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

SHAUNA MAYNE, individually and as personal representative of the ESTATE OF AMANDA MAYNE, Plaintiff, vs. SALT LAKE CITY POLICE DEPARTMENT, a governmental entity, Defendant.	COMPLAINT (Tier 3) Case No. Judge
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Plaintiff Shauna Mayne, individually and in her capacity as personal representative for the Estate of Amanda Mayne (deceased), hereby files this complaint against Defendant Salt Lake City Police Department, alleging, claiming, and seeking relief as follows:

Introduction

1. On August 17, 2022, Amanda Mayne ("Amanda") was murdered by her ex-husband, Taylor Ray Martin ("Martin"). In the years, months, and days before he brutally murdered her, Martin had been reported to the Taylorsville Police Department ("Taylorsville PD") and Salt

Lake City Police Department (“SLC PD”) for making death threats against her and her mom, Shauna Mayne.

2. SLC PD knew or should of known of the threats reported to Taylorsville PD. Moreover, despite the clarity and frequency of the threats against Amanda’s life and Amanda’s status as a person with diminished capacity, SLC PD did not properly investigate the situation and assess its lethality or take appropriate steps to protect Amanda. If it had, she would still be alive today.

3. Amanda’s death constituted a wrongful death resulting from SLC PD’s negligence. Notwithstanding case law from the Utah Supreme Court holding that the State is immune in cases of wrongful death, *Tiede v. State*, 915 P.2d 500 (Utah 1996), plaintiffs are prepared to demonstrate that the case in question must be overturned because it relied on an incorrect assessment of the history of Utah’s wrongful death actions. The Utah Constitution prohibits the legislature from abrogating the right of action for wrongful death. And at the time the Utah Constitution was drafted, the right of action included the right to assert against the State a claim for wrongful death arising from negligence. Indeed, the Utah Constitution enshrined the common understanding that no one—including a governmental entity—enjoys immunity for negligently causing the death of another, under Utah law.

Parties and Relevant Persons

4. Plaintiff Shauna Mayne (“Plaintiff” or “Ms. Mayne”) resides in Salt Lake County. On January 29, 2024, Ms. Mayne was appointed as Personal Representative for the Estate of Amanda Mayne by Judge Coral Sanchez in the Third District Court, Probate No. 233902738.

5. Kent Mayne is the father of Amanda Mayne.

6. Amanda Mayne (“Amanda”) was domiciled in Salt Lake County, Utah, at the time of her death.

7. Defendant SLC PD is a governmental entity located in Salt Lake County, Utah.

Venue, Jurisdiction, Statutory Prerequisites, and Constitutionality of Immunity

8. This case is of a civil nature, and jurisdiction is conferred pursuant to Utah Code § 63G-7-501(1).

9. Venue is proper pursuant to Utah Code §§ 63G-7-502(1), 78B-3-303(1), and 78B-3-307.

10. Plaintiff served the statutorily required Notice of Claim against the aforementioned governmental entity, *see* Utah Code §§ 63G-7-401, 402, has waited the required 60-day period, *see id.* § 63G-7-403(2)(a)(ii), and now timely commences this action within two years from the date of the incident, *see id.* § 63G-7-403(2)(b).

11. Plaintiff will also file an undertaking in the amount of \$300 pursuant to Utah Code § 63G-7-601(2).

12. Pursuant to Rule 26 of the Utah Rules of Civil Procedure, Plaintiff elects to file this matter under Tier 3.

Jury Demand

13. The Plaintiff hereby demands a jury trial as to all facts and issues in this case.

Factual Allegations

14. Plaintiff incorporates all preceding paragraphs as if fully set forth herein.

Amanda and her Marriage to Martin

15. Amanda was born on July 23, 1987.

16. As an adult, she had diminished cognitive capacity.

17. Her mother, Shauna, describes her cognitive aptitude as comparable to a teenager, and notes that her diminished mental capacity would be apparent to most people.

18. In addition to having a diminished cognitive capacity, Amanda suffered from anxiety, which made it difficult for her to respond to stressful situations.

19. Around 2016, Amanda met Martin, and after dating for some time, the two married.

Martin's Unstable and Violent Personality

20. Martin was an unstable individual prone to episodes of violence.

21. Upon information and belief, he had been diagnosed with bipolar disorder and/or schizoaffective disorder.

22. These conditions caused him to suffer paranoid delusions in which he believed specific individuals were responsible for his life setbacks.

23. To rectify these perceived wrongs, he would stalk these individuals and obsess about committing acts of violence against them.

24. His propensity to violence was known to SLC PD.

25. In June 2015, he was arrested for assault.

26. In December 2016, he began threatening Amanda's family, and he was arrested for domestic violence, tampering with witnesses, and engaging in threatening and intimidating behaviors.

27. That same month, Shauna sought a protective order against Martin.

28. The following month, in January 2017, the protective order was served on Martin, and the parties subsequently entered a 2-year agreement, after which time the protective order was withdrawn on February 8, 2017.

29. Ten days later, Martin was charged with assault, criminal mischief—including domestic violence—engaging in threatening and intimidating behavior, and damaging property.

30. Two months later, on April 4, 2017, Martin was put on probation for 24 months.

31. By April 24, 2017, an arrest warrant was issued because he had violated his probation, and on May 16, 2017, he was sentenced to 30 days in jail.

32. Four months later, in early September 2017, Martin was arrested for the charges brought against him in December 2016.

33. In this setting, he made a bomb threat and was, upon information and belief, charged in connection with that threat.

34. In November 2017, Martin was charged with threatening a judge, parole board, and/or family member, and he was arrested the following month.

Martin's Incarceration, and His Divorce from Amanda

35. In January 2018, Martin entered a plea agreement relating to the domestic violence charges from December 2016.

36. Under this agreement, he was sentenced to 365 days in jail for charges relating to the December 2016, February 2017, and November 2017 charges.

37. By March 2019, Martin was released from jail.

38. Fearing for her safety, Amanda fled the apartment she shared with Mr. Taylor and went to the home of her father, Kent Mayne.

39. Soon after, Martin reported Amanda missing.

40. When police found Amanda at her father's home, they told Shauna about "an unrelated matter," which involved information they learned from one of Martin's co-workers: specifically, Martin said he was making plans to kill Shauna and her son.

41. The police officer shared her belief that the co-worker was just trying to get Martin in trouble, but Shauna urged the officer to take the threat seriously.

42. Eventually, Martin went to Kent's home looking for Amanda, and upon learning that she was staying at Shauna's home—which is located in a different policing jurisdiction—Martin called the police in that jurisdiction and told them that Amanda was being held by Shauna against her will.

43. His erratic, disturbing behavior made his separation from Amanda permanent, and on April 26, 2021, Amanda obtained a final divorce decree from the Third District Court in Salt Lake County.

44. Despite the entry of this order, Martin had no intention of moving on with his life.

The Taylorsville Police Report

45. An incident documented by the Taylorsville PD reinforces this point.

46. Nine months after his divorce from Amanda was finalized, Martin reestablished contact with Amanda and Shauna.

47. To do so, he texted Shauna from an unknown number, claimed to be one of Amanda's old friends by the name of Aubrey, and asked for Amanda's current cell phone number.

48. Having no reason for concern, Shauna gave Martin—whom she believed to be Aubrey—Amanda's number.

49. Several days later, Shauna received the following disturbing text messages from a different, unknown number:¹

¹ All grammatical/spelling errors in the quotations that follow are original to the quotation. For simplicity, Plaintiff will not use [sic] to mark errors in any of the quotations.

a. “Look I know Amanda’s number voicemail is a fake a number doesn’t get reassigned for at least 45 days *I’m hunting you guys down* your out of your minds.” (emphasis added).

b. “Daniel Carrick modification pretty smart he must be sleeping with you ladies.”

c. “I enjoy destroying your life and relationships *potential* family members[.] *I will continue to.* this will *Never stop never ever*[.] *your daughter Will be killed* along with mr. Carrick[.] I can’t wait until your reaction happens You already destroyed her life correct[.] But now she’s gonna die and maybe[,], Maybe you to let’s play cards to find out[.]” (emphases added).

d. “Poor Amanda Mayne and poor Shauna Pathetic.”

e. “I know wear you all are.”

f. “I’m close to you guys everyday.”

g. “Been for 8 years.”

50. Shauna did not know Daniel Carrick, but the contents of the messages left no doubt in her mind as to their author: Martin.

51. Concerned for her life and Amanda’s life, Shauna filed a police report with Taylorsville PD on January 28, 2022, and identified Martin as the sender of the messages.

52. In this report, she also notified officers of Amanda’s diminished cognitive capacities.

53. Several days later, an officer of Taylorsville PD called Martin and discussed the situation.

54. Without being prompted, Martin asked if Shauna was making accusations about threatening text messages.

55. Despite the nature and criminality of Martin's conduct, this phone call would end the interview as there was "not sufficient evidence to move forward with the case at this time."

56. Even so, the Taylorsville PD logged the evidence pertaining to this report.

57. And as will be seen, that evidence shows that Martin was serious when he said, "I enjoy destroying your life and relationships *potential* family members[.] *I will continue to.* this will *Never stop never end*[.] *your daughter Will be killed . . .*" (emphases added).

58. Upon information and belief, SLC PD had access to Martin's criminal history in the days leading up to Amanda's murder.

59. Upon further information and belief, SLC PD had access to the numerous police reports filed against Martin in other jurisdictions, including the police report filed with Taylorsville PD.

The Salt Lake City Incidents
August 15, 2022

60. On August 15, 2022, Martin "coincidentally" showed up at Amanda's place of employment—ALSCO Uniforms—at sometime between 6:00 a.m. and 6:30 a.m.

61. At the time, he was carrying a bookbag that appeared to be weighed down.

62. By around 8:00 a.m., he headed to the break room, where Amanda and her boyfriend, Jerry Zuniga, were holding hands.

63. According to Mr. Zuniga, Martin said, "What are you doing? You need to leave! Are you f*****g my ex-wife? That's my f*****g ex-wife!"

64. ALSCO staff described Martin's as behaving aggressively while screaming, "That's my wife; that's my wife."

65. Martin then tried to grab Amanda, and Mr. Zuniga stepped in to protect her.

66. In response, Martin began yelling at Mr. Zuniga, baiting him to fight.

67. Eventually, ALSCO staff separated the two and put them in different rooms.

68. The purpose of Martin's "coincidental visit" was clear: he planned to confront Amanda and let her know that she still belonged to him.

69. During this time, Amanda called the police and handed her phone to the manager, Mr. Barton.

70. When police arrived, they immediately went to interview Martin.

71. As they entered the room, Martin said the following without being prompted:

"Dude, I just happened to run into my ex-wife by coincidence; well, soon to be ex-wife: we do not even have a divorce decree on file. And I'm talking to her saying I am going to forward her the papers, and then, you know, her boyfriend steps up and starts challenging me. And I say, step up then cuz. And he keeps talking his shit. And I'm like, then let's go, let's go n***a. You know, we didn't do anything. But you know, she's like saying I'm dangerous; I've never done anything domestically violent to her, put my hands on her in any way shape or form. I'm not stalking her; this is just a coincidence. . . . I came here to work through the temp agency. . . . [I] absolutely [did] not, under no circumstances, [knew that she worked here]. [We've been separated since] 2019. Then her saying we are already divorced when I haven't signed any papers, there's no decree, nothing of me being notified and her boyfriend trying to challenge me, that's not cool."

72. Martin's account of the incident was inconsistent with other witnesses' recollections.

73. He also lied in saying that he and Amanda were not divorced.

74. In his subsequent exchanges with investigating officers, Martin repeatedly insisted the incident was a coincidence and repeatedly asked whether the officer's believed him and thought he was a good guy.

75. In a telling moment, he said the following:

Officer: "Why did you let this guy get to you?"

Martin: "Because it's like rubbing it in my face." [*Holding up and turning on his cell phone screen*]: "I've never removed this [Amanda's picture] from my phone."

Officer: Then why take it so personally?

Martin: "Because it's one of the biggest f*****g *failures I hold onto*." (emphasis added) [*Begins crying*]. . . . "Four years going by, and I try to move on from it, but every day it's like running into her; I'm not even strong enough to do it, man. It's like, I wake up every day trying to move on, working my butt off, it's like I work at Maverick, dude, and I came here for some extra money. . . . It's hard man; it's like I am a f*****g c**k." (emphasis added).

76. In this exchange, Martin reveals his obsession with Amanda and his unwillingness to move on with his life.

77. After interviewing Martin, an officer went to interview Amanda.

78. She told the officer that she had been divorced from Martin for one year and had to wait for some time before the divorce went into effect because Martin refused to sign the divorce papers.

79. She further informed the officer that Martin had been harassing her family.

80. She then told the officer about the incident: "So, he just tapped me, and I, and I, can't really remember what he said, but he said, 'Are we divorced?,' and I said, 'Yeah, we've been

divorced for a year because I got a lawyer.' And I was just worried about Jerry because . . . I wanted to prevent them from fighting."

81. When she finished telling about her recollection of the incident, she asked the police officer if she could file a protective order against Martin.

82. The officer told her he had nothing to do with protective orders and that she would need to go to the Matheson Courthouse in Salt Lake City to request a protective order.

83. In a clear cry for help, Amanda said she believed Martin was stalking her, could have found out where she worked, and had a history of violence and threats—such as his threatening to bomb a police station in 2018.

84. Amanda's belief that Martin was stocking her was supported by ALSCO's manager and assistant manager, who expressed their skepticism of the "coincidental nature" of Martin's appearance.

85. The officers concluded their investigation and removed Martin from ALSCO's property.

86. Martin, however, became argumentative about leaving the property.

87. He even made tacit threats toward the police officers and Mr. Zuniga: "Do you guys think I am a bad guy, out of curiosity? . . . Want to know why I don't want to come back [to this property], because I'm not going back to jail. Because I told myself, 'if I ever go back to jail again, you guys are going to kill me before you get me into those gates. . . . If [Mr. Zuniga] ever puts his hands on me, I swear to God. . . . I am not her c**k, I ain't her b***h, calling me out like that . . . you know, I see him in public with her like that, God knows . . . I am a blackbelt like I said."

88. The officers eventually ended their investigation, and Martin went free.

August 16, 2022

89. At around 1:30 a.m., on the next day, August 16, 2022, Martin sent a threatening email to ALSCO through the company's sales lead system.

90. In it, he said the following:

This is the email received: [REDACTED]
[REDACTED] Comments: Your employee Amanda mayne and her boyfriend need to watch their back after messing with my friend today. All I could say is if you guys wanna try to save your other staff I'd get rid of them Especially since he killed himself after."

91. Martin signed this email as "John Dillinger."

92. John Dillinger was a gangster during the early 1900s and the leader of the Dirty Dozen. In 1909, Dillinger was killed by a federal officer after being betrayed by his girlfriend's former employer, Anna Sage.

93. ALSCO's management was deeply concerned about this threat.

94. In response, an officer of the Salt Lake Police Department interviewed Amanda.

95. During this interview, he learned that Martin had texted threats to Amanda.

96. When the officer tried talking to Amanda, she was in tears and told him she needed to leave.

97. She then provided the text messages from Martin to her manager at ALSCO.

98. The text messages said the following: "Your so stupid I hope you get killed by a car or something this week slut. Your so retarded I want you to dye. Whore. I got you b***h and everything. Cock suckers can't win lesbian." (emphasis added).

99. The investigating officer later performed a background check on Martin and learned that "he has been arrested multiple times for threats of violence, assault and threats against a judge."

100. The officer then called Martin.

101. During this call, Martin denied emailing ALSCO and texting Amanda.

102. The officer then told Martin that detectives would “subpoena [his phone] apps and go backwards that way.”

103. He then told Martin, “if you didn’t do anything, then it won’t come back to you but if you did then it won’t be good.”

104. Martin then said he wanted to exercise his rights and hung up the phone.

105. Viewed in context, the incident at ALSCO on August 15 and the email of August 16, show that after confronting Amanda, Martin had become unstable and was planning to take Amanda’s life:

- a. He deliberately went to her place of employment to confront her about their marriage.
- b. He assaulted Amanda, which forced her boyfriend to come to her defense.
- c. He yelled and behaved aggressively while threatening Amanda’s boyfriend.
- d. His aggressive and threatening behavior forced ALSCO employees to separate him and Amanda’s boyfriend.
- e. He revealed to the officers his obsession with Amanda as well as his emotional instability at the thought of Amanda being with another man, threatening to harm him if he saw them together in public.
- f. He lied to the officers about his relationship and history with Amanda, and showed suspicious occupation as to whether they believed him and thought he was a good guy.
- g. He told the officers that they would have to kill him if they tried to arrest him.

h. The next day an email threatening the lives of Amanda, her boyfriend, and ALSCO's employees was sent by John Dillinger—a man killed by federal officers after being betrayed by his girlfriend.

i. This email further betrayed Martin's belief that he had nothing to lose and his unstable emotional state when he followed his threat with the ominous reference to the claim that he "killed himself after."

j. He then texted Amanda saying he hoped she would be "killed by a car or something this week."

August 17, 2022

106. Around 4:00 a.m. on August 17, 2022, an UBER dropped Martin off at the corner of 4700 South and 3600 West.

107. After exiting the vehicle, Martin walked to a nearby gas station parking lot and waited for Amanda, who would arrive around 5:00 a.m. to catch a bus for work.

108. When Amanda arrived, Martin ambushed and shot her 14 times, including one time through the head.

109. He then walked down the street about one block and shot himself.

110. He had a backpack with him that contained a large amount of ammunition.

111. Upon information and belief, this is the same backpack he had with him when confronting Amanda on August 15, 2022, at ALSCO.

CAUSES OF ACTION
FIRST CAUSE OF ACTION
(NEGLIGENCE)

112. Plaintiff incorporates all prior paragraphs as if fully set forth herein.

113. SLC PD had a special relationship with Amanda, and Amanda reasonably relied on them to properly investigate and enforce the law after they received evidence of Martin's unstable character and intent to harm Amanda.

114. SLC PD had a duty to exercise reasonable care to, among other things, properly investigate and enforce Utah law governing reports of threatened violence.

115. SLC PD had a duty to follow police policies and legislative mandates regarding threats of violence.

116. SLC PD had a duty of exercise reasonable care and to provide appropriate training, supervision, instruction, discipline, and control over subordinates.

117. SLC PD had a duty to exercise reasonable care and to promulgate, create, implement, maintain, and enforce appropriate policies regarding responses to reports of domestic violence.

