recorder” with their *Notice of Claim* and that is fatal to this action because the most recent Utah case law mandates strict compliance with this *Notice* requirement, even if the governmental entity has the actual *Notice of 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* must 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 claimants strict compliance with the requirements of the *UGIA*. *Id.* at 1159. Although the

---

<sup>2</sup>When used in a statute, the word “shall” is a word of command and one which must be given a compulsory meaning; as denoting obligation. *Black’s Law Dictionary*, 1375 (6<sup>th</sup> Ed. 1990).

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 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 unserved, this Court lacks subject matter jurisdiction and their *Complaint* should be dismissed with prejudice.

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

The *UGIA* defines the extent to which the State of Utah, its political subdivisions and employees<sup>3</sup> are immune from suit. The *UGIA* initially provides that "all governmental entities are immune from suit for any injury which results from the exercise of a governmental function."<sup>4</sup> *Utah Code Ann.* § 63-30-3-(1). The *UGIA* then waives this

---

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

<sup>4</sup>

"Governmental Function" means any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity,

general immunity for “suit[s] . . . for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment.” *Id.* § 63-30-10. But the *UGIA* then contains exceptions to the foregoing waiver. *See id.* § 63-30-10(1) to (19).

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, the Court should dismiss Plaintiff’s *Complaint* in that the claims asserted therein arise out of the incarceration of William Matthew Pace. In *Madsen v. State*, 583 P.2d 92 (Utah 1978), the wife and daughter of a prison inmate brought a wrongful death action after the inmate died while incarcerated. *See id.* The decedent’s survivors in *Madsen* alleged that his death was the result of medical mistreatment and neglect, including “that the defendant’s agents failed and neglected to examine Madsen or to summon competent medical help to his aid, after being informed by other inmates that he was having difficulty breathing after the surgery.” *Id.* The Utah Supreme Court, relying on *Utah Code Ann.* § 63-30-10(10), dismissed Plaintiffs’ claim, stating:

The plain meaning of the section reflects a legislative intent to retain sovereign immunity for any injuries occurring while the

---

essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.

*Utah Code Ann.* § 63-30-2(4)(a). All of the acts of Washington County Defendants alleged in the *Complaint* clearly fit within this broad definition of governmental function.


incarcerated person is in prison and under the control of the State. Since this injury occurred while [the decedent] was under the control of prison officials, the governmental entities . . . are . . . immune from liability.

*Madsen*, 583 P.2d at 93.

The *UGIA* also provides 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) (emphasis added). This provision of the *UGIA* would likewise barr Plaintiffs’ *Complaint*. Accordingly, this Court should dismiss Plaintiff’s *Complaint* based upon the *sovereign immunity* retained under the *UGIA*. See *Oliver v. Woods*, 21 F. Supp.2d 1325, 1332 (D. Utah 1998) (dismissing “state law claims [that were] barred by *Utah’s Governmental Immunity Act*”), *overruled on other grounds*, 209 F.3d 1179 (10<sup>th</sup> Cir. 2000).<sup>5</sup>

DATED this 11<sup>th</sup> day of July, 2005.

SUITTER AXLAND



Jesse C. Trentadue

Michael W. Homer

*Attorneys for Defendants*

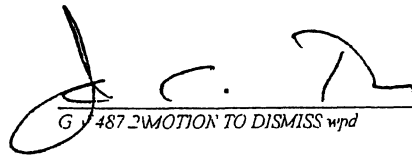
---

<sup>5</sup>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).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11<sup>th</sup> day of July, 2005, I caused a true and correct copy of the foregoing ST. GEORGE DEFENDANTS' COMBINED *MOTION TO DISMISS* AND *MEMORANDUM IN SUPPORT* to be served via, first class United States mail, postage prepaid, upon the following:

Matthew T. Graff, Esq.  
MATTHEW T. GRAFF & ASSOCIATES  
1957 West Royal Hunte Drive, Suite 200  
Cedar City, UT 84720

  
G:\4872\MOTION TO DISMISS.wpd

**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

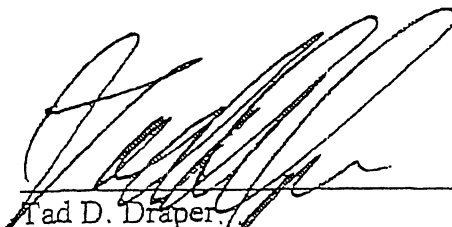
The injuries are, loss of support, companionship, society and other losses and injuries pertaining to a wrongful death action on behalf of Kristy Pace and the heirs of Matthew Pace. The compensable loss and damages resulting from the wrongful acts of the St. George Police Department include, but are 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

*copy*

MATTHEW T. GRAFF (8605)  
MATTHEW T. GRAFF & ASSOCIATES  
*Attorneys for Plaintiffs*  
1957 W. Royal Hunte Dr., Suite 200  
Cedar City, UT 84720  
Telephone: (435) 586-5115  
FAX: (435) 586-5118

---

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR  
WASHINGTON COUNTY, STATE OF UTAH

---

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

Plaintiffs,

v.

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

Defendants.

**MEMORANDUM IN OPPOSITION TO  
DEFENDANTS MOTION TO DISMISS**

Case No. 050500378  
Judge Eric A. Ludlow

*Oral Argument Requested*

---

**FACTS**

Decedent was arrested March 13, 2004 for theft. Decedent was wearing a prosthetic back brace at the time of the arrest and was searched by the arresting officers. Such search

failed to produce the 9mm pistol that Decedent had on his person under the back brace. As a result, while in custody, after the Decedent went to use the restroom and his restraints were removed, Decedent produced the handgun and fatally shot himself.

## ARGUMENT

Defendants have argued that the Notice of Claim requirement of the Utah Governmental Immunity Act require the dismissal of this suit. However, as is supported in this memorandum by affidavit, notice was sufficient upon the individuals or offices allowed by U.C.A. 63-30-11 and the precedence within this state. As such, the service rendered, and sworn to by affidavit, was indeed upon the “governing body” as required by the UGIA and is therefore sufficient, satisfying Rule 4 of the U.R.C.P., for service upon a governmental body.

In *Wills v. Heber Valley Historic Railroad Authority*, 2003 Ut 45, 79 P.3d 934 (Utah 2003), it was determined that mere service upon one of the offices of the Attorney General would suffice. In the absence of specific delineation by the statutory recipient of the notice, the notice may be properly served upon any of the addresses through which service could be delivered. *Shafer v. State*, 79 P.3d 936 (Utah 2003). It is not the responsibility of the Plaintiff to single out one of several addresses upon which Notice of Claim can be served if the Defendant has not taken affirmative steps to clarify the address of the individual to be served. *Id.* Defendant has taken no such affirmative steps in this instance, and as such, service was proper upon the address reasonably calculated to reach the statutory recipient of the notice.