118. SLC PD, through their agents, violated these duties when they failed to act with reasonable care in at least the following ways:

- a. failing to enforce Utah law, which prohibits police officers from exercising enforcement discretion, including issuing a citation or making an arrest and imposing an automatic no-contact order;
- b. failing to properly investigate inconsistencies in the witness's statements;
- c. failing to properly investigate the origins of the threatening email to ALSCO;
- d. failing to properly investigate the origins of the threatening text messages to Amanda;

e. failing to properly arrange, facilitate, and provide immediate and adequate notice of the rights of victims and of the remedies and services available to victims and threatened victims of violence;

f. failing to provide appropriate training, supervision, instruction, discipline, and control of officers on evaluating and investigating incidents of threatened violence, including but not limited to identifying signs of potential violence;

g. failing to properly create, implement, and enforce appropriate policies regarding investigations of threatened violence, including but not limited to well-accepted practices such as conducting threat assessments; and

h. any and all other breaches hereafter discovered.

119. In breaching their duties, as shown above, SLC PD increased the risk of violence that Amanda faced, while also allowing Amanda to believe that they were handling the matter to ensure her safety.

120. SLC PD's negligence was a proximate cause of Amanda's injuries and damages, including but not limited to, her death at the hands of Martin.

121. Amanda otherwise suffered harm and incurred damages due to SLC PD's negligence.

122. Plaintiff has a good-faith argument that their negligence claim is warranted by existing law or by a nonfrivolous argument for the modification or reversal of existing law.

Second Cause of Action
(Survival)

123. Plaintiff incorporates all prior paragraphs as if fully set forth herein.

124. Pursuant to Utah Code section 78B-3-107, Amanda's claims did not abate upon her death, and Plaintiff has a cause of action against SLC PD for special and general damages associated with such claims.

125. Plaintiff has a good faith argument that this claim is warranted by existing law or by a nonfrivolous argument for the modification or reversal of existing law.

Third Cause of Action
(Wrongful Death)

126. Plaintiff incorporates all prior paragraphs as if fully set forth herein.

127. Pursuant to Utah Code section 78B-3-106, Amanda's heirs have a cause of action against SLC PD for wrongful death associated with Amanda's underlying claims for negligence and failure to train, and they are entitled to general and special damages for, among other things, costs associated with Amanda's death, the value of services Amanda would have provided, loss of Amanda's society, comfort, association, love, counsel, care, consortium and protection, loss of the reasonable expectation to associate with Amanda for the rest of her natural life, and for any and all other damages as may be justified under the circumstances of the case.

128. Plaintiff has a good faith argument that this claim is warranted by existing law or by a nonfrivolous argument for the modification or reversal of existing law.

DAMAGES

129. Plaintiff incorporates the prior paragraphs as if fully set forth herein.

130. As a direct and proximate result of the negligent and careless acts for which SLC PD and its agents are legally responsible, Plaintiff has suffered serious and permanent harm and injuries, as well as severe pain and anguish.

131. As a further direct and proximate result of the negligent, careless, reckless, and willful acts for which SLC PD and their agents are legally responsible, it has been and continues to be necessary for Plaintiff to seek medical care and treatment.

132. As a direct and proximate result of the negligent, careless, reckless, and willful acts for which SLC PD and their agents are legally responsible, Plaintiff has suffered and will continue to suffer the following damages:

- a. Damages for costs of medical treatment in an amount to be proven at trial;
- b. Past and future damages for lost earnings in an amount to be proven at trial;
- c. Past and future damages for pain, suffering, mental anguish, and loss of life enjoyment in an amount to be proven at trial;
- d. Damages for loss of filial consortium; and
- e. Any and all other economic and non-economic damages as demonstrated by the evidence presented at trial.

PRAYER FOR RELIEF

1. For past and future medical expenses in an amount to be proven at trial;
2. For general damages, including pain and suffering, , and a reduction in the quality of life in an amount to be proven at trial;
3. For loss of income in an amount to be proven at trial;
4. For compensated and gratuitous care and services in an amount to be proven at trial;
5. For damages from a loss of filial consortium with the decedent;
6. For pre- and post-judgment interest and costs provided by law; and

7. For such other relief as may be justified based on the pleadings and/or evidence or which Plaintiff may be entitled to by law.

Dated this 22nd day of March 2024.

PARKER & MCCONKIE

/s/ Judson Burton

Judson Burton

Attorney for Plaintiff

Plaintiff's Address:

c/o Parker & McConkie

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The Order of the Court is stated below:

Dated: March 27, 2025
08:06:58 AM

At the direction of:
/s/ LAURA SCOTT
District Court Judge

by
/s/ KETI SAFONOVA
District Court Clerk



**THIRD JUDICIAL DISTRICT - SALT LAKE COUNTY DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH**

SHAUNA MAYNE, Plaintiff,	RULING Order Granting Motion to Dismiss and Denying Motion to Stay
vs.	Case No: 240902420
SALT LAKE CITY POLICE DEPARTME, Defendant.	Judge: LAURA SCOTT Date: March 26, 2025

Before the court are Defendant Salt Lake City Police Department's Motion to Dismiss With Prejudice (Motion to Dismiss) and Motion to Stay Pending Resolution of Related Appeal (Motion to Stay).

The court originally agreed to hold a hearing on the Motion to Dismiss, which is currently scheduled for April 14, 2025. However, given Plaintiff's admission in the Complaint and concession in her opposition to the Motion to Stay that "this court is obligated to dismiss this case under the binding precedent of Tiede v. State, 915 P.2d 500 (Utah 1996)," the court strikes the hearing because the issue has been authoritatively decided. See Rule 7(h) of the Utah Rules of Civil Procedure.

For this same reason, the court GRANTS the Motion to Dismiss on the ground that Plaintiff's claims are barred by the Utah Governmental Immunity Act. See Utah Code Section 63G-7-201(4); Tiede v. State, 915 P.2d 500; Tindley v. Salt Lake City School District, 2005 UT 30.

Because dismissal is required under Tiede, the court declines to reach Defendant's public duty doctrine argument.

Finally, because it is granting Defendant's Motion to Dismiss, the court DENIES the Motion to Stay as moot.

SO ORDERED.

End Of Order - Signature at the Top of the First Page

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 240902420 by the method and on the date specified.

EMAIL: KATHERINE NICHOLS KATHERINE.NICHOLS@SLC.GOV

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	03/27/25	/s/ KETI SAFONOVA
Date:	_____	_____
		Signature

IN THE SUPREME COURT OF THE STATE OF UTAH

Shauna Mayne, individually and as
personal representative of the Estate of
Amanda Mayne,

Appellants/Plaintiffs

v.

Salt Lake City Police Department

Appellee/Defendant

PUBLIC

Case No. 20250388-SC

Brief of Appellants

Appeal from the Seventh Judicial District Court, Grand County, from a final judgment
before the Honorable Don M. Torgerson

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LIST OF PARTIES

Parties to the Appeal:

Appellants: Shauna Mayne, individually and as personal representative of the Estate of Amanda Mayne

Counsel for Appellants: Judson D. Burton and Brian C. Stewart of PARKER & McCONKIE

Appellee: Salt Lake City Police Department

Counsel for Appellee: Katherine R. Nichols of SALT LAKE CITY ATTORNEY'S OFFICE

Parties Below Who are Not Parties to the Appeal:

None

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INTRODUCTION

On August 17, 2022, Amanda Mayne (“Amanda”) was murdered by her ex-husband, Taylor Ray Martin (“Martin”). In the years, months, and days before he brutally murdered her, Martin had been reported to the Taylorsville Police Department and Salt Lake City Police Department (“SLC”) for making death threats against her and her mother, Shauna Mayne (“Shauna”).¹ SLC knew or should have known of the threats reported to Taylorsville PD. Moreover, despite the clarity and frequency of the threats against Amanda’s life and Amanda’s status as a person with diminished capacity, SLC did not properly investigate the situation and assess its lethality or take appropriate steps to protect Amanda. If it had, she would still be alive today.

Amanda’s death resulted from SLC’s negligence. Nevertheless, below, SLC relied on the 1996 case of *Tiede v. State*, 915 P.2d 500 (Utah 1996), to argue for immunity under Utah’s Governmental Immunity Act (the “Act”). *Tiede* does not apply to this case. It involved wrongful death claims against the State, not a municipality. But even if it does apply, it should be overturned. It relied on an incorrect assessment of the history of Utah’s wrongful death action. The Utah Constitution prohibits the legislature from abrogating the right of action for wrongful death. And at the time the constitution was ratified, that right of action included the right to assert a claim for wrongful death against a municipality. Indeed, the Utah Constitution enshrined the understanding that no one—including a municipality—enjoys immunity for negligently causing the death of another.

¹ For clarity, counsel refers to Amanda and her mother, Shauna, by their first names.

Appellants note that the legal arguments in this brief are substantially similar to those presented in the case of *Petito v. Moab City Police Department*, Case No. 20241368-SC. Amanda Mayne’s mother, Shauna Mayne, desires to also have her daughter’s case heard and for the Court to have the benefit of the facts and arguments developed below as it decides the constitutionality of municipal immunity in cases of wrongful death. Moreover, this case allows the Court to hear from Utah’s most populous municipality—Salt Lake—on the interplay between wrongful death causes of action and the Act.

STATEMENT OF THE ISSUES

I. Whether applying the Utah Governmental Immunity Act to cases of wrongful death violates Section 5 of the Utah Constitution.

a. Preservation: Appellants preserved this issue in their Opposition to Appellee's Motion to Dismiss. [R.52–65].

b. Standard of Review: Whether a statute violates Utah's constitution is a question of law reviewed for correctness. *Chen v. Stewart*, 2004 UT 82, ¶ 25, 100 P.3d 1177 (stating that constitutional issues present legal questions reviewed for correctness), *abrogated on other grounds by State v. Nielsen*, 2014 UT 10, ¶ 43, 326 P.3d 645.

An appellate court also reviews a rule 12(b)(6) dismissal for correctness. *Christiansen v. Harrison W. Constr. Corp.*, 2021 UT 65, ¶ 10, 500 P.3d 825 (“The grant or denial of a rule 12(b)(6) motion is a question of law that we review for correctness, giving no deference to the district court’s determination.”). This rule permits dismissal of a complaint for “failure to state a claim upon which relief can be granted.” UTAH R. CIV. P. 12(b)(6). Courts “accept all facts as true, and indulge all reasonable inferences in favor of the [Appellant].” *Erickson v. Canyons School Dist.*, 2020 UT App. 91, ¶ 6, 467 P.3d 917 (alteration in original). And “if there is any doubt about whether a claim should be dismissed for lack of factual basis, the issue should be resolved in favor of giving the party an opportunity to present its proof.” *Zisumbo v. Ogden Regional Medical Ctr.*, 2015 UT App. 240, ¶ 9, 360 P.3d 758.

II. Whether *Tiede v. State* ought to be limited or overturned where it was based on an incorrect understanding of Section 5 of the Utah Constitution.

a. Preservation: Appellants preserved this issue in their Opposition to Appellee’s Motion to Dismiss. [R.65–68].

b. Standard of Review: In deciding whether to overturn its own precedent, a court considers whether “the [precedent] decision is clearly erroneous” and “the public’s substantial reliance upon an established legal principle.” *Cope v. Utah Valley State College*, 2014 UT 53, ¶ 19, 342 P.3d 243 (citation omitted). These considerations have “only limited application in the field of constitutional law.” *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 44, 56 S. Ct. 720 (1936) (Stone and Cardozo, JJ., concurring). After all, a court’s “interpretation [of the constitution] can be altered only by constitutional amendment or by overruling prior decisions.” *Agostini v. Felton*, 521 U.S. 203, 235, 117 S. Ct. 1997, 2016 (1997) (citation omitted).

STATEMENT OF THE CASE

Amanda's Marriage to Martin, and Martin's History of Violence

Amanda was born on July 23, 1987. [R.3, ¶ 15]. Though an adult, she had diminished capacity. [*Id.* ¶ 16]. Her mother, Shauna, describes her cognitive aptitude as comparable to a teenager, and notes that her diminished mental capacity would be apparent to most people. [R.4 ¶ 17]. Around 2016, Amanda met Martin, and after dating for some time, the two married. [*Id.* ¶ 19].

Martin was an unstable individual prone to episodes of violence—a fact known to SLC. [*Id.* ¶¶ 20, 24]. Upon information and belief, he had been diagnosed with bipolar disorder and/or schizoaffective disorder, and these conditions caused him to suffer paranoid delusions in which he believed specific individuals were responsible for his life setbacks. [*Id.* ¶¶ 21–22]. He had a lengthy history with law enforcement and had been arrested for domestic violence, assault, criminal mischief, and threatening a judge, parole board, and/or family member. [R.4–5, ¶¶ 26–34].

Martin's Incarceration and Divorce from Amanda

In January 2018, Martin was sentenced to 365 days in jail for various charges. [R.5, ¶¶ 35–36]. By March 2019, he was released from his incarceration. [*Id.* ¶ 37]. Fearing for her safety, Amanda fled the apartment she shared with Martin before his incarceration and went to the home of her father, Kent Mayne. [*Id.* ¶ 38]. Soon after, Martin reported Amanda missing. [*Id.* ¶ 39]. When police found Amanda at her father's home, they subsequently told her mother, Shauna, that they learned from one of Martin's co-workers that he was making plans to kill her (Shauna) and her son. [*Id.* ¶ 40].

His erratic, disturbing behaviors made his separation from Amanda permanent, and on April 26, 2021, Amanda obtained a final divorce decree from the Third District Court in Salt Lake County. [R.6, ¶ 43]. Despite the entry of this order, Martin had no intention of moving on with his life. [*Id.* ¶ 44].

The Taylorsville Police Report

Nine months later he contacted Shauna from an unknown number and pretended to be one of Amanda’s old friends hoping to reconnect. [*Id.* ¶¶ 46–47]. Having no reason for concern, Shauna gave Martin—whom she believed to be Amanda’s friend—Amanda’s number. [*Id.* ¶ 48]. Several days later, Shauna received several disturbing text messages from a different, unknown number:²

“Look I know Amanda’s number voicemail is a fake a number doesn’t get reassigned for at least 45 days *I’m hunting you guys down* your out of your minds.” (emphasis added).

“Daniel Carrick modification pretty smart he must be sleeping with you ladies.”

“I enjoy destroying your life and relationships *potential* family members[.] *I will continue to. this will Never stop never ever[.] your daughter Will be killed* along with mr. Carrick[.] I can’t wait until your reaction happens You already destroyed her life correct[.] But now she’s gonna die and maybe[.] Maybe you to let’s play cards to find out[.] (emphases added).

“I know where you all are.”

“I’m close to you guys every day.”

² All grammatical/spelling errors in the quotations from Martin throughout this brief are original to the quotations. For simplicity, Appellants will not use [sic] to mark errors in any of the quotations.

[R.6–7, ¶¶ 49(a)–(g)]. Shauna did not know Daniel Carrick, but the contents of the message left no doubt in her mind as to their author: Martin. [R.7, ¶ 50].

Concerned for her life and Amanda’s life, she filed a police report with Taylorsville PD on January 28, 2022, and identified Martin as the sender of the messages. [*Id.* ¶ 51]. In this report, she also notified officers of Amanda’s diminished cognitive capacity. [*Id.* ¶ 52]. Several days later, an officer of Taylorsville PD called Martin to discuss the situation, and without being prompted, Martin asked if Shauna was making accusations about threatening text messages. [R.7–8, ¶¶ 53–54]. Ultimately, this investigation was closed due to insufficient evidence. [R.8, ¶ 55]. But upon information and belief, SLC had access to Martin’s criminal history and the numerous police reports filed against him in other jurisdictions, including the police report filed with Taylorsville PD, in the days leading up to Amanda’s murder. [*Id.* ¶¶ 58–59].

The Salt Lake City Incidents
August 15, 2022

Nearly seven months later, on August 15, 2022, Martin “coincidentally” showed up at Amanda’s place of employment—ALSCO Uniforms—at sometime between 6:00 a.m. and 6:30 a.m. [*Id.* ¶ 60]. At the time, he was carrying a bookbag that appeared to be weighed down. [*Id.* ¶ 61]. By around 8:00 a.m., he headed to the break room, where Amanda and her boyfriend, Jerry Zuniga, were holding hands. [*Id.* ¶ 62]. According to Mr. Zuniga, Martin said, “What are you doing? You need to leave! Are you f*****g my ex-wife? That’s my f*****g ex-wife!” [*Id.* ¶ 63]. ALSCO staff described Martin as behaving aggressively while screaming, “that’s my wife; that’s my wife.” [*Id.* ¶ 64].

Martin then tried to grab Amanda, and Mr. Zuniga stepped in to protect her. [R.9, ¶ 65]. In response, Martin began yelling at Zuniga, baiting him to fight. [*Id.* ¶ 66]. Eventually, ALSCO staff separated the two and put them in different rooms. [*Id.* ¶ 67]. During this time, Amanda called the police and handed her phone to her manager, Mr. Barton. [*Id.* ¶ 69].

When police arrived, they immediately went to interview Martin. [*Id.* ¶ 70]. As they entered the room, Martin began telling police the “temp agency” he works through sent him to ALSCO Uniforms and that he coincidentally ran into his “soon to be ex-wife” when her boyfriend began confronting him. [*Id.* ¶ 71]. His unprompted account of the incident was inconsistent with other witnesses’ recollections. [*Id.* ¶ 72].

In the subsequent interview with officers, Martin’s obsession with Amanda became clear. In a telling moment, he said the following:

Officer: “Why did you let this guy get to you?”

Martin: “Because it’s like rubbing it in my face.” [*Holding up and turning on his cell phone screen*]: “I’ve never removed this [Amanda’s picture] from my phone.”

Officer: “Then why take it so personally?”

Martin: “Because it’s one of the biggest f*****g *failures I Hold onto*.” [Begins crying] . . . “*Four years going by, and I try to move on from it, but every day it’s like running into her; I’m not even strong enough to do it, man. It’s like, I wake up every day trying to move on, working my butt off, it’s like I work at Maverick, dude, and I came here for some extra money. . . . It’s hard man; it’s like I am a f*****g c**k.*” (emphases added).

[R.10, ¶ 75]. During this revealing exchange, another officer went to interview Amanda. [*Id.* ¶ 77].

Amanda told this officer that she had been divorced from Martin for one year, that Martin had refused to sign the papers when she filed for divorce, and that he had been

harassing her family. [*Id.* ¶¶ 78–79]. She then told the officer about the incident: “So, he just tapped me, and I, and I, can’t really remember what he said, but he said, ‘Are we divorced?’ and I said, ‘Yeah, we’ve been divorced for a year because I got a lawyer.’ And I was just worried about Jerry because . . . I wanted to prevent them from fighting.” [R.10–11, ¶ 80]. When she finished telling the officer about her recollection of the incident, she asked the officer if she could file a protective order against Martin. [R.11, ¶ 81]. In response, the officer directed her to the Mattheson Courthouse. [*Id.* ¶ 82]. In a clear cry for help, Amanda said she believed Martin was stalking her, could have found out where she was working, and had a history of violence and threats—such as his threatening to bomb a police station in 2018. [*Id.* ¶ 83].

The officers concluded their investigation and removed Martin from ALSCO’s property. [*Id.* ¶ 85]. Martin, however, became argumentative about leaving the property and made tacit threats toward the police officers and Mr. Zuniga:

Want to know why I don’t want to come back [to this property], because I’m not going back to jail. Because I told myself, ‘if I ever go back to jail again, *you guys are going to kill me before you get me into those gates*. . . . If [Mr. Zuniga] ever puts his hands on me, I swear to God. . . . I am not her c**k, I ain’t her b***h, calling me out like that . . . you know, *I see him in public with her like that, God knows* . . . I am a blackbelt like I said.

[*Id.* ¶ 87 (emphases added)]. The officers ended their investigation, and Martin went free.

[*Id.* ¶ 88].

August 16, 2022

At around 1:30 a.m., on the next day, August 16, 2022, Martin sent a threatening email to ALSCO through the company's sales lead system. [R.12, ¶ 89]. In it, he said the following:

This is the email received: [REDACTED]
[REDACTED]
[REDACTED] Comments: Your employee Amanda mayne and her boyfriend need to watch their back after messing with my friend today. All I could say is if you guys wanna try to save your other staff I'd get rid of them Especially since he killed himself after."

Martin signed this email as "John Dillinger." [Id. ¶ 91]. John Dillinger was the leader of the Dirty Dozen and was killed by a federal officer in 1909 after being betrayed by his girlfriend's former employer, Anna Sage. [Id. ¶ 92].

ALSCO's management was deeply concerned by this email and contacted SLC. [Id. ¶¶ 93–94]. During a subsequent interview with Amanda, an officer learned that Martin had texted threats to Amanda. [Id. ¶ 94–95]. These text messages said the following: "Your so stupid I hope you get killed by a car *or something* this week slut. Your so retarded I want you to dye. W***e. I got you b***h and everything. Cock suckers can't win lesbian." (emphasis added). [Id. ¶ 98]. The investigating officer later performed a background check and learned of Martin's history of violence. [Id. ¶ 99]. When the officer tried to talk with Martin about the email and text messages, Martin denied sending them and ultimately exercised "his right" and hung up after being told that if he did not cooperate his phone would be subpoenaed. [R.12–13, ¶¶ 100–03].

August 17, 2022

The next day, at around 4:00 a.m., an UBER dropped Martin off at the corner of 4700 South and 3600 West. [R.14, ¶ 106]. After exiting the vehicle, Martin walked to a nearby gas station parking lot and waited for Amanda, who would arrive around 5:00 a.m. to catch a bus for work. [*Id.* ¶ 107]. When she arrived, Martin ambushed her and shot her 14 times, including one time through the head. [*Id.* ¶ 108]. He then walked down the street about one block and shot himself. [*Id.* ¶ 109]. He had a backpack with him that contained a large amount of ammunition. [*Id.* ¶ 110]. Upon information and belief, this is the same backpack he had with him when confronting Amanda on August 15, 2022, at ALSCO. [*Id.* ¶ 111].

Procedural History

On March 22, 2024, Appellants filed suit against SLC, alleging negligent acts and omissions that led to the wrongful death of Amanda. [R.19]. In response, SLC moved to dismiss Appellants' complaint under rule 12(b)(6) of the Utah Rules of Civil Procedure. [R.24–31 (Motion to Dismiss with Prejudice)]. In its motion, SLC invoked governmental immunity and relied on *Tiede v. State*, 915 P.2d 500. [*See id.*]. Appellants opposed that motion. [R.37–70].

Before a hearing on the motion was held, SLC filed its Motion to Stay Pending Resolution of Related Appeal. [R.124–29]. In their opposition to that motion, Appellants argued that SLC had not met the high burden required for staying a case due to a different

case with different parties but related legal issues. [R.134–40].³ Appellants also noted that their Complaint acknowledged the district court’s obligation to dismiss the case under the precedent of *Tiede*. [R.140]. Based on this statement in Appellants’ Complaint and their opposition to SLC motion to stay, the district court vacated the hearing and granted SLC’s motion to dismiss. [R.153].

³ Though both cases dealt with the relationship between wrongful death actions and governmental immunity below, they also involved distinct legal issues. In this connection, Moab City Police Department moved for dismissal for an alleged lack of proximate cause. SLC did not seek dismissal on this ground but instead moved for dismissal under the public duty doctrine.

SUMMARY OF THE ARGUMENT

Appellants assert claims on behalf of Amanda for personal injuries under Utah Code section 78B-3-107 and on behalf of Shauna for wrongful death under Utah Code section 78B-3-106. [See R. ¶¶ 123–28]. These claims are based on the negligence of SLC’s officers and SLC’s own negligence in hiring, training, and supervising those officers. [R. ¶¶ 112–22]. Below, SLC invoked immunity under the Act. [R.28–29]. The district court, in turn, granted dismissal, concluding that SLC has immunity under the Act. The Court should reverse the district court’s ruling.

After all, if the Act applies here, it violates Section 5, which by its plain language enshrines a wrongful death cause of action into Utah constitutional jurisprudence. Moreover, in the years before statehood, the territorial legislature through a series of enactments made clear that Section 5 confers categorical protections for wrongful death causes of action. These protections would have allowed litigants to bring wrongful death claims against municipalities, who were not immune for negligent ministerial acts. Thus, the Act’s grant of immunity to municipalities, like SLC, in cases of wrongful death violates article XVI, section 5 of the Utah Constitution—the wrongful death clause (or “Section 5”). To the extent *Tiede* applies, it should be limited or overturned as contrary to Section 5. Appellants discuss each issue in turn.

ARGUMENT

I. The Court Should Hold that Applying the Act to this Case Violates Section 5 of the Utah Constitution

a. The Act violates Section 5 of the Utah Constitution when applied to wrongful death causes of action against municipalities

If the Act applies here, it violates Section 5. Below, Appellants begin with the plain language of Section 5. They then discuss this language in its historical context. That context shows that wrongful death causes of action have long occupied a privileged position in Utah. It also shows that when Section 5 was ratified, municipalities did not enjoy immunity from suit and could be sued for negligent ministerial acts, even when such acts resulted in death. This means that applying the Act here would unconstitutionally abrogate Appellants' wrongful death and survival action claims⁴ in contravention of Section 5.

1. Section 5 categorically protects wrongful death causes of action

To understand “the protections afforded by [Section 5 to] the Utah Constitution,” the Court should begin “with a review of the constitutional text.” *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 10, 140 P.3d 1235. This text “is not to be read as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them.” *Id.* (quoting *Dennis v. United States*, 341 U.S. 494, 523, 71 S. Ct. 857 (1951) (Frankfurter, J., concurring)). Courts should avail themselves of this rich history and look “to the background out of which [the text] arose and its practical application in order to determine the [framers'] intent.” *State v. Betensen*, 378 P.2d 669,

⁴ For simplicity, Appellants speak throughout this brief in terms of wrongful death. But the language of Section 1216 broadly encompasses both survival actions and wrongful death actions.

669–70 (Utah 1963). This background can be informed by prior caselaw, “historical evidence of the state of the law when it was drafted, and Utah’s particular traditions at the time of drafting.” *Am. Bush*, 2006 UT 40, ¶ 12. “The goal of this analysis is to discern the intent and purpose of both the drafters of our constitution and, more importantly, the citizens who voted it into effect.” *Id.*

Section 5 reads as follows:

The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law.

UTAH CONST., Art. XVI, Sec. 5. This language categorically protected wrongful death claims from legislative intrusion. *See Bybee v. Abdulla*, 2008 UT 35, ¶ 17, 189 P.3d 40 (“This provision confers special status on the cause of action for wrongful death.”).

Since its enactment, courts have struck down any legislative act that seeks to limit or eliminate a wrongful death claim, “whether in a wholesale or piecemeal fashion.” *Malan v. Lewis*, 693 P.2d 661, 667 (Utah 1984). And they have done so without first balancing the government’s interests against a claimant’s interests. *See Bybee*, 2008 UT 35, ¶ 17 (comparing the absolute protections of Section 5 with the open courts clause and its corresponding balancing test). Simply stated, if a statute abrogates a wrongful death claim, it is unconstitutional.

This fact was understood by the founding generation, who believed it necessary to graft onto Section 5 the phrase, “*except in cases where compensation for injuries resulting in death is provided for by law*,” to allow the legislature to subject wrongful death claims

to the workers' compensation statutory scheme. *See Henrie v. Rocky Mountain Packing Corp.*, 113 Utah 415, 425 (1948) (stating that "the original Workman's Compensation Act" of 1917 could not make its death benefits "the exclusive remedy" for wrongful death claims, as doing so "would have been a clear violation of" the wrongful death clause "as it then existed," and observing that "[i]n order to remedy this situation, the section was amended by adding thereto the words italicized"). But this amendment has a modest reach: it makes an exception only for wrongful death claims eligible for benefits under workers' compensation. *See Smith v. United States*, 2015 UT 68, ¶ 17, 356 P.3d 1249 (interpreting the term "compensation" in the wrongful death clause as carrying "the same meaning that it had in the [original] Workmen's Compensation Act").

Thus, all other efforts to eliminate or limit wrongful death claims will undoubtedly violate the plain language of Section 5. *See Bybee*, 2008 UT 35, ¶ 20 (concluding that any legislation purporting to compel arbitration in wrongful death claims would violate the wrongful death clause); *see also Smith*, 2015 UT 68, ¶ 19 (striking down the damages cap of the Utah Medical Malpractice Act as unconstitutional under Section 5). This reading of Section 5 is reinforced by the available historical evidence, which shows the robust protections accorded wrongful death claims by Utah's founders.

2. Utah's history reveals the original intent of Section 5 to create a wrongful death cause of action with categorical protections

Utah's history illuminates the original meaning of Section 5. It is well known that the State of Utah was founded by converts to the Church of Jesus Christ of Latter-day Saints. Before arriving in the Salt Lake Valley, these converts experienced episodes of

religious and political violence. The most intense period of violence erupted in late 1838 in Caldwell County, Missouri, when county militias with the eventual sanction of the State of Missouri forcibly expelled Latter-day Saints from their homes and settlements. A particularly harrowing episode occurred on October 30, 1838, when 18 men, women, and children were massacred at Haun's Mill. *See* Richard L. Bushman, *Joseph Smith, Rough Stone Rolling: A Cultural Biography of Mormonism's Founder* 365–66 (1st ed. 2005).

During and after these events, Latter-day Saints petitioned for relief. *See id.* at 392–94. But they “found the courts and law enforcement agencies unable or unwilling to protect the security of their persons or property against the armed attacks of hostile inhabitants.” Orma Linford, “The Mormons, the Law, and the Territory of Utah,” 23 *THE AMERICAN JOURNAL OF LEGAL HISTORY*, 213, 216 (1979). In short, “[t]he legal system was a passive instrument in the hands of the mob that forced the Saints out of a succession of new settlements in Missouri.” *Id.* at 216–17. These events would remain etched on Latter-day Saint cultural memory as they entered the Salt Lake Valley on July 24, 1847.⁵

⁵ This conflict was caused in substantial part by political considerations. Church members were commanded to gather in Missouri to build Zion. This led non-Latter-day Saints to fear the loss of their political influence over their communities. *See* Bushman, *Joseph Smith, Rough Stone Rolling*, p. 223. These conflicts resulted in the development of a Latter-day Saint *political* theology with sweeping consequences for early Utah history. *See id.* at 226 (noting that “[f]or the first time, government figures in [Joseph Smith’s] thought as an active agent”); *see also* Edwin Brown Firmage and Richard Collin Mangrum, *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints, 1830–1900*, 261 (1st ed. 1988) (“After [the saints] migrated to the deserts of the Great Basin, the Saints pursued their radical theory of Zion as an alternative to the social experiment of pluralistic America. A critical part of this effort was the establishment and maintenance of their own court system.”).

Soon thereafter, their ecclesiastical leaders began providing “the full complement of governmental functions.” *Id.* at 220. In 1849, they created the State of Deseret, a political entity never officially recognized by the United States. They also enacted a criminal code, which was later adopted by the Utah territorial legislature. *See id.* at 220–21. That code contained embedded civil remedies that required persons convicted of certain crimes to “pay all damages sustained, and be fined or imprisoned, or both at the discretion of the court.” CRIMINAL LAWS OF THE STATE OF DESERET § 29 (criminalizing assault).

These ordinances did not, however, include a wrongful death statute. If Utah were a common law jurisdiction, this would have left the territory’s citizens without a remedy. *See Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033, 1808 (holding that under the common law, “the death of a human being could not be complained of as an injury”); *see also* T.A. Smedley, *Wrongful Death-Bases of the Common Law Rules*, 13 VAND. L. REV. 605–24 (1960) (discussing the origins and errors of this rule). But Utahns, by their own reckoning, did not follow the common law. *See* Michael W. Homer, *The Judiciary and the Common Law in Utah Territory, 1850–61*, 21 DIALOGUE 97, 98 (1988).

In fact, they formally codified their rejection of the common law in 1854, when their territorial legislature enacted a statute that prohibited the citing of precedent in court. *See* 1854 COMP. UTAH LAWS, 16, § 1 (“[N]o report, decision, or doings of any Court shall be read, argued, cited, or adopted as precedent in any other trial.”). In the years that followed, the legislature enacted other statutes to reinforce this prohibition. *See* 1882 COMP. UTAH LAWS 73, § 1 (requiring the rules of equity to prevail over the common law when there is

a conflict); *see also* 1884 COMP. UTAH LAWS 154, § 3 (mandating that the code of civil procedure be liberally construed to preempt the common law).⁶

In keeping with the foregoing statutes, church leaders counselled Latter-day Saints to avoid the law courts. They also created ecclesiastical courts with “exclusive jurisdiction” as fora for adjudicating civil disputes. *See* Wain Sutton, ed., UTAH: A CENTENNIAL HISTORY, Vol. 2, 570–71 (1949); *see also* Edwin Brown Firmage and Richard Collin Mangrum, *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints, 1830–1900*, 261 (1st ed. 1988) (noting that “[a] critical part” of building a political Kingdom of God “was the establishment and maintenance of their own court system”).⁷

⁶ These statutes were partially aimed at preventing federal prosecutors and judges from relying on the common law to prosecute polygamists. *See* BLACKSTONE 1:423–24 (describing the act of marriage while already having a living husband or wife as a felony under the common law). But they also addressed the problem of transplanting foreign law into Utah soil. Zerubbabel Snow—the Associate Justice of the Utah Territorial Supreme Court from 1850 to 1854—expressed this point well to a group of law students when he said that Latter-day Saints had “a right to make such laws as suited [their] own Convenience Notions and circumstances” and should do so “without any regard to the Common Law of England or the laws which any of the states had adopted.” Dan Vogel (ed.), *The Willford Woodruff Journals* (Signature Books: 2023), Vol. 4, pp 85–86.

⁷ One historian has identified bishopric courts “as the most important of the tribunals in Mormon theocracy.” Wain Sutton, ed., UTAH: A CENTENNIAL HISTORY, Vol. 2, 570 (1949). “To these tribunals were brought all the minor difficulties of the Saints to be adjudicated.” *Id.* This system also included courts of appeals. And “[a]fter the establishment of the civil government in Salt Lake, Brigham Young and his associates urged the Saints to bring their difficulties before the church tribunals rather than before the civil courts for adjustment. *Id.* at 570–71. In fact, church leaders gave “exclusive jurisdiction” to ecclesiastical courts in civil cases. *See* Firmage and Mangrum, *Zion in the Courts*, 264. “Church members who violated the exclusive jurisdiction rule by suing their brethren in civil courts were guilty of ‘unChristianlike conduct’ and subject to being disfellowshipped.” *Id.*

These courts heard tort disputes and awarded compensatory remedies in cases ranging from assault and battery to negligence. *See* Firmage and Mangrum, *Zion in the Courts*, 354–70; *see also id.* at 369 (“Church courts generally punished members who willfully misbehaved in ways that caused unintentional injuries.”).⁸ And since these courts had “exclusive jurisdiction,” it stands to reason that they would have also heard wrongful death cases.

The desire to protect wrongful death claims for everyone in the territory—not merely those appearing in ecclesiastical courts—caused the territorial legislature to enact a wrongful death statute in response to an 1873 territorial district court case. That year, Henry Thomas sued Union Pacific Railroad Company for \$30,000 in damages “alleged to have been sustained by him in the loss of his minor son, Joseph Thomas, who was killed by a collision of the defendant’s cars.”⁹ Union Pacific moved to dismiss the case, apparently invoking the common-law rule that a cause of action expires upon the death of a decedent. *See Thomas v. Union Pac. R.R.*, 1 Utah 232, 232 (Terr. Utah 1875). The trial court agreed and granted the motion. Mr. Thomas appealed.

⁸ Firmage and Mangrum discuss several tort cases involving willful misconduct. For example, in 1849, a boy was run over by two horses who were being improperly run in the street. A Salt Lake bishop ordered the horse owners to pay “the injured boy \$5 plus any other medical fees necessary as a result of the injury.” *Id.* at 369. In an 1894 case, a bishop’s court awarded a claimant damages “when a defective seat caused her to fall out of [a common carrier’s] mail wagon en route from Paris to Montpelier, Idaho.” *Id.* at 369–70.

⁹ *See* Salt Lake Herald-Republican (*newspaper*), October 19, 1873, accessed on September 15, 2025, at https://newspapers.lib.utah.edu/details?id=11573391&q=%22Henry+Thomas%22&sort=date_tdt+asc%2Cparent_i+asc%2Cpage_i+asc.

His appeal was pending before the Utah Territorial Supreme Court when the territorial legislature enacted Section 1216—the predecessor to Section 5—and section 1241—a corresponding rule of civil procedure. Those enactments read as follows:

Section 1216. *Be it enacted by the Governor and Legislative Assembly of the Territory of Utah:* That whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if the death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.¹⁰

Section 1241. An action shall not abate by the death, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, or disability of a party, the court, on motion, may allow the action to be continued by or against his representative or successor in interest. In the case of any other transfer or interest, the action may be continued in the name of the original party, or the court may allow the person whom the transfer is made to be substituted in the action. After verdict shall have been rendered in any action for a wrong, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action now survives by law.