Strict compliance with the Notice of Claim provisions of the statute is not necessary in instances where the agency served could reasonably be considered an “agency concerned” with the purposes of the statute. *Brittain v. State by & Through Utah Dep’t of Employment Sec.*, 882 P.2d 666, 248 Utah Adv. Rep. 15 (Utah App. 1994). In that case, service was proper even upon the agency that investigated or settled the claims (Department of Risk Management) against the proper party at fault (Department of Employment Security).

It is further worth noting as a policy measure that the vast majority of the courts favor substantial compliance as the standard, and recent Utah decisions are consonant with such holdings as illustrated. See also *Feinberg v. New Jersey Dept. of Env’tl. Protection*, 137 NJ 126, 644 A2d 593, 45 ALR5th 837 (1994); *Indiana State Highway Comm. v. Morris*, 528 NE2d 468 (Ind. 1988); and within the 10<sup>th</sup> Circuit, *Ruffin v. Oklahoma Dep’t of Human Servs.* 852 P.2d 793 (Okla. App. 1993); *Woodrow v. University of Okla. Bd. of Regents*, 861 P.2d 1009 (Okla. App. 1993), which only required service upon the offending agency. In *Lafitte v. State Highway Dep’t.*, 885 P.2d 338, (Colo. App. 1994) the court excused a plaintiff’s failure to serve claim notice upon the Attorney General, since recent amendments to Colo. Rev. Stat. § 24-10-109 (1988) authorized substantial compliance with the claim-notice requirements. In that holding, only a good faith effort to serve the Attorney General was necessary. Notably, Utah courts have already definitively expressed the standard regarding Utah Transit Authority suits to regard the Notice of Claim as only requiring substantial compliance. *Stahl v. Utah Transit Auth.*, 618 P.2d 480 (Utah, 1980).

Defendants cite heavily to *Busch v. Salt Lake Intern. Airport*, 921 P.2d 470 (Utah

App.,1996). That case in fact outlines the reasoning behind the Notice of Claim requirements.

“The Governmental Immunity Act serves two important purposes. First, it affords the responsible public authorities an opportunity to investigate, settle, or deny a claim without expending public revenue for costly and unnecessary litigation. Brittain, 882 P.2d at 671. Also, compliance with the Governmental Immunity Act provides an opportunity to those vested with authority to remedy a dangerous condition so that further damage or injury can be avoided. *Sears v. Southworth*, 563 P.2d 192, 193 (Utah 1977).” *Busch* at 472.

Such legislative intent has been more than satisfied in the forgoing claim. The Defendants’ have been given ample time for investigating, settling, or denying the claim at hand, and have instead again delayed any substantive progression in this matter. A constructive knowledge of the incident has also been afforded to all those vested with authority to prevent this sort of tragedy from happening in the future. The purpose of the Notice of Claim act has therefore been completely satisfied.

Defendants were properly served all initial documents on this matter. Please see the Affidavit of Jason Neal (Exhibit A), attached, and copies of Affidavits of Service and Delivery regarding the service of all initial pleadings on this matter (Exhibit B).

### CONCLUSION

Plaintiffs’ service was strictly compliant with the provisions of the UGIA. If, however, only substantial compliance is found, the notice necessary to satisfy the legislative intent of the Notice provision of the act was satisfied, and Utah case law validates the service that was effectuated in this matter. In light of the foregoing, we respectfully request that this Court deny the Defendant’s motion to dismiss.

DATED this 26<sup>th</sup> day of July, 2005.

MATTHEW T. GRAFF & ASSOCIATES

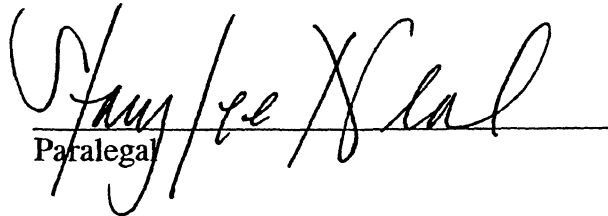
  
\_\_\_\_\_  
MATTHEW T. GRAFF  
Attorneys for Plaintiffs

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that a full, true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION OF DEFENDANTS MOTION TO DISMISS** was mailed by first class mail, postage fully prepaid on this 27<sup>th</sup> day of July, 2005, to the following:

Shawn M. Guzman  
St. George City Attorney  
175 East 200 North  
St. George, UT 84770

Jesse C. Trentadue  
Michael W. Homer  
Sutter Axland, PLLC  
8 East Broadway, Suite 200  
Salt Lake City, UT 84111

  
\_\_\_\_\_  
Paralegal

# Exhibit A

MATTHEW T. GRAFF (8605)  
**MATTHEW T. GRAFF & ASSOCIATES**  
*Attorneys for Plaintiffs*  
1957 West Royal Hunte Drive  
Suite 200  
Cedar City, Utah 84720  
Telephone: (435) 586-5115  
Facsimile: (435) 586-5118

---

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR  
WASHINGTON COUNTY, STATE OF UTAH

<p>KRISTIE PACE individually and for and on behalf of THE ESTATE OF WILLIAM MATTHEW PACE and ALL HEIRS OF THE ESTATE</p> <p>Plaintiffs,</p> <p>v.</p> <p>ST. GEORGE CITY POLICE DEPARTMENT, CITY OF ST. GEORGE, JOHN DOES 1 through 10</p> <p>Defendants.</p>	<p><b>AFFIDAVIT OF JASON NEAL</b></p> <p>Case No.050500378</p> <p>Judge Eric A. Ludlow</p>
---	--

Jason Neal, being first duly sworn upon oath, deposes and says as follows:

1. That he is a citizen of St. George, Utah.
2. That he is over the age of eighteen.
3. That he is employed by the law firm of Matthew T. Graff & Associates.
4. That one of his duties as an employee is to act as a civil process server when required.
5. That on March 3<sup>rd</sup>, 2005 he contacted the St. George City Offices to inquire as to the name of the individual that accepts service for all legal actions against St.

George City.