¹⁰ Latter-day Saint memory of Missouri may have played a role here. At least 11 of the legislators voting on these statutes were among those who were forcibly driven from Missouri. For example, Jesse N. Smith (a member of the Territorial Council), his brother Silas Sanford Smith (a member of the House of Representatives) and his family were driven from Missouri in the winter of 1839. In the days following their expulsion, their six-year-old brother, John Aiken Smith, died of exposure. Similarly, Wilard G. Smith and his parents settled at Haun's Mill. During the massacre, Willard's father and brother were murdered. Another one of his brothers, Alma Smith, was severely injured. Finally, Abraham Owen Smoot, father of future Senator Reed Smoot, was taken prisoner in 1838 alongside Joseph and Hyrum Smith.

See 1876 COMP. LAWS UTAH § 1216 (Particular Wrongs) and *id.* § 1241 (Civil Practice Act). In sum, Section 1216 secured a wrongful death cause of action while section 1241 instructed courts how to proceed in cases where a party dies.

The passage of these sections was timely. One year later, the territorial supreme court issued its decision in the case of *Thomas v. Union Pacific Railroad*. It declared the common law as “prevailing” in the territory and affirmed dismissal of Mr. Thomas’ case under the common-law rule that “the death of a person caused by another does not give rise to a cause of action in any one.” *Thomas*, 1 Utah at 234. This case and the legislature’s response to it reveals Utahns’ commitment to guarantee the existence of a wrongful death cause of action.

That commitment held firm during subsequent years. In 1884,¹¹ the legislature amended the Civil Practice Act to *expand* the protections afforded by Section 1216 by eliminating a cap on damages. *Cf.* 1876 COMP. LAWS UTAH § 1217 (Particular Wrongs) (limiting wrongful death damages to “the sum of ten thousand dollars”) *with* 1888 COMP. LAWS UTAH § 3179 (Civil Practice Act) (permitting wrongful death damages to “be given as under all circumstances of the case may be just”). This statute was accompanied by a related statute that called for “statutory enactments” to be “liberally construed to preempt the common law.” *Smith*, 2015 UT 68, ¶ 10, n.20 (citing 1884 UTAH LAWS 154–55). With these statutes, the legislature reinforced its rejection of the common law and its dedication to the right of action for wrongful death.

¹¹ By this time, the statute had been renumbered. *See* 1888 COMP. LAWS UTAH § 2961.

Yet, controversy remained as to precisely *what claims* these statutes protected, and in 1890, a dispute arose over Section 1216 and the phrase, “if death had not ensued.” *See Mason v. Union Pac. R.R.*, 24 P. 796, 797 (Terr. Utah 1890); *see also id.* (“While this law makes it the duty of the court to continue actions that survive in the name of the representative of the deceased party, it does not indicate those that do survive.”). The territorial supreme court read this phrase expansively and held that “immediately upon [a decedent’s] death, a *new cause of action arises* in [] favor [of the heirs].” *Id.* at 797 (emphasis added). So read, the heirs could recover compensation for their own damages, not solely the damages suffered by the decedent. *Id.* (“It gives the heirs a right of action to renumerate their loss, in consequence of death occasioned by the same act.”). A dissenting opinion construed the phrase narrowly, limiting “[t]he cause of action” to the action that had “been vested in plaintiff during his life-time,” thereby leaving the heirs without remedy for their own damages. *Id.* at 798 (Anderson, J., dissenting).

It can be no accident, then, that the drafters of Section 5 omitted the phrase, “if death had not ensued.”¹² Nor can it be an accident that when Utah achieved statehood in 1896, its newly formed legislature included the wrongful death *rule* from the Civil Practice Act but *not* Section 1216. This reads as a deliberate acknowledgement that Section 5

¹² Interestingly, this omission has set Utah apart from other jurisdictions, which use this phrase to provide more modest protections for wrongful death claims. *See Riggs v. Georgia-Pacific LLC*, 2015 UT 17, ¶ 12, 345 P.3d 1219 (discussing statutes and caselaw from foreign jurisdictions containing the phrase “if death had not ensued” and holding that the omission of this phrase from Utah’s wrongful death statute signifies the legislature’s intention to permit the heirs to sue for wrongful death, even when a decedent obtains a remedy from the defendant on the underlying claim before his or her death).

incorporated the protections of Section 1216 into Utah's constitution. *See Bybee*, 2008 UT 35, ¶ 18 (explaining that “[t]he wrongful death cause of action entered Utah territorial law in 1874 and was *incorporated* into the Utah Constitution when Utah entered the union”); *see also Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 683 (Utah 1985) (noting that the territorial era wrongful death statute “was then included in the Utah Constitution at statehood”).

This history shows that the wrongful death cause of action “was of such importance at the time of statehood given the general uncertainty of the law, at least in other states, that the framers of the Utah Constitution *provided for a judicial remedy*” in Section 5 of the Utah Constitution. *Jones v. Carvell*, 641 P.2d 105, 107 (Utah 1982). Therefore, the drafters of Section 5 and those who voted it into existence, *vested* a wrongful death cause of action held by heirs and conferred upon it *categorical* protections. Moreover, at the time they enacted Section 5, municipalities were not immune from suit for negligent ministerial acts, including those resulting in death.

3. When Section 5 was enacted, municipalities could be sued for negligence

- i. Utah courts have recognized that municipalities did not enjoy immunity at the time of statehood

When Section 5 was enacted, municipalities were not immune from suit for their negligent ministerial acts. To understand the caselaw, a word must be said about the peculiar nature of municipalities. Courts have examined the differences between sovereign states and municipalities. The former reign supreme in their respective jurisdictions; the latter do not. And because they lack sovereignty, they cannot be said to be immune under

the common law doctrine of sovereign immunity, based as it is on the precept that “the sovereign can do no wrong.” *DeBry v. Noble*, 899 P.2d 428, 440 (Utah 1995).

Given these differences, early Utah caselaw developed “two different lines of authority” “with respect to state and municipal immunity.” *See id.* Initially, Utah law “was liberal in allowing actions against governmental agencies.” *Id.* But in 1913, the Utah Supreme Court *created* blanket immunity for the State and declared that no tort suit could proceed against the State absent statutory authorization. *See Wilkinson v. State*, 134 P. 626, 626 (Utah 1913).

Tellingly, the Court never made a similar pronouncement for municipalities. Nor could it have easily done so. For by 1913, the Court had repeatedly employed “a discretionary/ministerial test to determine the liability of cities for negligent acts.” *DeBry*, 899 P.2d at 436. Under this test, “municipalities were held liable in negligence for breach of a duty of care in carrying out ‘ministerial’ responsibilities, whether those responsibilities were imposed by statute or undertaken pursuant to a power granted by a city’s charter.” *Id.* Liability could attach, moreover, even if there was “*no statute expressly giving the action against the defendant city for the recovery of damages.*” *Levy v. Salt Lake City*, 1 P. 160, 164 (Terr. Utah 1881).

This test, of course, turns on the distinction between “discretionary” and “ministerial.” In *Kiesel v. Ogden City*, the territorial supreme court explained that distinction in context of damage to land from a backed-up sewage pipe:

The general rule is that a private action cannot be maintained for an injury for mere failure to construct a sewer, or for injuries from inadequate sewers built according to plans made by competent persons, and adopted by such officers

in good faith. But if injury results from a wrong mode of carrying such plans into execution, or if they are unskillfully or improperly executed, or if the sewer when built is found to be defective or inadequate, and injury results from a neglect to remedy such defects or inadequacy, when discovered, an action will lie.

30 P. 758 (Terr. Utah 1892), *overturned by Cobia v. Roy City*, 366 P.2d 986 (Utah 1961).

Put differently, a municipality cannot be sued for failing to create a plan or for the adequacy of a plan, once created, but it can be sued for the negligent implementation of a plan.

Unsurprisingly, the territorial and state supreme courts have held municipalities liable for a range of ministerial activities. *See Levy v. Salt Lake City*, 16 P. 598 (Terr. Utah 1887) (ditch construction); *Yearance v. Salt Lake City*, 24 P. 254 (Terr. Utah 1890) (street obstruction); *Thomas v. Springville City*, 35 P. 503 (Terr. Utah 1893) (bridge maintenance); *Naylor v. Salt Lake City*, 35 P. 509 (Terr. Utah 1893) (street obstruction); *Scoville v. Salt Lake City*, 39 P. 481 (Terr. Utah 1895) (slip-and-fall); *Scott v. Provo City*, 45 P. 1005 (Terr. Utah 1895) (street maintenance); *Jordan v. Mt. Pleasant*, 49 P. 746 (Terr. Utah 1897) (flooding-barrier construction); *MacKay v. Salt Lake City*, 81 P. 81 (Utah 1905) (bridge maintenance); *Jones v. Ogden City*, 89 P. 1006 (Utah 1907) (street obstruction); *Brown v. Salt Lake City*, 93 P. 570 (Utah 1908) (water-system maintenance); *see also DeBry*, 899 P.2d at 436 (grouping these cases under the discretionary/ministerial test).¹³

¹³ The case of *Royce v. Salt Lake City*, 49 P. 290 (Utah 1897) is not to the contrary. In that case, a prisoner was injured after the chief of police unlawfully imprisoned him and forced him to work in a city quarry. *Id.* at 291–92. Relying on principles from corporate law, the Utah Supreme Court held that the city was not *vicariously liable* for the chief of police’s unlawful acts, which were *ultra vires*. *Id.* at 292. It also said, in dicta, that laws for the public benefit cannot be a basis for vicarious liability because officers enforcing those laws are not acting as “servants of the corporation.” *Id.* But this assertion was relied upon in only one subsequent opinion. *See Everill v. Swan*, 55 P. 68 (Utah 1898) (relying on this

Consistent with this precedent, no case from this period endorses the concept of municipal *immunity*.¹⁴ Instead, they all speak in terms of municipal *liability*. See *Jenkins v. Jordan Valley Water Conservancy Dist.*, 2012 UT App 204, ¶ 26, 283 P.3d 1009, *overturned on other grounds by Cope v. Utah Valley State College*, 2014 UT 53, 342, P.3d 243 (discussing the difference between governmental immunity and liability). Accordingly, they do not extend immunity when injury arises from the negligence of a city *and* the assault or battery of a third party. Cf. UTAH CODE § 63G-7-201(4)(b) (the battery

language in deciding whether a state statute precluded a city from terminating the employment of police officers without good cause). Moreover, the case has nothing to say about municipal *immunity*, speaking only to the vicarious liability of municipality. Tellingly, when the Utah Supreme Court in *DeBry* surveyed the law of municipal immunity at the time of statehood, it wholly omitted *Royce* from its account. See *DeBry*, 889 P.2d at 436–38. It also bears mentioning that *Royce* did not deal with a wrongful death claim or a claim of *direct liability* against the city for negligent hiring, training, and supervision. It thus provides no guidance on the interplay between Section 5 and municipal liability, nor illuminate a municipality’s liability for its own negligence. In sum, then, *Royce* fails every test for precedent and was not closely followed in the years after it was decided. If *Royce* does apply to extend sovereign immunity to municipalities in cases like this, it ought to be overruled for the reasons mentioned in this brief: wrongful death claims are deeply rooted in Utah law. They existed prior to statehood and were codified in a territorial statute. That statute granted a broad right of action in the years immediately prior to the enactment of the constitution. See 1884 Utah Laws 193–94. Moreover, common law immunity did not exist, since territorial law expressly abrogated the common law. See 1884 Utah Laws 156–57. It also disavowed the principle that statutes that conflict with the common law are interpreted narrowly. See 1884 Utah Laws 154–55. Thus, common law immunity did not extend to shield the State (or municipalities) from wrongful death actions.

¹⁴ Municipal *immunity* is first mentioned in *Alder v. Salt Lake City*, 231 P. 1102 (Utah 1924) (noting “a well-recognized exception to the general rule of [municipal] *immunity* in cases involving the maintenance and care of public streets” (emphasis added)). Interestingly, *Alder* cites section 816 of the 1917 Compiled Laws of Utah as support. This section is the successor to the statute discussed in *Brown*, 93 P. 570. Tellingly, *Alder* was decided 11 years after the Utah Supreme Court declared blanket *immunity* for the State of Utah. See *Wilkinson*, 134 P. 626, *superseded by statutes as stated in Madsen v. Borthick*, 658 P.2d 627 (Utah 1983).

exception). This nuance would not enter judicial opinions until passage of the Utah Governmental Immunity Act in 1965. *See* UTAH CODE § 63-30-10(2) (1965) (the predecessor to the battery exception); *see also Connell v. Tooele City*, 572 P.2d 697, 698 (Utah 1977) (applying the false arrest exception, which appears alongside the battery exception) and *Maddocks v. Salt Lake City Corp.*, 740 P.2d 1337, 1340 (Utah 1987) (applying the false arrest and battery exceptions).

Similarly, the notice of claim statute from this period did not purport to *waive* municipal immunity. *DeBry*, 899 P.2d at 438 (discussing UTAH REV. STAT. § 312 (1898) and noting that it did not waive immunity but “merely established a procedural requirement”). It also did not apply to wrongful death cases. *See Brown*, 93 P. 570 (rejecting city’s argument for dismissal where a decedent’s mother had failed to comply with Utah Revised Statute section 312 and holding that the mother’s wrongful death claim did not come within the terms of the statute). In sum, municipalities did not enjoy immunity from suit at the time of statehood. This conclusion is reinforced in the context of wrongful death claims by the language of Section 1216.

ii. Municipalities could be sued for wrongful death under the language of Section 1216

Before statehood, the last iteration of Section 1216 and its companion statutes in the Code of Civil Procedure allowed claimants to maintain an action “against *the person* causing the injury or death” and “if such person be employed by another person who is responsible for his conduct, also against *such other person.*” 1888 COMP. LAWS OF UTAH, § 3178 (emphases added) (dealing with suits involved deceased minors); *see also id.* §

3179 (same but for suits involving deceased adults). The term “person” would have been understood to include municipalities and governmental entities as “*bodies politic and corporate*[.]” Cf. 1898 REV. STAT. OF UTAH § 2498 (1898) (defining “person” for purposes of the revised statutes rules of construction); *see also Person*, BLACK’S LAW DICTIONARY (1st ed. 1891) (“Persons are divided by law into *natural* and *artificial*. Natural persons are such as the God of nature formed us; artificial such as are created and devised by human laws, for the purpose of society and government, which are called ‘corporations’ or ‘bodies politic.’” (emphases added)) and *Cotton v. United States*, 52 U.S. 229, 231, 13 L. Ed. 675, 676 (1851) (“Every sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property, both real and personal.”).

And “bodies politic and corporate” was a legal term with an established reference to municipalities. *See, e.g.*, 1888 COMP. LAWS OF UTAH § 1819 (referring to towns as “body corporate and politic”) and §§ 304 (Salt Lake City), § 411 (Logan), § 476 (Smithfield); § 778 (Provo); § 1036 (Springville); § 1140 (Payson); § 1217 (Fillmore); and §1254 (Parowan) (referring to cities, including these aforementioned cities, as a “body corporate and politic”); *see also Mt. Pleasant v. Beckwith*, 100 U.S. 514, 522, 25 L. Ed. 699, 700 (1879) (noting that a state legislature “extinguished *the corporation and body politic* known as the town of Racine, then called Orwell, and enacted that thereafter it should have no existence as *a body politic and corporate*” (emphases added)) and *Territory v. Golding*, 3 Utah 39, 49 (Terr. Utah 1881) (“The territory of Utah is a *body politic*, created and organized by congress” (emphasis added)).

In using this broad, well-defined term—while mandating the liberal construal of the section in which it appears in derogation of the common law, *see Smith*, 2015 UT 68, ¶ 10, n.20—the territorial legislature clearly expressed its intent to displace sovereign immunity and allow suits against governmental entities. Thus, Section 1216 safeguarded a remedy for wrongful death against all wrongdoers, including municipalities. And it was this version of the statute that was incorporated into the constitution as Section 5.

Taken together, then, the caselaw above and Section 1216 demonstrate that municipalities simply were not immune from suit for negligent ministerial acts or for wrongfully causing the death of another person.¹⁵ The Court should, therefore, hold that municipalities were not immune from suit in cases of wrongful death. It should also hold the Act to be unconstitutional in this case.

b. The Act would unconstitutionally violate Section 5 if applied to Appellants' wrongful death claim

If the Act applies to extend immunity to SLC, it will unconstitutionally abrogate a cause of action available when Section 5 was enacted. For, as shown above, municipalities

¹⁵ *See, e.g., Brown*, 93 P. at 570 (wrongful death from negligent maintenance of water system) and *Sullivan v. Salt Lake City*, 44 P. 1039 (Utah 1896) (wrongful death of city employee from negligent operation of gravel pit). There are also many wrongful death cases published in newspapers from this time. For example, in 1900, parents sued Ogden City for the wrongful death of their two daughters, who died after a bank of sand in a city-owned sand pit gave way and buried them. *See* https://newspapers.lib.utah.edu/details?id=11117595&page=10&q=suit+for+damages+death&sort=rel&year_start=1856&year_end=1901, last accessed on September 15, 2025. Similarly, in 1901, parents sued Salt Lake City for the death of their 15-month-old son, who died of drowning in a open city ditch. *See* https://newspapers.lib.utah.edu/details?id=13387128&page=10&q=suit+for+damages+death&sort=rel&year_start=1856&year_end=1901, last accessed on September 15, 2025.

could be sued for ministerial acts of negligence that resulted in death when Utah enacted Section 5. Thus, the Act, as applied to wrongful death cases against municipalities, operates to wholly eliminate a wrongful death cause of action that existed when Utah achieved statehood.

That result clearly violates the plain language of Section 5. As the Utah Supreme Court has said, Section 5 prevents “the abolition of the right of action for wrongful death, ‘whether in a wholesale or piecemeal fashion.’” *See Berry*, 717 P.2d at 684 (citing *Malan*, 693 P.2d 661). Where this is so, the Court should reject SLC’s invitation to apply the Act to this case and hold that doing so would violate Section 5. *See id.* at 483 (“The right protected by Article XVI, section 5 is not subject to the same kind of balancing analysis required by [the open courts clause].”). But if the Court determines that *Tiede* controls the outcome of this case, it should further find that *Tiede* lacks the indicia of persuasive precedent.

II. If *Tiede v. State* Applies Here, It Ought to be Overturned Because It Rests on Weak Authority and Reasoning and Misunderstands the Original Intent of Section 5

a. The Court can, as a matter of constitutional avoidance, hold that Tiede does not apply to wrongful death actions against municipalities

If *Tiede v. State* is binding precedent here, it should be limited or overturned: it relies on unpersuasive authority and reasoning and fails to understand the original import and meaning of Section 5. Before reaching that conclusion, the Court can find, as a matter of constitutional avoidance, that *Tiede* does not apply to wrongful death claims against municipalities. After all, it dealt with wrongful death claims against the *State* and based its

holding on an analysis of state sovereign immunity. Specifically, it cited the 1913 case of *Wilkinson v. State*, 134 P. 626 (Utah 1913), for the proposition that “[s]overeign immunity was a settled feature of the common law when Utah became a state and adopted its constitution.” *Tiede v. State*, 915 P.2d 500, 504 (Utah 1996).¹⁶ As further support, it looked to an 1898 statute that retained immunity for the State while affording a discretionary process whereby the State could consider and pay claims. *Id.* (discussing 1898 REV. STAT. UTAH § 929). Relying on these authorities, it held that applying the battery exception to reinstate “governmental immunity from wrongful death suits against *the State*” did “not abrogate any previously existing right of action and therefore [did] not violate [Section 5].” *Id.* (emphasis added).

As can be seen, *Tiede* has nothing to say about the constitutionality of the Act in wrongful death cases against a municipality. *See Eldridge v. Johndrow*, 2015 UT 21, ¶ 26, 345 P.3d 553 (“For a case to be stare decisis on a particular point of law, that issue *must have been raised in the action* decided by the court.” (quoting 20 AM. JUR. 2D, *Courts* §134 (2014) (emphasis added))). This is crucial. For as discussed in the previous section, very “different lines of [common law] authority [] developed after statehood with respect to *state* and *municipal* immunity.” *DeBry v. Noble*, 899 P.2d 428, 440 (Utah 1995) (emphases added). These different lines were reflected in Utah’s first statutes, which *presume* a

¹⁶ The term “sovereign” references a “sovereign *state*” as one “vested with independent and supreme authority” in its sphere. *Sovereign, n.*, BLACK’S LAW DICTIONARY (9th ed.). This is the meaning used by the supreme court in *Tiede* and *Wilkinson*, both of which dealt with lawsuits against the State of Utah. *See Tiede*, 915 P.2d at 504 (“In the absence of either express constitutional or statutory authority an action against a *sovereign state* cannot be maintained.”) (quoting *Wilkinson*, 134 P. 626, 630 (Utah 1913)).

municipality’s liability for negligence. *See DeBry*, 899 P.2d at 438 (noting that Utah Revised Statute section 312 (1898) “did not purport to waive sovereign immunity” but “merely established a procedural requirement that a claim for negligence against a city or town had to be presented to a city or town council within a certain time before an action could be maintained”).

Thus, *Tiede* does not control the outcome of this case. The Court should so find and hold that SLC does not enjoy immunity from Appellants’ lawsuit. But if *Tiede* does apply, the Court should limit or overturn it to restore the founders’ original intent for Section 5.

b. If Tiede applies, it should be limited or overturned as inconsistent with Section 5

Tiede should be limited or overturned: it cites erroneous legal authorities and relies on weak reasoning. *See State v. Menzies*, 889 P.2d 393, (Utah 1994) (overturning precedent that was established “with little analysis and without reference to authority”).¹⁷ To be sure, stare decisis “is a cornerstone of Anglo-American jurisprudence” because it “is crucial to the predictability of the law and the fairness of adjudication.” *State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993). As such, courts “do not overrule [their] precedents ‘lightly.’” *Eldridge*, 2015 UT 21, ¶ 21 (quoting *State v. Hansen*, 734 P.2d 421, 427 (Utah 1986) (plurality opinion)).

¹⁷ The appellants’ briefing in *Tiede* grappled only provisionally with Section 5, providing no meaningful guidance on its history. A copy of the briefing from that case is included here as **Addendum 3**. *See State v. Archibeque*, 2022 UT 18, ¶ 15, 509 P.3d 768 (“Under our adversarial system of justice, courts decide the matters before them ‘on the basis of facts and arguments . . . adduced by the parties,’ relying on the parties ‘to zealously advocate their cause.’” (ellipses in original)).

To decide whether to limit or overturn precedent, Utah courts consider “two broad factors that distinguish between weighty precedents and less weighty ones.” *Id.* The first factor investigates “the persuasiveness of the authority and reasoning on which the precedent was originally based.” *Id.* The second factor assesses “how firmly the precedent has become established in the law since it was handed down.” *Id.*

Courts do not apply these factors in a wooden or mechanical way. After all, the “presumption against overruling precedent is not equally strong in all cases.” *Id.* ¶ 22 (citation omitted); *see also Francis v. Southern Pac. R.R.*, 333 U.S. 445, 471, 68 S. Ct. 611 (1948) (Black, J., dissenting) (“When precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule’s creator to destroy it.”). Relevant here, “[t]he doctrine of stare decisis . . . has only a limited application in the field of constitutional law.” *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 44, 56 S. Ct. 720, 80 L. Ed. 1033 (1936) (Stone and Cardozo, JJ., concurring); *see also* Jack L. Landau, *Some Thoughts About Constitutional Interpretation*, 115 Penn St. L. Rev. 837, 838 (2011) (“[I]n the case of state constitutional interpretation, the pull of stare decisis may not be as strong as it is in other contexts.”). This is because a court’s “interpretation [of the constitution] can be altered only by constitutional amendment or by overruling prior decisions.” *Agostini v. Felton*, 521 U.S. 203, 235, 117 S. Ct. 1997, 2016 (1997) (citation omitted). Neither of the foregoing factors support giving *Tiede* special weight as to wrongful death suits against municipalities.

1. Tiede relies on erroneous legal authorities and weak reasoning

As discussed in the previous section, *Tiede* cited the 1913 case of *Wilkinson v. State*, for the proposition that “[s]overeign immunity was a settled feature of the common law when Utah became a state and adopted its constitution.” *Id.* at 504. It then cited *State v. District Court*, 78 P.2d 502 (Utah 1937), *overruled on other grounds by Colman v. Utah State Land Bd.*, 795 P.2d 622 (Utah 1990), *Campbell Building Co. v. State Road Commission*, 70 P.2d 857 (Utah 1937), and section 929 of the 1898 Revised Statutes of Utah for added support.

But these authorities—at best—weakly support its holding as to the issue of sovereign immunity. *Wilkinson* was the first case to declare blanket immunity for the State, and it did so seventeen years after statehood. Tellingly, it did not cite a single prior Utah decision for support. *See Wilkinson*, 42 Utah at 493 (collecting out-of-jurisdiction cases). Nor could it. For in the decades leading up to the 1896 ratification of Utah’s constitution, the territorial legislature repeatedly repudiated the common law. It was not until 1898—two years after Section 5 had been enacted—that the legislature adopted the common law for the first time. *See* § 2488, REV. STAT. OF UTAH (1898) (“The common law of England, so far as it is not repugnant to, or in conflict with the Constitution and laws of the United States, or the Constitution and laws of this state, shall be the rule of decision in all the courts of this state.”); *see also* § 2490, REV. STAT. OF UTAH (1898) (“No part of the Revised Statutes is retroactive, unless expressly so declared.”).

Wilkinson does not analyze these statutes nor Utah’s history of hostility against the common law. It also had no need to do so: it was not, after all, dealing with a wrongful

death claim protected by Section 5. Thus, it does not warrant the conclusion that the State could not be sued when Utah first achieved statehood.

The same analysis applies to *Campbell Building Co. v. State Road Commission* and *State v. District Court*. In *Campbell*, the supreme court concluded that a contractor could not sue the state road commission for damages in tort where the state had only waived immunity for suits arising out of a written contract. 70 P.2d at 861 (“In an action against the state board of land commissioners, where any recovery would affect state funds, the action was held to be one against the state.” (citing *Wilkinson v. State*, 134 P. 626)). Similarly, in *State*, the supreme court held the state road commission, as an agency of the state, immune from a lawsuit that sought to enjoin the commission from building a viaduct. 78 P.2d at 504 (“Being an unincorporated agency of the State, a suit against it is a suit against the State. The State cannot be sued unless it has given its consent or has waived its immunity.” (citing *Wilkinson*, 134 P. 626 and *Campbell Building Co.*, 70 P.2d 857)).

As can be seen, both *Campbell* and *State* rely on *Wilkinson* for their understanding of sovereign immunity and do not supply any independent analysis. Their authority and persuasiveness is, therefore, wholly derivative of *Wilkinson*. Moreover, neither case mentions, let alone discusses, the state of the common law and sovereign immunity as it existed in 1896. They simply had no reason to do so as they were not dealing with the interplay between wrongful death claims under Section 5 and sovereign immunity. In sum, *Wilkinson*, *Campbell*, and *State* do not justify *Tiede*’s holding.

The same holds true of section 929 of the 1898 Revised Statutes of Utah. In relying on this section, *Tiede* noted that “[a]t the time the constitution was adopted in 1895, there

was no express constitutional or statutory authority allowing suits for wrongful death against the State.” *Tiede*, 915 P.2d at 504. It then noted that all claims against the State had to be presented to the State Board of Examiners under section 929 of the 1898 Revised Statutes of Utah. *Id.* This, of course, begs the question by assuming the need for statutory authorization due to sovereign immunity. But again, if sovereign immunity did not apply to claims for wrongful death, the State Board of Examiners would not have jurisdiction over that claim.

It also bears mentioning that none of the legal authorities relied upon by *Tiede* have anything to do with *municipal* liability. Instead, they all dealt with claims against the state or its subdivisions. Likewise, one reviews *Tiede’s* language in vain for any reasoning pertaining to a municipality’s immunity in cases of wrongful death. In sum, then, *Tiede* relies on erroneous and inapposite authorities, and on undeveloped reasoning concerning the interplay between Section 5 and governmental immunity. This undermines its weightiness as precedent. This conclusion is reinforced by reliance considerations.

2. *Tiede* is not firmly established precedent in the arena of municipal immunity

In assessing whether *Tiede* has become firmly established precedent, the Court considers “the extent to which people’s reliance on [it] would create injustice or hardship if it were overturned.” *Eldridge*, 2015 UT 21, ¶ 35. Thus, “[e]ven if earlier precedent was wrongfully decided, the court will not overrule the precedent where . . . it has remained standing for a significant period and *many have relied on it.*” *Id.* (emphasis in original) (citing 20 AM. JUR. 2D Courts § 132 (2014)). In making this assessment, courts also

consider “how well [the precedent] has worked in practice” and “whether the precedent has become inconsistent with other principles of law.” *Id.* ¶ 40. Under these considerations, *Tiede* is not firmly established precedent on the question of municipal immunity.

As already shown, it says nothing of municipal liability. Thus, courts and parties could not *reasonably* rely on its analysis to extend the Act’s battery exception to municipalities. By implication, nothing can be said about how well it has worked in practice when applied to municipal defendants. Unsurprisingly, since *Tiede* was decided in 1996, not a single reported judicial decision has applied it to extend immunity to a municipality in a wrongful death case. *See, e.g., Smith v. United States*, 2015 UT 68, 356 P.3d 1249 (referencing *Tiede* in deciding the constitutionality of the medical malpractice damage cap); *Riggs v. Georgia-Pacific LLC*, 2015 UT 17, ¶ 9, n.7, 345 P.3d 1219 (citing *Tiede* for the proposition that “the scope of protection afforded by the wrongful death provision [of the Utah Constitution] is limited to the rights of action that existed at the time the provision was adopted” (citation omitted)); *Wagner v. Utah Department of Human Servs.*, 2005 UT 54, ¶ 11, 122 P.3d 599 (citing *Tiede* for the proposition that “[t]his court has previously held in governmental immunity cases that the State is immunized against a negligence action if the action arises out of an assault or battery” (citation omitted)); *Tindley v. Salt Lake City Sch. Dist.*, 2005 UT 30, ¶ 36, 116 P.3d 295, *disavowed on other grounds by Smith*, 2015 UT 68 (citing *Tiede* for the proposition that the governmental immunity act “does not abrogate any previously existing right of action and therefore does not violate article XVI, section 5”); *Parks v. Utah Transit Auth.*, 2002 UT 55, ¶ 15, 53 P.3d 473, *disavowed on other grounds by Smith*, 2015 UT 68 (same); *Taylor v. Ogden City Sch.*

Dist., 927 P.2d 159, 163–64 (Utah 1996) (citing *Tiede* as support for applying the battery exception in a non-wrongful death case).

As can be seen, *Tiede* “has not been necessary to the outcome of [any wrongful death] cases” against municipalities. *Eldridge*, 2015 UT 21, ¶ 36. On balance, then, these considerations show that “the public has [not likely] relied on [*Tiede*] in any substantial way” in this area of law. *Id.* Thus, to the extent *Tiede* applies to wrongful death cases against municipalities, it ought to be overturned and limited as applying only to cases against the State of Utah.

3. *Tiede* constitutionalizes an erroneous reading of Section 5

Above all, the Court should limit or overturn *Tiede* to rectify an error in its constitutional jurisprudence. *Agostini v. Felton*, 521 U.S. 203, 235, 117 S. Ct. 1997 (1997) (noting that the policy underlying stare decisis “is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions”). Appellants have traced—in near tortious detail—the history of Section 5. That history depicts the founders’ rejection of the common law with respect to wrongful death claims and their desire to give such claims a wide scope with categorical protections. Their rejection of the common law—and by logical extension the common-law doctrine of sovereign immunity—resulted in a wrongful death claim that could be asserted against any *person* and his or her employer, which would have included governmental entities. And these protections were given constitutional weight in the passage of Section 5.

The Court should do away with *Tiede*. It was simply wrong when it treated sovereign immunity as a “settled feature” of Utah law at the time of statehood. *See Tiede*, 915 P.2d at 504. Doing so will restore the protections envisioned by the founders of our State and ensure that those who lose a loved one shall have access to the courts for a remedy, even if the wrongdoer is the state, a city, or a public employee.

CONCLUSION

Amanda’s death could have been prevented. SLC had every reason to know that Martin posed a clear, imminent danger. Even so, its officers failed to act reasonably under the circumstances. This Court should reject SLC’s attempt to shield itself behind governmental immunity. Extending immunity would be contrary to Utah’s constitutional jurisprudence and longstanding values of affording a remedy to those who have lost a loved one at the hands of another’s negligence. The Court should, therefore, overrule the district court and remand the case.

Respectfully submitted this 15th day of September, 2025.

PARKER & McCONKIE

/s/ Judson D. Burton .
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the word limits set forth in rule 24(g)(1) of the Utah Rules of Appellate Procedure. It contains 10,802 words, excluding the parts of the brief exempted by rule 24(g)(2).

2. This brief complies with rule 21 of the Utah Rule of Appellate Procedure regarding public and non-public filings.

DATED this 15th of September, 2025.

/s/ Judson D. Burton

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 2025, a true and correct copy of the foregoing **Brief of Appellants** was sent by electronic mail to the following:

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**CERTIFICATE OF SERVICE
ON ATTORNEY GENERAL**

I hereby certify that on September 15, 2025, a true and correct copy of the Appellants' Principal Brief was served on Utah Attorney General's Office via the Utah Solicitor General at notices@agutah.gov in accordance with rule 25A of the Utah Rules of Appellate Procedure.

DATED this 15th of September, 2025.

/s/ Judson D. Burton

ADDENDUM 1

The Order of the Court is stated below:

Dated: March 27, 2025
08:06:58 AM

At the direction of:
/s/ LAURA SCOTT
District Court Judge

by

/s/ KETI SAFONOVA
District Court Clerk



**THIRD JUDICIAL DISTRICT - SALT LAKE COUNTY DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH**

SHAUNA MAYNE, Plaintiff,	RULING Order Granting Motion to Dismiss and Denying Motion to Stay
vs.	Case No: 240902420
SALT LAKE CITY POLICE DEPARTME, Defendant.	Judge: LAURA SCOTT Date: March 26, 2025

Before the court are Defendant Salt Lake City Police Department's Motion to Dismiss With Prejudice (Motion to Dismiss) and Motion to Stay Pending Resolution of Related Appeal (Motion to Stay).

The court originally agreed to hold a hearing on the Motion to Dismiss, which is currently scheduled for April 14, 2025. However, given Plaintiff's admission in the Complaint and concession in her opposition to the Motion to Stay that "this court is obligated to dismiss this case under the binding precedent of Tiede v. State, 915 P.2d 500 (Utah 1996)," the court strikes the hearing because the issue has been authoritatively decided. See Rule 7(h) of the Utah Rules of Civil Procedure.

For this same reason, the court GRANTS the Motion to Dismiss on the ground that Plaintiff's claims are barred by the Utah Governmental Immunity Act. See Utah Code Section 63G-7-201(4); Tiede v. State, 915 P.2d 500; Tindley v. Salt Lake City School District, 2005 UT 30.

Because dismissal is required under Tiede, the court declines to reach Defendant's public duty doctrine argument.

Finally, because it is granting Defendant's Motion to Dismiss, the court DENIES the Motion to Stay as moot.

SO ORDERED.

End Of Order - Signature at the Top of the First Page

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 240902420 by the method and on the date specified.

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**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALE LAKE COUNTY, STATE OF UTAH**

SHAUNA MAYNE, individually and as
personal representative of the ESTATE OF
AMANDA MAYNE,

Plaintiffs,

VS.

SALT LAKE CITY POLICE DEPARTMENT,
a governmental entity,

Defendant.

FINAL JUDGMENT

Case No. 240902420
Judge Laura Scott

In accordance with Utah Rule of Civil Procedure 54, the Court enters this Final Judgment. All of Plaintiffs' claims against Defendant have been dismissed with prejudice.

----- END OF ORDER -----

The Court's electronic signature appears at the top of the first page.

APPROVED AS TO FORM:

/s/ Judson D. Burton
Judson D. Burton
Attorney for Plaintiffs

/s/ Katherine R. Nichols
Katherine R. Nichols
Attorney for Salt Lake City Police Department
Signed by Judson D. Burton with written
permission of Katherine R. Nichols

CERTIFICATE OF SERVICE

I hereby certify that, on April 4, 2025, I caused a true and correct copy of the foregoing to be served upon all counsel of record via the Court's electronic filing system.