6. That the name given to him was Gay Cragun.
7. That on March 3<sup>rd</sup>, 2005, he did serve Gay Cragun with a Complaint, Summons and Subpoena Duces Tecum on the matter of Pace v. St. George City Police Department, City of St. George, and John Does 1 through 10, known as Case No. 050500378 in the Fifth Judicial District of Washington County.
8. That Gay Cragun came out of her office into the hallway inside the St. George City Offices, and did in fact accept service of the Complaint, Summons, and Subpoena Duces Tecum in this matter, known as Case No. 050500378 in the Fifth Judicial District of Washington County.
9. That he then went across the street to the St. George City Police Department and attempted to serve the Complaint, Summons, and Subpoena Duces Tecum on the matter known as Case No. 050500378 to the receptionist in the reception area.
10. That the receptionist stated that someone in management would need to address this issue. The Receptionist went into the back office area and returned with a man.
11. That this male employee, representing the St. George City Police Department refused to accept service of the documents related to Case No. 050500378.
12. That this employee of the St. George City Police Department then told Jason Neal that the person who actually accepts service for the St. George Police Department is Gay Cragun.
13. That he then inquired as to the reason for this.

14. That he was then told that because the St. George City Police Department is operated and governed by the City of St. George entity, that St. George City must accept service of all legal documents.
15. That, after this he traveled to his place of employment at Matthew T. Graff & Associates, which is located in Cedar City, Utah.
16. That he reported the refusal of service to Matthew T. Graff, Plaintiffs' attorney on this matter.
17. That after making a phone call to the City of St. George, it was confirmed by a representative of the City of St. George that they are in fact supposed to accept service for the St. George City Police Department.
18. That on May 4<sup>th</sup>, 2005, he returned to the St. George City Offices.
19. That he asked the receptionist to request that Gay Cragun accept service of documents.
20. That Gay Cragun was paged.
21. That Gay Cragun did not appear for at least ten minutes.
22. That Gay Cragun did appear in the hallway and was visibly angry.
23. That Gay Cragun inquired as to why she was being served a duplicate set of documents.
24. That he explained the refusal of service he encountered at the St. George City Police Department and the subsequent confirmation that she was to accept service for the St. George City Police Department.
25. That Gay Cragun took the documents from Jason Neal and stated "I guess it's me then."

26. That Gay Cragun was properly served, acting as a representative for the City of St. George, which governs and operates the St. George City Police Department.

FURTHER AFFIANTS SAITH NOT.

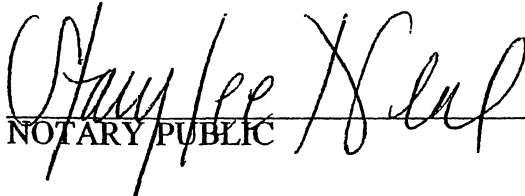
Dated this 21<sup>st</sup> day of July, 2005.

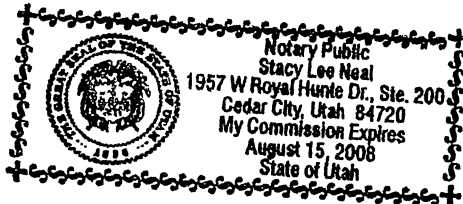
  
E. JASON NEAL

STATE OF UTAH           )  
                                  :  
COUNTY OF IRON       )

I hereby testify that E. JASON NEAL appeared before me this 21<sup>st</sup> day of July, 2005 and affixed his signature to this Affidavit and deposed and swore that the items contained herein were true and accurate.

My Commission Expires:

  
NOTARY PUBLIC



# Exhibit B

**AFFIDAVIT OF SERVICE AND DELIVERY**

Having been duly sworn, I hereby depose and say that I am a resident of the State, and a Citizen of the United States, that I am over the age of 21 years, am not a party to or interested in any action being taken. That at the time of service I did endorse upon the copies left for the person being served, the date and my name thereto.

I served: Guy Crugan

Located at: 175 E. 200 N.

On the: 3<sup>rd</sup> day of March, 2005.

At the hour of: 9:10 A..m.

Who is the: ☒ Defendant ( ) Plaintiff ( ) Garnishee ( ) Witness  
( ) Other ( ) Respondent

DOCUMENT(S) SERVED: ☒ Subpoena Duces Tecum

MANNER OF SERVICE: ☒ Personally served ( ) At the dwelling, house or usual place of abode with some person of suitable age and discretion there residing.  
( ) By delivering a copy to an agent authorized by appointment or by law to receive process  
( ) By posting in a conspicuous manner (Upon the main entry point)

COMMENTS:

CLIENT INFORMATION: \_\_\_\_\_

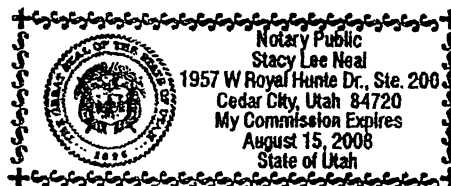
Dated this: 3<sup>rd</sup> day of March, 2005.

[Signature]  
Process Server

SUBSCRIBED AND SWORN BEFORE ME THIS: 3 day of March, 2005.

Service Fees \$: \_\_\_\_\_

[Signature]  
Notary Public



**AFFIDAVIT OF SERVICE AND DELIVERY**

Having been duly sworn, I hereby depose and say that I am a resident of the State, and a Citizen of the United States, that I am over the age of 21 years, am not a party to or interested in any action being taken. That at the time of service I did endorse upon the copies left for the person being served, the date and my name thereto.

I served: Gay Cruggins

Located at: 175 E. 200 N.

On the: 3<sup>rd</sup> day of March, 2005.

At the hour of: 10.10 A. m.

Who is the: (X) Defendant ( ) Plaintiff ( ) Garnishee ( ) Witness  
( ) Other ( ) Respondent

**DOCUMENT(S) SERVED:** (X) Summons and Complaint

**MANNER OF SERVICE:** (X) Personally served ( ) At the dwelling, house or usual place of abode with some person of suitable age and discretion there residing.  
( ) By delivering a copy to an agent authorized by appointment or by law to receive process  
( ) By posting in a conspicuous manner (Upon the main entry point)

**COMMENTS:**

**CLIENT INFORMATION:** \_\_\_\_\_

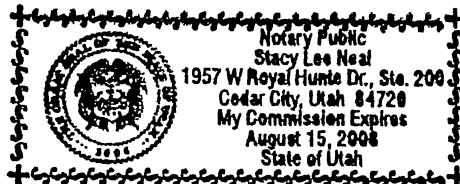
Dated this: 3<sup>rd</sup> day of March, 2005.

Stacy Lee Neal  
Process Server

SUBSCRIBED AND SWORN BEFORE ME THIS: 3 day of March, 2005.