/s/ Marynell Hinton
Paralegal

ADDENDUM 3

3-23
mail

~~ORIGINAL~~ ORIGINAL

IN THE SUPREME COURT
STATE OF UTAH

ROLF TIEDE, Individually, and as the guardian of PATRICIA TIEDE, et al.,	:	APPEAL BRIEF
Plaintiffs/Appellants,	:	
vs.	:	Case No. 940425
THE STATE OF UTAH, THE UTAH STATE DEPARTMENT OF CORRECTIONS, et al.,	:	Priority (15)
Defendants/Appellees.	:	

On Appeal from Third Judicial District Court of Summit County,
Judge David S. Young, Presiding.

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FILED
MAR 23 1995
CLERK SUPREME COURT
UTAH

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UTAH SUPREME COURT CHECKLIST FOR BRIEFS

Date
Case No.

3-13-95
9410425

TIMELY FILING OF BRIEFS

An untimely brief may be rejected under Rule 27(d). If a brief is untimely, a motion under Rule 26 will be mandatory for permission to file a late brief.

TEN COPIES (Petition for Rehearing: Original & 6 copies.)

LENGTH (excluding addendum)
1. Appellant/Appellee: 50 pages
2. Reply: 25 pages
3. Petition for Rehearing: 15 pages
4. Amicus/Intervenor: 50 pages

SIZE AND BINDING

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1. Ten characters per inch. Proportional spacing is acceptable.
2. Print on both sides on the page.
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Petition for Rehearing: Tan
Response to Petition for Rehearing: White
2. Name of counsel and parties represented.
3. Argument priority classification. (R. 29) (Appellee)

CONTENT REQUIREMENTS - IN ORDER STATED

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B. Statement of grounds for seeking review of issue not preserved in trial court (Mandatory for Appellant)
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JURISDICTIONAL STATEMENT

The Supreme Court of Utah has jurisdiction over this matter pursuant to Utah Code Annotated section 78-2-2 (1953).

ISSUES PRESENTED

1. Whether Article XVI, Section 5 of the Utah State Constitution does not allow the State to abrogate an action to recover damages for injuries resulting in death?
2. Whether there was a duty on the part of the State to attempt to locate and apprehend the dangerous criminals that escaped from the Orange Street Community Center Half-way House when the State knew of their location and intentions?

The appeal was preserved by moving the Court for a new trial following the dismissal of the plaintiffs' claims against the State defendants. A copy of the motion is attached in the supplement.

The applicable standard of review is to review the trial court's decision for correctness as it was based upon a legal conclusion. Ferree v. State, 784 P.2d 149 (Utah 1989).

DETERMINATIVE STATUTES AND REGULATIONS

The determinative Constitutional provisions and statutes in this case are Article XVI, Section 5 of the Utah State Constitution, and Utah Code Ann. section 63-30-10 (Supp. 1994).

STATEMENT OF THE CASE

On December 14, 1990, Von Taylor and Edward Deli walked away from the Orange Street Community Center Halfway House, owned by the State of Utah Department of Corrections. (R. 3, 72, 101) Both were convicted felons. Taylor had been incarcerated for a violent crime. (R. 3, 72, 102)

For more than a week after they walked away from the halfway house, Taylor and Deli had been staying at Taylor's father's cabin, which was near the Appellant's cabin, as well as in other cabins in the area. (R. 3, 73, 102) During the winter, these cabins were accessible only by snowmobile from a parking lot near the entrance to the cabin area. (R. 102)

The plaintiffs have alleged that the employees of the Division of Corrections were negligent in fulfilling their obligation to apprehend these men or protect the plaintiffs' deceased family members from them. There were no attempts, or totally inadequate attempts, by state officials to apprehend Taylor and Deli after their escape, even though their whereabouts at Taylor's father's cabin were known or at the very least easily discoverable. (R. 3-5, 72-74, 102) On December 21, 1990, Taylor called Scott Manley at the halfway house. (R. 4, 73, 102, 128) He left a message for Manley and left a telephone number, which was the number of a cabin in the immediate vicinity of the Tiede cabin. (R. 4, 73, 102, 128) On the morning of December 22 at approximately 9:47 a.m., Taylor once again telephoned Scott Manley at the halfway house. On this day Taylor actually talked to Manley. (R. 4, 73, 102, 128) He informed Manley that he had been staying at his parents' cabin, and

had broken into other cabins in the area where he had stolen guns. (R. 4, 73, 102, 128) He also told Manley that he was staying at a cabin and waiting for the owners to arrive, at which time he planned to kill them and kidnap their daughters. (R. 4, 73, 102, 128) •

This information was turned over to the Department of Corrections employees who pacified Manley by telling him that the information would be passed on to higher officials. (R. 4, 73, 102, 128) If the defendant had responded to this information, the plaintiffs' decedents would probably be alive today. (R. 4-6, 73-74, 102) No steps were taken to apprehend Taylor and Deli, and no attempt was made to warn or protect the Tiedes. Late that afternoon, the Tiede family walked into their cabin. (R. 4-6, 73-74, 102) Kaye Tiede and Beth Potts were shot and killed by Taylor and Deli. Rolf Tiede was gravely injured, and Linac and Patricia Tiede were kidnaped. (R. 4, 73, 102)

SUMMARY OF THE ARGUMENTS

The Utah Governmental Immunity Act waives sovereign immunity for government negligence unless the Act specifically retains the immunity by statute. The Act prohibits civil law suits from being brought against the government where the damages arose out of assault and battery. Utah Code Annotated section 63-30-10(2). In this case, the relatives of the plaintiffs were murdered. The Act does not mention wrongful death or murder, and therefore, liability should arise.

In the trial court, the state's motion to dismiss was granted and a motion for new trial

denied when the trial court determined the legislative intent and actually added the words wrongful death and murder to the governmental immunity act's carefully chosen words. The trial court violated the rules of statutory construction and ignored the Utah Constitution in making its rulings. The trial court should not have added words to the statute, nor should the court have determined the legislative intent.

The Utah Constitution, Art. XVI, section 5, states that a cause of action "to recover damages for injuries resulting in death, shall never be abrogated." For this reason, the words wrongful death and murder do not appear in the Utah Governmental Immunity Act. If the trial court is correct and the words murder and wrongful death should be added to protect the government's interest, then the statute would become unconstitutional. Therefore, the trial court's rulings are incorrect and the matter should be remanded for trial.

ARGUMENT

A. THE STATE DEPARTMENT OF CORRECTIONS HAD A DUTY OF CARE TO THE PLAINTIFF.

Hornbook law declares that to establish negligence, a plaintiff must first establish a duty of care owed to the plaintiffs by the defendants. Weber ex rel. Weber v. Springville City, 725 P.2d 1360, 1363 (Utah 1986); Prosser & Keeton on the Law of Torts, section 30, at 164 (W. Keeton 5th ed. 1984). Whether a duty exists is a question of law. Weber, 725 P.2d at 1363. Generally, for a governmental agency to be held liable for negligence, the plaintiff must show a breach of a duty to an individual, not merely the breach of an obligation due to the general

public at large. Ferree v. State, 784 P.2d 149, 151 (Utah 1989); Christenson v. Hayward, 694 P.2d 612 (Utah 1984).

In Ferree, the Court was asked to determine whether a duty existed on the part of the state when an inmate on a weekend release became intoxicated and bludgeoned to death Ferree. The inmate was incarcerated on drug offenses and had never exhibited violent tendencies. After discussing several cases from other jurisdictions, the Court held that a duty did not exist in that particular case. However, the Court also stated that "when officials have a good reason to believe that a particular person may be jeopardized by the release of a prisoner who has a demonstrated capacity for violence, the result may be otherwise." Ferree, 784 P.2d at 152.

In the instant case, the defendants did not release the prisoners, rather, they escaped. These criminals were known to be dangerous and violent. Taylor was in prison for two counts of aggravated burglary with a weapon and Deli was convicted of attempted arson. Taylor was allegedly in possession of firearms while staying at one of the halfway houses. In addition to the criminals' violent propensities, the other defendants had several reasons to believe that a particular person was in jeopardy. Von Taylor actually phoned an inmate in a halfway house and left his name and telephone number. Later, Taylor again called Scott Manley at the halfway house. The escapee revealed their location, and their intent to kill and kidnap the occupants of a particular cabin. This information was passed on to corrections officials, who promised to send the information on to other authorities.

Clearly, a duty existed. The criminals were dangerous. The defendants knew where the

escaped convicts were and what they intended to do. The defendants knew that the escapees had possession of firearms, yet nothing was done to protect the plaintiffs. The defendants were negligent in failing to apprehend the escaped criminals. The defendants were negligent in failing to notify the plaintiffs of the danger they were in. If the State of Utah Corrections Department had not been negligent in failing to perform their duty to protect, the plaintiffs would have no claim, but the defendants failed to go after the escaped convicts.

The Ferree analysis was affirmed and brought into harmony with the Restatement (Second) of Torts, section 319 (1965), in the case of Rollins v. Petersen, 813 P.2d 1156, 1159 (Utah 1991). There, the Utah Supreme Court held that section 319 is modified in that in order for a person or group to be reasonably identifiable, the custodian must know that the detainee was likely to cause a particular harm if not controlled. Rollins, 813 P.2d at 1162. In Rollins, an inmate from the state mental hospital left the grounds, stole a car, and killed one Ms. Schopf in a head-on car collision. The Court held that no duty existed because Schopf was not a specific, identified party to whom the State owed a special duty. However, this case does fit the definition set forth by the Court in Rollins.

This case is distinguishable from both Ferree and Rollins, and it fits the precise situation that the Court contemplated for the finding of a special duty on the part of the defendant State agencies. Two violent criminals escaped from the defendant's control. The defendant became aware of their whereabouts and of their intentions to physically harm a specific group of people, yet nothing was done. This is negligence and the breach of specific duty.

B. ARTICLE XVI, SECTION 5 OF THE UTAH STATE CONSTITUTION DOES NOT ALLOW THE STATE TO ABROGATE AN ACTION TO RECOVER DAMAGES FOR INJURIES RESULTING IN DEATH.

Article XVI, Section 5 of the Utah State Constitution holds that "[t]he right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided by law." Plaintiffs believe this section shows that the reasoning employed by the trial court was incorrect. According to the Constitution, the State, and anyone else, must be liable for wrongful death or any other tort resulting in death. The district Court, in its rulings, specifically stated that they were adding the word murder to the State's immunity statute in order to retain the state's immunity. This is incorrect according to the Constitution. Therefore, the immunity statute must necessarily be limited to the assault language, and cannot be extended to wrongful death or murder.

1. Addition of the words "murder" or "wrongful death" to Utah Code Ann. section 63-30-10(2) would make the statute unconstitutional.

Article XVI, Section 5 of the Constitution of Utah forbids a right of action to recover damages resulting from death to be abrogated in any manner. This section of the Constitution specifically prohibited the legislature from adding the wording murder or wrongful death to the immunity statute. Adding these words would violate the state's constitution.

In its decision granting the State's Motion to Dismiss, the district court stated that the "Court does not feel that the legislature intended to immunize the state in one case where the

victim of an assault survives but to impose liability where under identical circumstances and an identical type of assault the victim does not survive. Decision, p. 3-4. In ruling on a Motion for New Trial, Judge Young stated "that the wrongful death of the other parties was anticipated to be included in the Governmental Immunity Act." Hearing Transcript, p. 24. The Court repeatedly added language to the statute and divined legislative intent. This is improper and grounds for reversal.

2. Case law supports the application of Article XVI section five to the case at hand.

Article XVI is the labor article within the Utah State Constitution. This was a point of concern to the trial court. However, Article XVI, Section 5 has been applied to cases which had nothing to do with labor. Two such cases are Rhoades v. Wright, 622 P.2d 343 (Utah 1980), and Stoltz v. Burlington Transp. Co., 178 F.2d 514 (10th Cir. 1949). Both cases hold that Article XVI, Section 5 does not allow the right to recover in a wrongful death suit to be abrogated.

In Rhoades, plaintiff's husband was shot and killed by defendant while inspecting his farm. In Stoltz, plaintiff's son was killed in an accident while riding defendant's bus. The plaintiffs in both Rhoades and Stoltz sued for wrongful death. Both cases dealt mainly with the conflict between Utah and Colorado state laws concerning the recovery of damages in wrongful death cases. However, once it was established that the law of Utah would apply, the Courts in both Rhoades and Stoltz stated that their decisions conformed to Article XVI, Section 5. Rhoades 622 P.2d at 351, and Stoltz 178 F.2d at 514. The Court in Rhoades clearly states that

the outcome of that case "...conforms with Utah's strong public policy regarding plaintiff's rights to bring a wrongful death action as stated in Article XVI, Section 5 of the Utah Constitution."

Neither Rhoades nor Stoltz were cases that dealt with labor, yet Article XVI, Section 5 was found to apply to both of them. In addition, the Utah Supreme Court found a portion of the Product Liability Act unconstitutional due to this section and the open courts clause in 1985. Berry ex rel. Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985). For these reason, the plaintiffs in the case at hand believe that Article XVI, Section 5 should apply in this case. Their right to recover in this wrongful death action should not be abrogated by the state's claim of immunity, particularly where wrongful death has been specifically left out of the immunity statute.

C. **THE STATE WAIVED ITS IMMUNITY FROM A LAWSUIT
FOUNDED IN NEGLIGENCE UNDER UTAH CODE ANNOTATED
SECTION 63-10-10 (SUPP. 1994).**

Utah Code Ann. section 63-30-10 (Supp. 1992) states "[i]mmunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of [the following exceptions]." Therefore, the defendant has waived immunity for suit unless there is a specific exemption under which the state has retained its sovereign immunity. There is no exception which applies to the defendant in this case. Therefore, the order dismissing this case should be reversed and the matter remanded for trial'

1. Immunity is not retained under subsection (2) as this matter did not arise out of assault, battery or other listed exceptions.

The trial court dismissed this action basing its holding on Utah Code Ann. section 63-30-10(2) (Supp. 1994). In its opinion, the trial court states the "Court does not feel that the legislature intended to immunize the state in one case where the victim of an assault survives but to impose liability where under identical circumstances and an identical type of assault the victim does not survive." Furthermore, the trial court held that "assault" is the civil counterpart to "murder" and that "false imprisonment" is the civil counterpart to the criminal "kidnaping." Decision, p 3-5. The plaintiff must vigorously oppose this interpretation of the state's immunity statute .

a. The trial court should not determine legislative intent when the statutory language is plain and unambiguous.

First and foremost, "where statutory language is plain and unambiguous, this Court will not look beyond the same to divine legislative intent. Rather [the Court is] guided by the rule that a statute should generally be construed according to its plain language." Brinkerhoff v. Forsyth, 779 P.2d 685, 686 (Utah 1989); Allisen v. American Legion Post No. 134, 763 P.2d 806, 809 (Utah 1988). The trial court expressly stated that it determined the legislative intent behind the statute on page 3-4 of its decision. Then in its ruling on the plaintiff's motion for new trial, the Court divined the legislature's anticipation and the Court asked counsel whether "they thought of" leaving out 'wrongful death' from the immunity act because of the Constitution and

whether there was legislative intent to support the position that wrongful death should not be added to the statute. Transcript, p. 10. Plaintiffs believe that this was a mistake. The trial court should have looked simply to the actual, plain, and unambiguous language of the statute.

b. A statute should be read according to its literal wording.

The Supreme Court has repeatedly stated that a statute must be read according to its literal wording and that it is presumed that a statute's words and phrases were chosen carefully and advisedly. Amax Magnesium Corp. v. Tax Commission, 796 P.2d 1256, 1258 (Utah 1990); Horne v. Horne, 737 P.2d 244, 247 (Utah 1987); West Jordan v. Morrison, 656 P.2d 445, 446 (Utah 1982). Utah Code Ann. section 63-30-10 states an exception to the waiver of immunity clause for assault, battery and false imprisonment. Nowhere in the statute are the words kidnap or murder found.

The trial court determined that the difference between assault and murder is a "distinction without a legal difference." Decision, p. 3. Furthermore, the court stated that kidnaping "falls within the 'false imprisonment' provisions of the governmental immunity act." Decision, p. 4. The plaintiff must disagree. Assault is legally different from murder both in a criminal and a civil context. In effect, the trial court has made murder a lesser included offense of assault by claiming that a murder is no different than an assault.

Assault, as defined in Utah Code Ann. section 76-5-102 (1990) is "an attempt, with unlawful force or violence, to do bodily injury to another; a threat, accompanied by a show of

immediate force or violence, to do bodily injury to another; or an act, committed with unlawful force or violence, that causes bodily injury to another." In a civil context, assault is defined as "an offer to show violence to another without striking him," or "an intentional, unlawful threat by word or act to do violence to the person of another coupled with apparent ability to do so and the doing of an act that creates a well founded fear of such violence being done." Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325; State v. Wilson, 276 So.2d 45 (Fla.).

The civil tort of wrongful death is actually more closely akin to the crime of murder. The immunity section specifically excludes the words wrongful death, murder and kidnaping. Assault does not rise to the level of wrongful death or murder. Therefore, the plaintiffs should be free to pursue such an action against the state and the trial court's ruling must be reversed.

- c. Arbitrary cut-offs are common in statutory language, and the court should not add words to the statute, or expand the meaning of words found within the statute.

There are several instances in statutory law where the legislature has made arbitrary cut-offs of liability. For example, in personal injury cases dealing with automobile accidents, the legislature has proclaimed that \$3,000 is the liability threshold. If a plaintiff has \$2,999 in damages, she cannot sue. See Utah Code Ann. section 76-6-412 (1990). In the present case, the legislature stated that sovereign immunity was not waived for assault or false imprisonment. However, the legislature did not add murder, wrongful death, or kidnaping to the list of exceptions to the waiver of immunity as required by the constitution. The clear language of the

statute does not contain this language. Plaintiffs believe that the legislature has made an arbitrary cut-off when it included assault and false imprisonment in Utah Code Ann. 63-30-10(2), and did not include murder, wrongful death, and kidnap.

2. Immunity is not retained under subsection (10) as the injuries did not arise out of the incarceration of any person in a place of legal confinement.

The state has retained immunity where negligence arises out of the incarceration of any person according to Utah Code Ann. section 63-30-10(10) (Supp. 1992). There are a couple of cases which discuss this subsection of the waiver of immunity statute. The two most important cases are Kirk v. State, 784 P.2d 1255 (Utah App. 1989), and Epting v. State, 546 P.2d 242 (Utah 1976). Both cases hold that immunity was retained by the state.