Service Fees \$: \_\_\_\_\_

Stacy Lee Neal  
Notary Public



**AFFIDAVIT OF SERVICE AND DELIVERY**

Having been duly sworn, I hereby depose and say that I am a resident of the State, and a Citizen of the United States, that I am over the age of 21 years, am not a party to or interested in any action being taken. That at the time of service I did endorse upon the copies left for the person being served, the date and my name thereto.

I served: Gary Grugun

Located at: 175 E. 200 N.

On the: 4th day of March, 2005.

At the hour of: 8:40 A.m.

Who is the: ☒ Defendant ☐ Plaintiff ☐ Garnishee ☐ Witness  
☐ Other ☐ Respondent

**DOCUMENT(S) SERVED:** ☒ Summons and Complaint

**MANNER OF SERVICE:** ☒ Personally served ☐ At the dwelling, house or usual place of abode with some person of suitable age and discretion there residing.  
☐ By delivering a copy to an agent authorized by appointment or by law to receive process  
☐ By posting in a conspicuous manner (Upon the main entry point)

**COMMENTS:**

**CLIENT INFORMATION:** \_\_\_\_\_

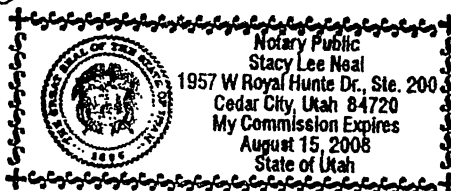
Dated this: 4th day of March, 2005.

[Signature]  
Process Server

SUBSCRIBED AND SWORN BEFORE ME THIS: 4th day of March, 2005.

Service Fees \$: \_\_\_\_\_

[Signature]  
Notary Public



# AFFIDAVIT OF SERVICE AND DELIVERY

Having been duly sworn, I hereby depose and say that I am a resident of the State, and a Citizen of the United States, that I am over the age of 21 years, am not a party to or interested in any action being taken. That at the time of service I did endorse upon the copies left for the person being served, the date and my name thereto.

I served: Gay Crugun

Located at: 175 E. 200 N.

On the: 4th day of March, 2005.

At the hour of: 8:40 A. .m.

Who is the: ☒ Defendant ☐ Plaintiff ☐ Garnishee ☐ Witness  
☐ Other ☐ Respondent

DOCUMENT(S) SERVED: ☒ Subpoena Duces Tecum

MANNER OF SERVICE: ☒ Personally served ☐ At the dwelling, house or usual place of abode with some person of suitable age and discretion there residing.  
☐ By delivering a copy to an agent authorized by appointment or by law to receive process  
☐ By posting in a conspicuous manner (Upon the main entry point)

COMMENTS:

CLIENT INFORMATION: \_\_\_\_\_

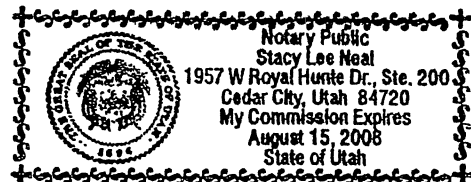
Dated this: 4th day of March, 2005.

[Signature]  
Process Server

SUBSCRIBED AND SWORN BEFORE ME THIS: 4th day of March, 2005.

Service Fees \$: \_\_\_\_\_

[Signature]  
Notary Public



Jesse C. Trentadue (#4961)  
Michael W. Homer (#1535)  
**SUITTER AXLAND, PLLC**  
8 East Broadway, Suite 200  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7300  
Facsimile: (801) 532-7355

Shawn M Guzman (#7392)  
**ST. GEORGE CITY ATTORNEY**  
175 East 200 North  
St. George, Utah 84770  
Telephone: (435) 634-5000  
Facsimile: (435) 674-4260

*Attorneys for City of St. George, Utah and St. George City Police Dept.*

---

**FIFTH JUDICIAL DISTRICT COURT**

**IN AND FOR WASHINGTON COUNTY, STATE OF UTAH**

---

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

v. )

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

**REPLY MEMORANDUM IN  
SUPPORT OF ST. GEORGE  
DEFENDANTS' *MOTION TO  
DISMISS***

Case No. 050500378

Judge Eric A. Ludlow

**ORAL ARGUMENT REQUESTED**

---

St. George Defendants hereby submit, through counsel, this *Reply Memorandum in*

**RECEIVED**

**AUG 11 2005**

*Support of St. George Defendants' Motion to Dismiss.*

**THE COURT LACKS JURISDICTION BECAUSE PLAINTIFFS FAILED TO  
COMPLY WITH THE NOTICE OF CLAIM REQUIREMENTS OF THE UTAH  
GOVERNMENTAL IMMUNITY ACT**

Plaintiffs directed and delivered their *Notice of Claim* by certified and regular mail, to St. George Police Department, City of St. George, the Mayor of St. George City, and the City Council members of St. George City. Plaintiffs did not direct or deliver their *Notice of Claim* to the St. George City Recorder or the St. George City Clerk.<sup>1</sup> St. George Defendants demonstrated in their opening *Memorandum* that the Plaintiffs were required to “direct and deliver to . . . the city or town recorder” their written *Notice of Claim*. (*Memo. in Support of Mot. to Dismiss*, pp. 3-6.) St. George Defendants further demonstrated that because strict compliance with the *Notice of Claim* provisions is required under Utah law Plaintiffs’ *Complaint* must be dismissed with prejudice. (*See id.*) Plaintiffs respond by arguing that (1) “[i]n the absence of specific delineation by the statutory recipient of the notice, the notice may be properly served upon any of the addresses through which service could be delivered”;

---

<sup>1</sup> The relevant provision of the *Utah Governmental Immunity Act* in effect at the time of the alleged injury in this case was *Utah Code Ann.* § 63-30-11(3)(b)(ii)(A) (Supp. 2003), requiring that the *Notice of Claim* be “directed and delivered to . . . the city . . . recorder” of St. George City. The relevant provision of the *Governmental Immunity Act of Utah* in effect at the time Plaintiffs mailed their *Notice of Claim* was *Utah Code Ann.* § 63-30d-401(3)(b)(ii)(A) (2004), requiring that the *Notice of Claim* be “directed and delivered by hand or by mail . . . to the office of . . . the city or town clerk” of St. George City. Regardless of the applicable provisions, because Plaintiffs failed to direct or deliver their *Notice of Claim* to the City Recorder or the City Clerk, the outcome is the same. *See Goebel v. Salt Lake City S. R.R. Co.*, 2004 UT 80, ¶¶ 38-40, 104 P.3d 1185 (holding that notice of claim requirements in effect at the time of giving notice are controlling).