In Kirk, a court bailiff sued for damages when a prison inmate escaped from custody, grabbed a gun, and shot the bailiff while the inmate was being transported to court. The Court found Epting "dispositive on appeal" because the prisoner had either totally escaped control and was acting on his own so the corrections department was not responsible for him, or he was still under control of the authorities which would make the state immune under the statute. Kirk, 784 P.2d at 1257.

In Epting, a prisoner escaped from a work release program. While free, the escaped inmate killed a woman whose children sued the state for negligence. The Court held that either the waiver exception applied or the inmate was no longer under the control of the state. This was a three to two split decision.

At first glance, this case would seem to fit nicely into the case law mentioned above. However, upon a deeper look, it becomes apparent that the pleadings and facts of this case should lead the Court to a different conclusion. The plaintiffs in Epting "contended that the State was negligent in failing to use due care in keeping prisoner Hart incarcerated or under surveillance and that failure proximately caused the death of their mother." Epting, 546 P.2d at 243. The plaintiffs in Kirk sued under similar theory. Kirk, 784 P.2d at 1256.

In the instant case, the plaintiffs sue on the State's negligence in not attempting to locate and apprehend the prisoners that escaped from the Orange Street Community Center. The negligence was not in failing to keep the inmates under the State's control, but negligence arose when the defendants knew where the escaped inmates were and that they intended to harm a specific person. At this point, the defendants were under a duty to protect a specific group of people. The State failed in this duty.

One escaped prisoner called and left his name and telephone number. The defendants did nothing. The inmate called again. The defendants did nothing. The defendant was informed of the escaped inmates specific whereabouts. The defendants did nothing. The defendant was informed of the escaped prisoners intent to kill and kidnap the people in a specific cabin. The defendants still did nothing.

The State of Utah and its Department of Corrections have a general duty to attempt to find and apprehend escaped convicts. This duty became a specific one when the defendants knew the intentions and whereabouts of the escapees. The State's negligence did not arise out

of the incarceration of the prisoners, nor is the claim inapplicable because the state had no control. The claim is proper because the defendants failed to exercise a discretionary function in going after the escaped inmates.

CONCLUSION

The trial court erred in applying the rules of statutory construction. The Utah constitution and the specific statutory language of the Utah Governmental Immunity Act allows for civil suit against the government where the state is negligent in allowing a death to occur. Therefore, the plaintiffs request the Court to reverse the trial court's rulings and remand this case for trial by jury.

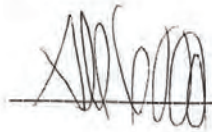
SIGNED and DATED this 21 day of March, 1995.


ALLEN K. YOUNG
Attorney for appellants

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing postage pre-paid on the 21 day of March, 1995 to:

Debra Moore
Assistant Attorney General
Jan Graham
Attorney General
Attorneys for Defendants
330 South 300 East
Salt Lake City, Utah 84111



**THIRD JUDICIAL DISTRICT
SUMMIT COUNTY
STATE OF UTAH**

FILE NO. 92-11400

TITLE: (✓ Parties Present)		COUNSEL: (✓ Counsel Present)	
ROLF TIEDE, Individually, & as the		EDWARD P. MORIARITY	
guardian of PATRICIA TIEDE, ET AL :		SPENCE, MORIARITY & SCHUSTER	
VS		15 S JACKSON	
		JACKSON, WY 83001	
THE STATE OF UTAH, ET AL		SCOTT A. CALL	
		ASST ATTY GEN	
		236 STATE CAPITOL, SLC 84114	
=====			
JOYE D. OVARD			
CLERK		HON. FRANK G. NOEL	
REPORTER		JUDGE	
BAILIFF		DATE: SEPTEMBER 15, 1992	
=====			

The Court now has before it the defendant THE STATE OF UTAH and UTAH STATE DEPARTMENT OF CORRECTIONS' MOTION TO DISMISS. The court has reviewed the memos filed in connection therewith, has heard oral argument and after having taken the matter under advisement now rules as follows:

The plaintiffs in this action are relatives of the deceased Beth Potts and Kaye Tiede. They bring this action for, among other things, damages occurring as a result of the wrongful death of Beth Potts and Kaye Tiede at the hands of the defendants Von Taylor and Edward Deli at a time when Mr. Taylor and Mr. Deli had walked away from a halfway house while in the custody of the State of Utah and the Utah State Department of Corrections. The facts of this case have been adequately set forth in the memos filed in connection with this motion and the Court will not attempt a lengthy repeat of those facts.

The moving defendants in this case argue that they are immune from suit under the facts of this case and pursuant to Utah Code Annotated 63-30-3. The plaintiffs argue that the State has waived immunity for certain negligent acts of state employees and the State has countered by arguing that the State's waiver of immunity does not

THIRD JUDICIAL DISTRICT
SUMMIT COUNTY
STATE OF UTAH

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TITLE: (✓ Parties Present) ; COUNSEL: (✓ Counsel Present)

CLERK

HON.

REPORTER

JUDGE

DATE: 9-15-92

BAILIFF

apply "if the injury arises out of:...(2) assault, battery, false imprisonment..." Utah Code Annotated 63-30-10. The defendants argue, therefore, that immunity is restored and the State cannot be sued by virtue of legislative decree if the injury complained of arises out of the intentional acts just mentioned.

The defendants also argue that the State is immune from liability because the governmental act referred to above also insulates the State from any injuries arising out of "incarceration of any person in any State Prison, County or City jail or other place of legal confinement". Utah Code Annotated 63-30-10(10). The Court does not feel that it is necessary to address this second argument made by the defendant in as much as the first argument is dispositive of the matter.

Plaintiff argues that the governmental immunity act referred to above which restores immunity for assault is not applicable in as much as Beth Potts and Kaye Tiede died at the hands of the individual defendants Taylor and Deli. Plaintiffs argue that since Mrs. Potts and Mrs. Tiede were "murdered", they were not "assaulted" within the meaning of the Statute. Plaintiffs point out that had the legislature intended to immunize the State for acts constituting murder they would have so stated and would not

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THIRD JUDICIAL DISTRICT
SUMMIT COUNTY
STATE OF UTAH

FILE NO. 92-11400

TITLE: (✓ Parties Present) ; COUNSEL: (✓ Counsel Present)

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HON.

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DATE: 9-15-92

BAILIFF

have limited the immunity to "assault". Further Plaintiffs agree that if Mrs. Potts and Mrs. Tiede had somehow survived the actions of Taylor and Deli that they would not have had a cause of action because then Taylor and Deli's actions would have amounted only to an "assault" and would not have amounted to murder. Indeed Plaintiffs concede that Rolf, Linne and Patricia Tiede who were assaulted by Taylor and Deli but survived, do not have a cause of action against the state for the assault and agree that that portion of their claim may be dismissed.

The Defendants urge the Court, however, to rule that since Mrs. Potts and Mrs. Tiede did not survive the actions of Taylor and Deli amounted to murder and were not a mere "assault" and therefore the state does not have immunity. The Court is of the opinion that the comparison made by Plaintiffs between murder and assault is a distinction without a legal difference. Murder is a criminal term whereas assault is a term that is used in civil law. The murder of Mrs. Potts and Mrs. Tiede was clearly the result of or arose out of an assault by Taylor and Deli. The Court does not feel that the legislature intended to immunize the state in one case where the victim of an assault survives but to impose liability where under identical circumstances and

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THIRD JUDICIAL DISTRICT
SUMMIT COUNTY
STATE OF UTAH

FILE NO. 92-11400

TITLE: (✓ Parties Present) COUNSEL: (✓ Counsel Present)

CLERK

HON.

REPORTER

DATE: 9-15-92

JUDGE

BAILIFF

an identical type of assault the victim does not survive.

Two of the plaintiffs, Lanae Tiede and Patricia Tiede have also claimed injuries as a result of their having been kidnapped by Taylor and Deli. The State argues that since their injuries arose out of "false imprisonment" the governmental immunity act has granted immunity to the state and that cause of action should be dismissed as well. Plaintiffs argument in this regard is similar to the argument previously made. That is plaintiffs argue that "false imprisonment" and "kidnapping" are different terms and that the legislature did not intend to immunize the state against actions arising out of a kidnapping. The Court points out that the term kidnapping is a criminal term whereas the term "false imprisonment" is used in civil law. The Court is of the opinion that the actions of Taylor and Deli in kidnapping Lanae and Patricia Tiede fall within the "false imprisonment" provisions of the governmental immunity act and that therefore the state is immune from liability for any injuries arising out of those actions.

It is clear that plaintiffs have suffered much as a result of the actions of Taylor and Deli. The legislature, however, has granted specific immunity to the State

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THIRD JUDICIAL DISTRICT
SUMMIT COUNTY
STATE OF UTAH

FILE NO. 92-11400

TITLE: (✓ Parties Present) COUNSEL: (✓ Counsel Present)

CLERK

HON.

REPORTER

DATE:

JUDGE

BAILIFF

of Utah for such actions, and therefore the Court has no choice but to grant the defendants' MOTION TO DISMISS.

Counsel for defendants THE STATE OF UTAH AND THE UTAH STATE DEPARTMENT OF CORRECTIONS is to prepare an order consistent with this ruling, submit it to opposing counsel for approval as to form and then to the Court for signature.

COPIES MAILED TO COUNSEL AS SHOWN ON PAGE 1. ON SEPT. 30, 1992.

C-1-91

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R. PAUL VAN DAM - #3312
Attorney General
SCOTT A. CALL - 0544
Assistant Attorney General
Attorneys for Defendants
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1016

FILED

OCT 17 1992

Clerk of Summit County

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

ROLF TIEDE, Individually, and as the guardian of PATRICIA TIEDE and SHAWN ROLF TIEDE, LINAE TIEDE, SUE ELLEN REEDER, BARBARA NORIEGA, CLAUDIA GOATES, and KENNETH TIDWELL,	:	ORDER OF DISMISSAL WITH PREJUDICE
Plaintiffs,	:	Civil No. 9211400
vs.	:	Judge Frank G. Noel
THE STATE OF UTAH, THE UTAH STATE DEPARTMENT OF CORRECTIONS, FREMONT COMMUNITY CENTER, ORANGE STREET COMMUNITY CENTER, VON TAYLOR, EDWARD DELI, and JOHN DOSS I-V,	:	
Defendants.	:	

On August 24, 1992, at approximately 4:00 p.m.,
defendants The State of Utah and The Utah State Department of
Corrections' Motion to Dismiss came on for hearing before the
Honorable Frank G. Noel. Defendants The State of Utah and The
Utah State Department of Corrections were represented by
Assistant Attorney General Scott A. Call; and plaintiffs were
represented by Allen K. Young of Young & Kester. The Court,
having reviewed the memoranda and pleadings filed by the parties,

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having heard oral argument thereon, and being fully advised in
the premises, hereby makes and enters the following order on the
defendant The State of Utah and The Utah State Department of
Corrections' Motion to Dismiss;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that
defendant The State of Utah and The Utah State Department of
Corrections are immune from the claims alleged in the plaintiffs'
Complaint under Utah Code Ann. § 63-30-10(2) because the
plaintiffs' injuries all arise out of assault, battery and false
imprisonment. Therefore, the plaintiffs' Complaint against The
State of Utah and The Utah State Department of Corrections is
hereby dismissed with prejudice.

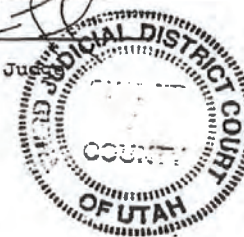
DATED this 16 day of Nov. October, 1992.

BY THE COURT:

FRANK G. NOEL
District Court Judge

Approved as to form:

Allen K. Young
Young & Kester
Attorney for Plaintiff



CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing ORDER OF DISMISSAL WITH PREJUDICE was mailed, postage prepaid, this 10th day of ^{November} ~~October~~, 1992, to the following:

EDWARD P. MORIARITY
J. DOUGLAS McCALLA
SPENCE, MORIARITY & SCHUSTER
15 South Jackson
Jackson, Wyoming 83001

ALLEN K. YOUNG
YOUNG & KESTER
101 East 200 South
Springville, UT 84663

Sally Briggs

GOVERNMENTAL IMMUNITY ACT

63-30-10

History: L. 1965, ch. 139, § 9; 1991, ch. 76,

Amendment Notes. — The 1991 amendment, effective April 29, 1991, added "Unless the injury arises out of one or more of the ex-

ceptions to waiver set forth in Section 63-30-10," and made a minor punctuation change and deleted the former second sentence, which read: "Immunity is not waived for latent defective conditions."

NOTES TO DECISIONS

ANALYSIS

Negligent construction.
Notice to city.
Nuisance action.
Other public improvement.
Private developments.
Cited.

Negligent construction.

When university construction diverted flow of surface water, flooding basement and causing other damage to adjoining landowner, governmental immunity was waived and university was liable to landowner. Sanford v. University of Utah, 26 Utah 2d 285, 488 P.2d 741 (1971).

Notice to city.

Requirement that notice of claim be given to political subdivision within ninety days (now one year) in § 63-30-13 is applicable to this section. Parrish v. Layton City Corp., 542 P.2d 1086 (Utah 1975) (decided under former law).

Nuisance action.

Intent of legislature was to include within the waiver of immunity an action for private

nuisance in so far as the action is predicated on a dangerous or defective condition of a public improvement that unreasonably interferes with the use and enjoyment of the claimant's property. Sanford v. University of Utah, 26 Utah 2d 285, 488 P.2d 741 (1971).

Other public improvement.

Damages to house and basement partially incurred from defective conditions of sewer drain and canal fell under purview of this section. Parrish v. Layton City Corp., 542 P.2d 1086 (Utah 1975).

Private developments.

This section's waiver of immunity for injuries caused by defective conditions applies only with regard to conditions on property in the public use, not on private developments such as an irrigation canal owned by a private company. Loveland v. Orem City Corp., 746 P.2d 763 (Utah 1987).

Cited in Ingram v. Salt Lake City, 733 P.2d 126 (Utah 1987); Rocky Mt. Thrift Stores, Inc. v. Salt Lake City Corp., 784 P.2d 459 (Utah 1989).

COLLATERAL REFERENCES

Journal of Energy Law and Policy. — Comment. The Only Way to Manage a Desert: Utah's Liability Immunity for Flood Control. 8 J. Energy L. & Pol'y 95 (1987).

A.L.R. — State and local government liability for injury or death of bicyclist due to defect or obstruction in public bicycle path, 68 A.L.R.4th 204.

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

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

- (1) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;
- (2) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights;
- (3) the issuance, denial, suspension, or revocation of or by the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization;

- (4) a failure to make an inspection or by making an inadequate or negligent inspection;
- (5) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;
- (6) a misrepresentation by an employee whether or not it is negligent or intentional;
- (7) or results from riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;
- (8) or in connection with the collection of and assessment of taxes;
- (9) the activities of the Utah National Guard;
- (10) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;
- (11) any natural condition on publicly owned or controlled lands, any condition existing in connection with an abandoned mine or mining operation, or any activity authorized by the Board of State Lands and Forestry;
- (12) research or implementation of cloud management or seeding for the clearing of fog;
- (13) the management of flood waters, earthquakes, or natural disasters;
- (14) the construction, repair, or operation of flood or storm systems;
- (15) the operation of an emergency vehicle, while being driven in accordance with the requirements of Section 41-6-14;
- (16) a latent dangerous or latent defective condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them;
- (17) a latent dangerous or latent defective condition of any public building, structure, dam, reservoir, or other public improvement; or
- (18) the activities of:
 - (a) providing emergency medical assistance;
 - (b) fighting fire;
 - (c) regulating, mitigating, or handling hazardous materials or hazardous wastes;
 - (d) emergency evacuations; or
 - (e) intervening during dam emergencies.

History: L. 1965, ch. 139, § 10; 1975, ch. 194, § 11; 1982, ch. 10, § 1; 1985, ch. 169, § 1; 1989, ch. 185, § 1; 1989, ch. 187, § 3; 1989, ch. 268, § 29; 1990, ch. 15, §§ 1, 2; 1990, ch. 319, §§ 1, 2; 1991, ch. 76, § 4.

Amendment Notes. — The 1989 amendment by ch. 185, effective April 24, 1989, added Subsection (1)(m) and designated the first and second sentences of Subsection (2) as Subsections (2)(a) and (b).

The 1989 amendment by ch. 268, effective July 1, 1989, substituted "Board of State Lands and Forestry" for "State Land Board" in Subsection (1)(k), subdivided Subsection (1)(k) and made related punctuation changes, and rewrote Subsection (1)(l)(iii), which had read, "handling hazardous materials."

The 1989 amendment by ch. 187, effective

July 1, 1990, added "arises out of" to the introductory paragraph in Subsection (1) and deleted it from the beginning of each subsection of Subsection (1); substituted "Board of State Lands and Forestry" for "State Land Board" in Subsection (1)(k); substituted "Rule 12(g), Utah Rules of Criminal Procedure" for "Subsection 77-35-12(g)" in Subsection (2); and made minor stylistic changes.

The 1990 amendment by ch. 15, effective July 1, 1990, deleted the subsection designation (1) from the beginning of the section, redesignated former Subsections (1)(a) to (1)(i) as Subsections (1) to (13) and made related changes, and deleted former Subsection (2), waiving immunity from suit for violation of Fourth Amendment rights and making the provisions of Chapter 16 of Title 78 the exclu-

COLLATERAL REFERENCES

Am. Jur. 2d. — 48 Am. Jur. 2d Labor and Labor Relations §§ 21 to 28.

C.J.S. — 51 C.J.S. Labor Relations § 8. Key Numbers. — Labor Relations — 24.

Sec. 5. [Injuries resulting in death — Damages.]

The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law.

History: Const. 1896; L. 1919 (S.S.), S.C.R.

1.

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IN THE THIRD JUDICIAL DISTRICT COURT
SUMMIT COUNTY, STATE OF UTAH

--0000000--

ROLF TIEDE, Individually, and as the
guardian of PATRICIA TIEDE and
SHAWN ROLF TIEDE, LINAE TIEDE
SUE ELLEN REEDER, BARBARA
NORIEGA, CLAUDIA GOATES, and
KENNETH TIDWEL,
Plaintiffs,

MOTION FOR NEW
TRIAL

v.

THE STATE OF UTAH, THE UTAH
STATE DEPARTMENT OF
CORRECTIONS, FREMONT
COMMUNITY CENTER, ORANGE
STREET COMMUNITY CENTER, VON
TAYLOR, EDWARD DELI, and JOHN
DOES I - V.