(2) “[s]trict compliance with the *Notice of Claim* provisions of the statute is not necessary in instances where the agency could reasonably be considered an ‘agency concerned’ with the purposes of the statute”; (3) other jurisdictions do not require strict compliance with their notice of claim provisions; and (4) Plaintiffs’ *Notice of Claim* was sufficient to meet the policy considerations behind *Notice of Claim* requirements. (See *Memo. in Opp. to Defendants’ Mot. to Dismiss*, pp. 2-4.) Plaintiffs’ arguments are unavailing.

Plaintiffs’ first assertion is that if it is unclear what location to send a *Notice of Claim* to, the *Notice* may be sent to any address associated with the designated statutory recipient. In support of this argument, Plaintiffs rightly cited 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 *Utah Governmental Immunity Act*’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. Plaintiffs’ reliance on *Wills* and *Shafer* is, however, inapposite here because (1) the *ACT* stated 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 or Clerk as required by the *Act*, and for this reason the Court should grant the *Motion to Dismiss*.

Plaintiffs’ second assertion — that “[s]trict compliance with the *Notice of Claim*

provisions of the statute is not necessary in instances where the agency could reasonably be considered an ‘agency concerned’ with the purposes of the statute” – is based solely on *Brittain v. State*, 882 P.2d 666 (Utah Ct. App. 1994). However, *Brittain* dealt with a claim against the State of Utah, for which the notice requirements are different than as against a city. *See id.* at 669-70. More importantly, *Brittain* was overruled when “[i]n 1998 the Utah Legislature amended the Immunity Act, clarifying exactly to whom Notices must be directed and delivered.” *Greene v. Utah Transit Authority*, 2001 UT 109, ¶ 13, 37 P.3d 1156 (recognizing statutory overruling of *Brittain*). Thus, Plaintiffs’ argument based thereon fails.

Plaintiffs next note “that the vast majority of the courts [in other jurisdictions] favor substantial compliance as the standard” and claims that “recent Utah decisions are consonant with such holdings.” Plaintiffs cite only *Stahl v. Utah Transit Auth.*, 618 P.2d 480 (Utah 1980), in support of this latter assertion. *Stahl* held that only substantial compliance was required with respect to the *Utah Public Transit District Act*, not with the *Utah Governmental Immunity Act*. *See id.* at 481-82. In fact, the *Stahl* court affirmed “[t]he **express bar against maintaining an action for noncompliance with the notice provision in the Governmental Immunity Act.**” *Id.* at 481 (emphasis added). Thus, notwithstanding that other jurisdictions may not require strict compliance with their notice of claims provisions, Plaintiffs have cited no authority for the proposition that Utah law requires anything less than strict compliance.

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*, and then argue that substantial compliance with the *Act*’s *Notice of Claim* requirements fulfills the *Act*’s two purposes. Notwithstanding Plaintiffs’ argument, the Utah Supreme Court has held repeatedly and recently that the *Notice of Claim* requirements of the *Utah Governmental Immunity Act* 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* at the St. George City Mayor and City Council, they did not direct it to the City Recorder or Clerk. Thus, their *Notice of Claim* was not in strict compliance with the notice requirements of the *Act*, and the Court should dismiss Plaintiffs’ *Complaint* with prejudice.

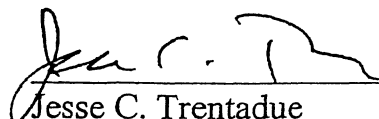
**THE COURT ALSO LACKS JURISDICTION BECAUSE SOVEREIGN  
IMMUNITY HAS NOT BEEN WAIVED FOR INJURY ARISING OUT OF THE  
INCARCERATION OF ANY PERSON OR FOR NEGLIGENT INSPECTIONS**

St. George Defendants demonstrated in their opening *Memorandum* that this Court lacks jurisdiction to hear Plaintiffs' claims because those claims are for injury arising out of the incarceration of William Matthew Pace, and *sovereign immunity* is retained when the suit is for negligently caused injury arising out of the incarceration of any person. *See Utah Code Ann.* § 63-30-10(10) (Supp. 2003). St. George Defendants likewise demonstrated in their opening *Memorandum* that this Court lacks jurisdiction to hear Plaintiffs' claims because those claims are for injury arising out of the allegedly negligent search of Matthew Pace, and *SOVEREIGN immunity* is retained for injury resulting from an inadequate or negligent inspection. *See Utah Code Ann.* § 63-30-10(4). Thus, even if the Court were to decide that Plaintiffs' *Notice of Claim* was in strict compliance with the *Utah Governmental Immunity Act*, the Court would still lack jurisdiction to hear Plaintiffs' claims. In their *Memorandum in Opposition to Defendants' Motion to Dismiss*, Plaintiffs do not even address these arguments. More importantly, Plaintiffs failure to respond to St. George Defendants' arguments is "fatal to [their] claims." *Hinsdale v. City of Liberal*, 19 Fed. Appx. 749, 769 (10<sup>th</sup> Cir. 2001) ("[Plaintiff]'s failure to respond [to defendant's summary judgment argument] is fatal to his claims."); *see also, Teumer v. General Motors Corp.*, 34 F.3d 542, 545-46 (7<sup>th</sup> Cir. 1994) (same); *Wilkinson v. Ellis*, 484 F. Supp. 1072, 1078 n. 13 (D. Pa. 1980)

(stating that plaintiff apparently conceded defendant's argument by not addressing it in response to defendant's motion to dismiss). Even if Plaintiffs' failure to respond to St. George Defendants' arguments in this regard is not alone fatal to their claims, the authority upon which St. George Defendants' rely is incontrovertible to the effect that *sovereign immunity* is retained **"for any injuries occurring while the incarcerated person is in [jail] and under the control of [a governmental entity]."** *Madsen v. State*, 583 P.2d 92, 93 (Utah 1978)(emphasis added). **"Since [the] injury [complained of here] occurred while [the decedent] was under the control of [jail] officials, the governmental entities . . . are . . . immune from liability."** *Id.*(emphasis added). The Court should therefore grant St. George Defendants' *Motion to Dismiss* for lack of jurisdiction. *See id.*

DATED this 8<sup>th</sup> day of August, 2005.

SUITTER AXLAND

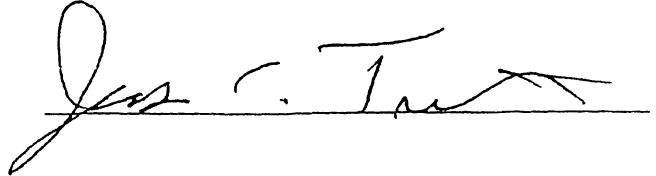
A handwritten signature in dark ink, appearing to read "Jesse C. Trentadue", written over a horizontal line.

Jesse C. Trentadue  
Michael W. Homer  
*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 8<sup>th</sup> day of August, 2005, I caused a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF ST. GEORGE DEFENDANTS' *MOTION TO DISMISS*** to be served via, first class United States mail, postage prepaid, upon the following:

Matthew T. Graff, Esq.  
MATTHEW T. GRAFF & ASSOCIATES  
1957 West Royal Hunte Drive, Suite 200  
Cedar City, UT 84720

A handwritten signature in black ink, appearing to read "Joseph C. Tamm", is written over a horizontal line.

COPY

MATTHEW T. GRAFF (8605)  
MATTHEW T. GRAFF & ASSOCIATES  
*Attorneys for Plaintiffs*  
1957 W. Royal Hunte Dr., Suite 200  
Cedar City, UT 84720  
Telephone: (435) 586-5115  
FAX: (435) 586-5118

---

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR  
WASHINGTON COUNTY, STATE OF UTAH

---

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

Plaintiffs,

v.

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

Defendants.

**PLAINTIFFS' SUPPLEMENTAL  
MEMORANDUM IN OPPOSITION TO  
DEFENDANTS MOTION TO DISMISS**

Case No. 050500378  
Judge Eric A. Ludlow

*Oral Argument Requested*

---

Plaintiffs, by and through their counsel of record, Matthew T. Graff, hereby  
respectfully submit their Supplemental Memorandum in Opposition to Defendants' Motion to

Dismiss with supporting affidavit.

## ARGUMENT

Defendants have argued that the Notice of Claim requirement of the Utah Governmental Immunity Act requires the dismissal of this suit. Included herein is the affidavit of service and delivery of Summons and Complaint upon Gay Cragun. Gay Cragun was served with Summons and Complaint on the 3<sup>rd</sup> day of March, 2005 at 10:10 a.m. **Gay Cragun represented to Jason Neal, the process server, that she is the proper person for service as the City Recorder of the City of St. George, in *exact* compliance with U.C.A. 63-30-11(3)(b)(ii)(A). (See, affidavit of Jason Neal). In the very words of the Reply Memorandum submitted by Defendants received August 11, 2005, “Plaintiffs did not direct or deliver their Notice of Claim to the St. George City Recorder or the St. George City Clerk.” This statement is entirely erroneous, and proven by sworn affidavit already before this court. All of the foregoing information was already held by this court and also held by Defendants. The Motion to Dismiss alleging failure to comply with this provision of the Utah Governmental Immunity Act has wasted the time of this court and our law offices, and we hereby request the award of attorneys fees in an amount to be shown at trial.**

Jurisdiction is retained in this matter, and the provisions of Sovereign Immunity with regards to the incarceration of any person or for negligent inspections is, on its face, inapplicable here. Defendants quoted Madsen to assert that “sovereign immunity is retained ‘for any injuries occurring while the incarcerated person is in [jail] and under the control of a governmental entity.’” The true holding of Madsen uses the word **prison**, rather than jail. In

their second citation to the case, they again replaced the word “prison” with “jail.” We find it perplexing that Defendants decided to use different language than the true holding of the one case they cite in support of their claims to divest this court of jurisdiction. The word distinction is crucial and dispositive of this portion of the Defendants’ Motion to Dismiss. The deceased was not in prison, nor is the wording of the holding of Madsen applicable here. The deceased had only recently been read his Miranda rights and was using the bathroom on break from interrogation when he shot himself in the head. He had not been sentenced and was not incarcerated due to sentencing for a crime.

With respect to the fatality of a claim for failure to respond to an argument within the Defendants’ Motion for Summary Judgment, such doctrine is applicable with respect to a *claim*, not jurisdiction. This court has exercised and may retain jurisdiction absent a rebuttal claim by Plaintiffs if jurisdiction is proper, as seen by the wording of Hinsdale (which wording was also interestingly omitted from the citation in Defendants’ Motion). “Defendants . . . made an argument why summary judgment is appropriate as to a *particular claim*, which shifted the burden to Mr. Hinsdale, as nonmovant. Mr. Hinsdale's failure to respond is fatal to his claims.” Hinsdale v. City of Liberal, 19 Fed. Appx. 749, 769 (10<sup>th</sup> Cir. 2001). In that case, the Plaintiff failed to respond to the substantive Section 1983 claims rebutted by the Defendants, and therefore those specific claims failed. Defendant has never included jurisdiction as a “claim”, but we rather leave it to the discretion of this court to determine its propriety. As the courts determining jurisdiction within Utah inquire, “if the matter is to be determined on the documentary evidence alone, the plaintiff must simply make a prima facie showing of personal

jurisdiction. If there are material disputes in the documentary evidence, the matter must proceed to trial where the plaintiff must prove jurisdiction by a preponderance of the evidence.” *Kamdar & Co. v. Laray Co., Inc.*, 815 P.2d 245 (Utah App. 1991). We rely on our assertions from prior pleadings that jurisdiction is, in fact, proper and challenge the position of the Defendants with regard to the same. At the time of trial, Defendants may collaterally attack jurisdiction under the standard of a preponderance of the evidence standard.

### **CONCLUSION**

Plaintiffs’ service was strictly compliant with the provisions of the UGIA. Jurisdiction is maintained properly within this court. In light of the foregoing, we respectfully request that this Court deny the Defendant’s motion to dismiss, and for the award of attorneys fees in an amount to be determined at trial. **ORAL ARGUMENT REQUESTED.**

DATED this \_\_\_\_\_ day of August, 2005.

MATTHEW T. GRAFF & ASSOCIATES

---

MATTHEW T. GRAFF  
Attorneys for Plaintiffs

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that a full, true and correct copy of the foregoing **PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANTS MOTION TO DISMISS** was mailed by first class mail, postage fully prepaid on this \_\_\_\_\_ day of July, 2005, to the following:

Shawn M. Guzman  
St. George City Attorney  
175 East 200 North  
St. George, UT 84770

Jesse C. Trentadue  
Michael W. Homer  
Sutiter Axland, PLLC  
8 East Broadway, Suite 200  
Salt Lake City, UT 84111

\_\_\_\_\_  
Paralegal

# EXHIBIT A

COPY

AFFIDAVIT OF SERVICE AND DELIVERY

Having been duly sworn, I hereby depose and say that I am a resident of the State, and a Citizen of the United States, that I am over the age of 21 years, am not a party to or interested in any action being taken. That at the time of service I did endorse upon the copies left for the person being served, the date and my name thereto.

I served: Gay Cruggins

Located at: 175 E 200 N

On the: 3<sup>rd</sup> day of March, 2005.

At the hour of: 10:10 A.m.

Who is the: (X) Defendant ( ) Plaintiff ( ) Garnishee ( ) Witness  
( ) Other ( ) Respondent

DOCUMENT(S) SERVED: (X) Summons and Complaint

MANNER OF SERVICE: (X) Personally served ( ) At the dwelling, house or usual place of abode with some person of suitable age and discretion there residing.  
( ) By delivering a copy to an agent authorized by appointment or by law to receive process  
( ) By posting in a conspicuous manner (Upon the main entry point)

COMMENTS:

CLIENT INFORMATION: \_\_\_\_\_

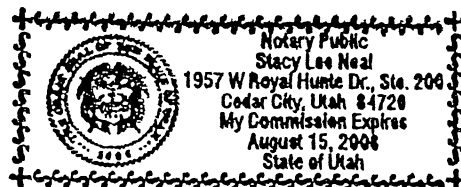
Dated this: 3<sup>rd</sup> day of March, 2005.

Stacy Lee Neal  
Process Server

SUBSCRIBED AND SWORN BEFORE ME THIS: 3 day of March, 2005.

Service Fees \$: \_\_\_\_\_

Stacy Lee Neal  
Notary Public



COPY

AFFIDAVIT OF SERVICE AND DELIVERY

Having been duly sworn, I hereby depose and say that I am a resident of the State, and a Citizen of the United States, that I am over the age of 21 years, am not a party to or interested in any action brought. That at the time of service I did endorse upon the copies left for the person being served, the name and my name thereto.

I served: Gay Grugun

Located at: 175 E. 200 N.

On the: 4th day of March, 2005.

At the hour of: 8:40 A..m.

Who is the: ☒ Defendant ☐ Plaintiff ☐ Garnishee ☐ Witness  
☐ Other ☐ Respondent

DOCUMENT(S) SERVED: ☒ Summons and Complaint

MANNER OF SERVICE: ☒ Personally served ☐ At the dwelling, house or usual place of abode with some person of suitable age and discretion there residing.  
☐ By delivering a copy to an agent authorized by appointment or by law to receive process  
☐ By posting in a conspicuous manner (Upon the main entry point)

COMMENTS:

CLIENT INFORMATION:

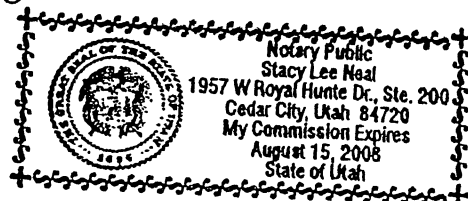
Dated this: 4th day of March, 2005.

[Signature]  
Process Server

SUBSCRIBED AND SWORN BEFORE ME THIS: 4th day of March, 2005.

Service Fees \$:

[Signature]  
Notary Public



MATTHEW T. GRAFF (8605)  
**MATTHEW T. GRAFF & ASSOCIATES**  
*Attorneys for Plaintiffs*  
1957 W. Royal Hunte Dr., Suite 200  
Cedar City, UT 84720  
Telephone: (435) 586-5115  
FAX: (435) 586-5118

---

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR  
WASHINGTON COUNTY, STATE OF UTAH

---

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

Plaintiffs,

v.

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

Defendants.

**PLAINTIFFS' REPLY MEMORANDUM  
IN SUPPORT OF SUPPLEMENTAL  
MEMORANDUM**

Case No. 050500378  
Judge Eric A. Ludlow

*Oral Argument Requested*

---

Plaintiffs, by and through their counsel of record, Matthew T. Graff, hereby  
respectfully submit their Supplemental Memorandum in Reply to Plaintiffs Motion to File

## Supplemental Memorandum.

Defense raises three issues in their Memorandum in Opposition. Plaintiffs will address each in turn.

Defense first asserts that Plaintiffs are not in strict compliance with U.C.A. 63-30-11(3)(b)(ii)(A)(2003). Notice of Claim, as filed by prior counsel Braunberger, Boud & Draper, was in fact proper, as it was directed and delivered to the known address of the city recorder as a duly filed Notice of Claim in accordance with the statute. The address it was mailed to was 175 East 200 North, St. George, UT 84770. *See attached exhibit*. When a lawsuit is filed against a city, the city entity is served by leaving a copy of the summons and complaint with the city recorder. *Banford ex rel. Banford v. Quinley*, 1999 WL 33244607 (Utah App., 1999). Utah R. Civ. P. 4. See also *Busch v. Salt Lake Intern. Airport*, 921 P.2d 470 (Utah App., 1996) (declaring that even if the notice of claim was insufficient, the cause of action cannot be time barred, and a conforming notice of claim can still be re-filed regardless).

Concerning the mis-quotation of the holding of *Madsen*, Defendants replaced the word “jail” with “prison.” *Madsen v. State*, 583 P.2d 92 (Utah 1978). Whether or not that is the correct *holding* of *Madsen* is currently at issue, but the citation in Defense’s memorandum was intentionally altered from the true wording of the case. Considering that the statute contemplates incarceration, Plaintiff submits that an individual who is taking a break to urinate after interrogations is not contemplated under the statute. A prison, which is dramatically different than jail, is also substantively distinct from a detainee, or even a person willfully submitting to interrogatories by the Police. We further have no way of knowing the full status of the Plaintiff

in light of Defense's obstinacy with submitting to statutorily justified discovery. For all we have been informed by Defense, the Decedent may not have even been Mirandized at the time he shot himself in the head. Discovery is necessary to even go forward procedurally in this case and to ascertain what causes of action are to be properly pursued. (We have now requested a [statutorily unnecessary] Rule 26 conference with Defense two times with no response).

With respect to the argument Defense set forth that the Utah Governmental Immunity Act must waive sovereign jurisdiction over "her" claims, "she" has done so. "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." U.C.A. 1953 § 63-30d-301(3)(a)(4). This is the same argument Plaintiffs presented when Defense vehemently objected to our proper discovery requests of the tapes and materials documenting the suicide without a Rule 26 scheduling conference. This argument should not come as any surprise to Defense, although they have as of yet failed to properly address the issue, even though it is determinative of their duty to respond to our discovery requests and waives governmental immunity. Defense also again attempted to claim that a failure of Plaintiffs to respond to their arguments regarding a "waiver of sovereign immunity" somehow stripped this court of the jurisdiction to hear this suit. Jurisdiction of this court is not a "claim" made by the Defense for which Plaintiffs must raise a rebuttal. Defense wishes to strip this court of subject matter jurisdiction because of a failure to respond to an assertion of lack of jurisdiction in a pleading (claiming jurisdiction was improper due to the Governmental Immunity Act). Any such argument is untenable and is uniformly rejected in all jurisdictions. The U.S. Supreme Court

holding of *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003 (U.S., 1998) emphasized that subject matter jurisdiction is completely separate of all claims made by either party. “It is firmly established in our cases that the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case.” Under either theory (that immunity is waived, or that jurisdiction is not a claim), this court may hear this proceeding.

We reiterate the position of Utah Courts regarding the use of procedural delays to avoid discovery. “When an administrative agency determines that a party has not complied with legitimate discovery requests due to willfulness, bad faith, fault, or persistent dilatory tactics frustrating the judicial process, the agency acts within its discretion in imposing sanctions. Joseph v. Salt Lake City Civil Service Com'n, 2002, 53 P.3d 11, 452 Utah Adv. Rep. 43, 2002 UT App 254, certiorari denied 63 P.3d 104, certiorari denied 124 S.Ct. 133, 540 U.S. 821, 157 L.Ed.2d 40.” See in general U.C.A. 1953 § 63-46b-7; “Procedures for formal adjudicative proceedings--Discovery and subpoenas.” Although Plaintiffs do not at this time seek sanctions against Defendants, we ask that the court consider the legitimacy and substantive weight of the discovery requests issued by Plaintiffs in Subpoena form, the 2<sup>nd</sup> of March, 2005. Now, six months later, after a litany of non-substantive filings and memorandum, Defense is still unresponsive to any of our requests for scheduling conferences or requests to convene in any manner progressive to the discovery of any of the jealously guarded facts surrounding this embarrassment within a city organization.

## CONCLUSION

Plaintiffs' service was strictly compliant with the provisions of the UGIA, the misquotation of Defense's case holding improperly interprets the statutory intent, and Jurisdiction is maintained properly within this court. In light of the foregoing, we respectfully request that this Court grant Plaintiffs' Motion for Leave to File Supplemental Memorandum, and for the award of attorneys fees in an amount to be determined at trail. **ORAL ARGUMENT REQUESTED.**

DATED this 21<sup>st</sup> day of September, 2005.

MATTHEW T. GRAFF & ASSOCIATES



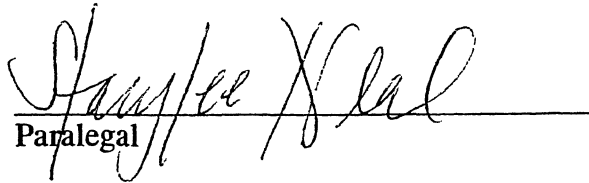
MATTHEW T. GRAFF  
Attorneys for Plaintiffs

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that a full, true and correct copy of the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF LEAVE TO FILE SUPPLEMENTAL MEMORANDUM** was mailed by first class mail, postage fully prepaid on this 24<sup>th</sup> day of September, 2005, to the following:

Shawn M. Guzman  
St. George City Attorney  
175 East 200 North  
St. George, UT 84770

Jesse C. Trentadue  
Michael W. Homer  
Sutiter Axland, PLLC  
8 East Broadway, Suite 200  
Salt Lake City, UT 84111

  
Paralegal

# **EXHIBIT #1**

**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

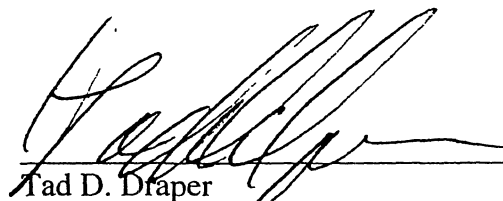
The injuries are, loss of support, companionship, society and other losses and injuries pertaining to a wrongful death action on behalf of Kristy Pace and the heirs of Matthew Pace. The compensable loss and damages resulting from the wrongful acts of the St. George Police Department include, but are 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

COPY

FILED  
FIFTH DISTRICT COURT  
2006 JAN 18 PM 4:54  
WASHINGTON COUNTY

Jesse C. Trentadue (#4961)  
Michael W. Homer (#1535)  
SUITTER AXLAND, PLLC  
8 East Broadway, Suite 200  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7300  
Facsimile: (801) 532-7355

BY \_\_\_\_\_

Shawn M. Guzman (#7392) -  
ST. GEORGE CITY ATTORNEY  
175 East 200 North  
St. George, Utah 84770  
Telephone: (435) 634-5000  
Facsimile: (435) 674-4260

Attorneys for City of St. George, Utah and St. George City Police Dept.

**FIFTH JUDICIAL DISTRICT COURT**

**IN AND FOR WASHINGTON COUNTY, STATE OF UTAH**

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

Plaintiffs,

v.

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

Defendants.

ORDER RE: MOTION TO DISMISS


Case No. 050500378

Judge James L. Schmate

On November 1, 2005, Defendants' *Motion to Dismiss* came on for a regularly scheduled hearing before the Honorable L. Shumate. Plaintiffs were represented at the hearing by Matthew T. Graff. Defendants were represented by Jesse C. Trentadue. The Court having heard the arguments of counsel, being otherwise fully advise and these premises, does hereby grant Defendants' *Motion to Dismiss*. Defendants' *Motion to Dismiss* is granted because the *Court* lacks subject matter jurisdiction over Plaintiffs' claims due to Plaintiffs' failure to comply with the service of a *Notice of Claim* in the Court is with the provisions of the Utah Governmental Immunity Act, Utah Code. Ann. § 63-30-11(3)(b)(ii)(A) (2003) and because this matter arises out of the incarceration of William Matthew Pace for which the State of Utah and its political subdivisions retain governmental immunity in accordance with Utah Code. Ann. § 63-30-10(10) (2003). This dismissal, however, is without prejudice since the Court lacks subject matter jurisdiction. For the reasons stated above, it is hereby ordered, adjudged and decreed that Plaintiffs' *Complaint* be and the same is hereby dismissed without prejudice, each party to bear their respective costs and attorney's fees.

DATED this 18 day of January, 2006.

BY THE COURT:



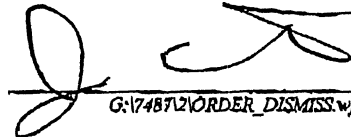
---

Hon. James L. Schmate  
District Judge

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 6 day of December, 2005, I caused a true and correct copy of the foregoing **ORDER RE: MOTION TO DISMISS** to be served via, first class United States mail, postage prepaid, upon the following:

Matthew T. Graff, Esq.  
MATTHEW T. GRAFF & ASSOCIATES  
1957 West Royal Hunte Drive, Suite 200  
Cedar City, UT 84720



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

G:\74872\ORDER\_DISMISS.wpd