Case No. 9211400

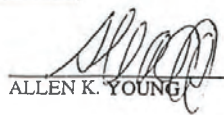
Judge David S. Young

Defendants.

--0000000--

The plaintiffs, by and through counsel, Allen K. Young of Young & Kester, hereby moves the Court to grant a new trial against the State of Utah, the Utah State Department of Corrections, the Fremont Corrections Center and the Orange Street Correction Center for negligence based upon an error of law made by the trial court in granting summary judgment pursuant to Rule 59(a)(7).

DATED this 21 day of Feb, 1994.


ALLEN K. YOUNG

5-22
ORIGINAL

IN THE UTAH SUPREME COURT

ROLF TIEDE, individually, and :
as the guardian of PATRICIA :
TIEDE and SHAWN ROLF TIEDE; :
LINA TIEDE; SUE ELLEN REEDER, :
BARBARA NORIEGA; CLAUDIA GOATES; :
and KENNETH TIDWELL, :

Plaintiffs and Appellants, :

v. :

STATE OF UTAH, UTAH DEPARTMENT :
OF CORRECTIONS, FREMONT COMMUNITY :
CENTER, ORANGE STREET COMMUNITY :
CENTER, VON TAYLOR, EDWARD DELI, :
and JOHN DOES I-V, :

Defendants and Appellees. :

Case No. 940425

Priority 15

BRIEF OF APPELLEES

Appeal from a Final Order of the
Third Judicial District Court, Salt
Lake County, State of Utah, the
Honorable David S. Young presiding

FILED

MAY 22 1995

ORAL ARGUMENT AND PUBLISHED DECISION REQUESTED

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Case No.

5-22

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CONTENT REQUIREMENTS - IN ORDER STATED

List of all parties.
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Statement of Issues & Standard of Review.
A. Citation to record showing issue preserved in trial court; OR
B. Statement of grounds for seeking review of issue not preserved in trial court (Mandatory for Appellant)
Constitutional or statutory provisions.
Statement of Case. (Mandatory for Appellant)
Statement of Facts.
Summary of Argument.
Argument.
Conclusion.
Signature of counsel of record or party if pro se.
Proof of Service.
Addendum. (Mandatory for Appellant)

IN THE UTAH SUPREME COURT

ROLF TIEDE, individually, and :
as the guardian of PATRICIA :
TIEDE and SHAWN ROLF TIEDE; :
LINA TIEDE; SUE ELLEN REEDER, :
BARBARA NORIEGA; CLAUDIA GOATES; :
and KENNETH TIDWELL, :

Plaintiffs and Appellants, :

Case No. 940425

v. :

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Defendants and Appellees. :

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Appeal from a Final Order of the
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ORAL ARGUMENT AND PUBLISHED DECISION REQUESTED

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IN THE UTAH SUPREME COURT

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TIEDE and SHAWN ROLF TIEDE; :
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CENTER, VON TAYLOR, EDWARD DELI, :
and JOHN DOES I-V, :

Priority 15

Defendants and Appellees. :

BRIEF OF APPELLEES

STATEMENT OF JURISDICTION

Jurisdiction over this appeal is conferred on this Court by
section 78-2-2(3)(j) of the Utah Code. See Utah Code Ann. § 78-2-
2(3)(j) (Supp. 1994).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

ISSUE NO. 1: Did the trial court correctly deny the Tiedes' motion for a new trial on the ground that the State was statutorily immune from liability for the Tiedes' injuries because those injuries arose from assault, battery and false imprisonment?

STANDARD OF REVIEW: This issue of statutory interpretation presents a question of law, which this Court should review for correctness. See Malcolm v. State, 878 P.2d 1144, 1146 (Utah 1994) (reviewing state's immunity under assault-and-battery exception to the general waiver of governmental immunity for negligence claims); Ledfors v. Emery County Sch. Dist., 849 P.2d 1162, 1162-63 (Utah 1993) (same). In addition, where the trial court's denial of a motion for a new trial rests upon a question of law, this Court should review the trial court's decision under a correctness standard. See also Crookston v. Fire Ins. Exch., 860 P.2d 937, 938 (Utah 1993) (affirming denial of motion for new trial based on challenge to jury instructions on punitive damages).

ISSUE NO. 2: Did the trial court correctly deny the Tiedes' motion for a new trial on the ground that, in retaining the State immunity from the Tiedes' wrongful death claim, section 63-30-10 of the Utah Code is consistent with the wrongful death action provision of the Utah Constitution?

STANDARD OF REVIEW: Whether a statute infringes upon a constitutional right is a question of law, reviewable for correctness. See West Valley City v. Streeter, 849 P.2d 613, 614 (Utah Ct. App. 1993) (upholding animal protection ordinance against

challenge under state and federal constitutions); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 887 (Utah 1988) (upholding utility tax ordinance against challenge under state and federal equal protection clauses). Again, where the denial of a motion for a new trial rests upon a question of law, the trial court's decision is reviewable for correctness. Crookston, 860 P.2d at 938.¹

DETERMINATIVE OR IMPORTANT PROVISIONS

The following provisions are set forth in Addendum A to this brief:

Utah Code Ann. § 63-30-10(2) (Supp. 1990).

Utah Const. art. XVI, § 5.

¹In their brief, the Tiedes address two additional issues: (1) whether the State owed a duty to protect them from harm by Taylor and Deli, and (2) whether the State is immune from liability under section 63-30-10(10) of the Utah Code (the incarceration exception to the general waiver of immunity for negligence claims). Although these issues are potential alternative grounds for affirmance, the State does not address them on appeal. Neither of these issues was considered by the trial court. Moreover, the question of the State's immunity under the assault-and-battery exception (Issue No. 1 in this Brief) is dispositive. Where an immunity issue is dispositive, this Court has ruled on that basis without addressing the public duty issue. See, e.g., Malcolm v. State, 878 P.2d 1144, 1146 (Utah 1994) (holding State immune from liability, while assuming for purposes of opinion that State owed duty to protect rape victim from parolee); Ledfors v. Emery County Sch. Dist., 849 P.2d 1162, 1163-64 (Utah 1993) (holding school district immune from liability without addressing issue of whether district owed duty to beating victim); Peterson v. Board of Educ., 855 P.2d 241, 243 (Utah 1993) (per curiam) (same).

STATEMENT OF THE CASE

Nature of the Case

The State of Utah, the Utah Department of Corrections, the Fremont Community Center, and the Orange Street Community Center ("the State"), appellees, respond to this appeal by Rolf Tiede, individually and as guardian of Patricia Tiede and Shawn Rolf Tiede; Linae Tiede; Sue Ellen Reeder; Barbara Noriega; Claudia Goates; and Kenneth Tidwell ("the Tiedes"); appellants. The Tiedes appeal from the dismissal of their wrongful death and personal injury claims against the State, which arose from an incident in December 1990 in which several of the Tiedes and their decedents, Kaye Tiede and Beth Potts, were the victims of a murder, kidnapping and assault by defendants Von Taylor and Edward Deli. Neither Taylor nor Deli is a party to this appeal.

The Tiedes alleged that the State was negligent in failing to apprehend Taylor and Deli after they escaped from a halfway house while on parole from the Utah State Prison. The district court dismissed the Tiedes' claims against the State on the ground that the State was immune from the Tiedes' claims under the provision of the Utah Governmental Immunity Act which retains immunity from liability for injuries arising out of an assault, battery or false imprisonment. The Tiedes appeal from the district court's order denying their motion for a new trial which sought reconsideration of the dismissal.

Course of the Proceedings and Disposition Below

The Tiedes filed their initial complaint on March 23, 1992.

Several months later, on June 15, 1992, the Tiedes filed an amended complaint. R. 70-81. One week later, on June 22, 1992, the State filed a motion to dismiss on the ground that the Utah Governmental Immunity Act granted the State immunity from the Tiedes' claims. R. 87-88. On November 17, 1992, the district court, the Honorable Frank G. Noel presiding, granted the State's motion, dismissing the Tiedes' claims against the State on the ground that the State was statutorily immune from liability from claims arising out of an assault, battery or false imprisonment. R. 137-18. On December 7, 1992, without seeking certification of the order of dismissal as a final order, the Tiedes filed a notice of appeal. On May 10, 1993, by stipulation of the parties, that appeal was dismissed and the case remitted to the district court. R. 177.

Ten months later, on March 14, 1994, the district court, the Honorable David S. Young presiding, entered a default judgment against Taylor and Deli for \$10.5 million in general damages and \$4 million in punitive damages. R. 206-08. On March 22, 1994, the Tiedes filed a motion for a new trial against the State on the ground that the November 1992 order of dismissal was legally erroneous. R. 214-15. On August 9, 1994, Judge Young entered an order denying the Tiedes' motion. R. 282-84. On September 2, 1994, the Tiedes filed a notice of appeal from that order. R. 291.

Statement of Facts

On December 22, 1990, Taylor and Deli, parolees from the Utah State Prison, shot and killed plaintiffs' decedents Beth Potts and Kaye Tiede at the Tiedes' cabin in Summit County. R. 73. Taylor

and Deli also shot Rolf Tiede, who survived, and kidnapped Patricia and Linae Tiede. R. 73. The Tiedes allege that the State negligently failed to apprehend Taylor and Deli, or to protect or warn the Tiedes, and therefore proximately caused the Tiedes' injuries. R. 74.

SUMMARY OF THE ARGUMENT

The trial court properly denied the Tiedes' motion for a new trial on the ground that the Tiedes' injuries arose out of assault, battery and false imprisonment and that immunity for such injuries was expressly retained by the Utah Governmental Immunity Act. The fact that Taylor and Deli also committed criminal acts of murder and kidnapping in assaulting the Tiedes, and that the Tiedes seek recovery in wrongful death, is immaterial. This Court has consistently applied the Act according to its express terms, regardless of the particular language in which plaintiffs couch their legal theories of recovery. Furthermore, the Act expressly encompasses claims for injuries resulting in death.

This Court should reject the Tiedes' contention that the State's statutory immunity from their claims infringes the wrongful death provision of the Utah Constitution. The wrongful death provision protects only rights of action that existed when the Constitution was adopted. The State's immunity from the Tiedes' claims does not abrogate any previously existing right of action because the State was immune from such claims when the Utah Constitution was adopted. Accordingly, this Court should affirm

the district court's judgment in its entirety.

ARGUMENT

POINT I

UNDER THE UTAH GOVERNMENTAL IMMUNITY ACT, THE STATE IS IMMUNE FROM LIABILITY FOR THE TIEDES' INJURIES BECAUSE THOSE INJURIES AROSE OUT OF ASSAULT, BATTERY, AND FALSE IMPRISONMENT

The trial court correctly denied the Tiedes' motion for a new trial because the Tiedes' injuries arose out of intentional torts for which immunity is expressly retained under the Utah Governmental Immunity Act ("the Act"). Section 63-30-10(2) of the Act provides: "Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of . . . assault, battery, [or] false imprisonment . . ." Utah Code Ann. § 63-30-10(2) (Supp. 1990) (emphasis added). In determining whether an injury falls within this and other exceptions to the general waiver of immunity for negligence claims by section 63-30-10, this Court has "focus[ed] on the conduct or situation out of which the injury arose, not on the theory of liability crafted by the plaintiff or the type of negligence alleged." Ledfors v. Emery County Sch. Dist., 849 P.2d 1162, 1166 (Utah 1993) (rejecting argument that immunity had been waived because injuries arose out of school district's alleged failure to protect and supervise beating victim rather than out of a battery). See also Malcolm v. State, 878 P.2d 1144, 1146-47

(Utah 1994) (rejecting argument that immunity had been waived because injuries arose out of negligent supervision of parolee who sexually assaulted and raped the plaintiff, rather than out of a battery).

The Tiedes' injuries arose out of conduct expressly encompassed within section 63-30-10(2). In shooting Beth Potts, Kaye Tiede and Rolf Tiede, Taylor and Deli committed the torts of assault and battery. Similarly, in abducting Linae and Patricia Tiede, Taylor and Deli committed the torts of assault and false imprisonment. An assault is: an act "(a) intending to cause a harmful or offensive contact with the person of the other . . . or an imminent apprehension of such a contact," by which "(b) the other is . . . put in such imminent apprehension." Restatement (Second) of Torts § 21 (1965). A battery is: an act "(a) intending to cause a harmful or offensive contact with the person of the other, . . . or an imminent apprehension of such a contact," from which "(b) a harmful contact with the person of the other directly or indirectly results." Id. at § 13. False imprisonment is: an act "intending to confine the other . . . within fixed boundaries," which "results in such a confinement," while "the other is conscious of the confinement or is harmed by it." Id. at § 35. The Tiedes do not dispute these definitions; nor do they dispute that the conduct of Taylor and Deli satisfies these definitions.

That the conduct of Taylor and Deli in assaulting, battering and imprisoning their victims also constituted the crimes of murder

and kidnapping, as the Tiedes point out, is irrelevant to the application of section 63-30-10(2). If the injuries arose out of conduct constituting any of the torts enumerated in section 63-30-10(2), immunity is plainly retained no matter what other legal theories may also apply to that conduct. The argument that immunity does not apply because Taylor and Deli committed murder and kidnapping is nothing more than an "attempt to evade [the statutory categories of section 63-30-10] by recharacterizing the supposed cause of the injury." Ledfors, 849 P.2d at 1166. This Court has rejected similar attempts many times. See, e.g., Malcolm, 878 P.2d at 1146-47 (holding state immune under assault-and-battery exception for injuries caused by rape and aggravated sexual assault); S.H. v. State, 865 P.2d 1363, 1365 (Utah 1993) (holding state immune under assault-and-battery exception for injuries caused by sexual molestation). See also C.T. v. Martinez, 845 P.2d 246, 250 (Utah 1992) (Zimmerman, J. concurring) (stating state immune under licensing exception for injuries caused by sexual abuse and assault).

The Tiedes' contention that the trial court incorrectly read the words "murder" and "kidnapping" into section 63-30-10(2) ignores the plain meaning of the existing statutory language. The statute expressly includes the torts of assault, battery and false imprisonment and the Tiedes' injuries were plainly caused by the commission of those torts. Therefore, no additional language is necessary to apply the statute to the Tiedes' claims. Contrary to the Tiedes' contention, the trial court did not expand the meaning

of section 63-30-10(2) to cover the Tiedes' claim; it merely applied the plain language of the statute as written.

Furthermore, the Tiedes' proposed distinction based on whether the tortious conduct is or is not also a criminal offense is inconsistent with the statute's context and purpose. R. 133-34. The Utah Governmental Immunity Act applies to civil suits and the language of the Act is therefore couched in civil terms. See Utah Code Ann. § 63-30-3(1) (1989) ("Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function"); Utah Code Ann. § 63-30-2(1) ("As used in this chapter: (1) 'Claim' means any claim or cause of action for money or damages against a governmental entity or employee."). Murder and kidnapping, on the other hand, are both criminal offenses punishable by the State. Neither provides an independent basis for civil recovery in damages. See Utah Code Ann. § 76-5-203 (1990) (murder); Utah Code Ann. § 76-5-301 (1990) (kidnapping). The common law civil counterparts of the crimes of murder and kidnapping are assault, battery and false imprisonment. The conduct for which the Legislature sought to retain immunity in section 63-30-10(2) is fully described in terms of civil tort law; no need exists to use terms from the criminal law context.

Nor does any need exist to use the term "wrongful death," as the Tiedes suggest, because whether or not death results, the conduct itself is already fully and adequately described by the common law tort terms of assault and battery. Wrongful death is a

statutory rather than a common law claim. See Utah Code Ann. § 78-11-7 (1992). At common law, an action for assault or battery expired on the victim's death. See W. Page Keeton, Prosser and Keeton on the Law of Torts § 127 (5th ed. 1984). Whether or not the victim dies, however, the underlying conduct still constitutes a "battery." As Judge Noel reasoned, where the Legislature made no distinction in section 63-30-10(2) based on whether or not the conduct resulted in death, the court should not read such a distinction into the statute. R. 133-34.

More importantly, the Legislature has expressly indicated its intent to include death claims within the categories of exceptions in section 63-30-10. That section states: "Immunity from suit of all governmental entities is waived . . . except if the injury arises out of [any of the stated categories]." Utah Code Ann. § 63-30-10(2) (Supp. 1990) (emphasis added). At the same time, section 63-30-2(5) states: "'Injury' means death" Utah Code Ann. § 63-30-2(5) (1989) (emphasis added). Consistent with this plain language, this Court has applied section 63-30-10 to wrongful death actions many times. See, e.g., Keegan v. State, 259 Utah Adv. Rep. 13, 18 (Utah March 7, 1993) (affirming summary judgment for state in wrongful death action based on discretionary function exception); Duncan v. Union Pacific R.R., 842 P.2d 832, 834-36 (Utah 1992) (same); Madsen v. State, 583 P.2d 92, 93 (Utah 1978) (applying incarceration exception); Emery v. State, 26 Utah 2d 1, 2-4, 483 P.2d 1296, 97-98 (1971) (applying incarceration exception). Thus, assaults or batteries that cause death are

expressly included within section 63-30-10(2) and the Tiedes' argument that wrongful death claims are excluded is contrary to the plain language of the statute.

In sum, the trial court correctly applied section 63-30-10(2) to the Tiedes' claims according to its express language. The terms "murder," "kidnapping," and "wrongful death" are simply alternative legal theories for describing conduct already encompassed within the express wording of the statute. Accordingly, the trial court properly dismissed the Tiedes' claims.

POINT II

THE STATE'S STATUTORY IMMUNITY FROM THE TIEDES' WRONGFUL DEATH CLAIMS IS CONSISTENT WITH THE WRONGFUL DEATH PROVISION OF THE UTAH CONSTITUTION BECAUSE SUCH IMMUNITY EXISTED AT COMMON LAW

The State's immunity under the Utah Governmental Immunity Act from the Tiedes' claims does not violate the constitutional prohibition against abrogation of death claims because the state was already immune from such claims at common law. The wrongful death provision of the Utah Constitution states as follows:

The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law.

Utah Const. art. XVI, § 5 (emphasis added). As this Court explained in Garfield Smelting Co. v. Industrial Commission, 53 Utah 133, 178 P. 57 (1918), the scope of protection afforded by the wrongful death provision is limited to rights of action that

existed at the time the provision was adopted:

In view, therefore, that the Constitution clearly prohibits the Legislature from abrogating the "right of action," it becomes necessary to inquire what that right of action was and who enjoyed it at the time the Constitution was adopted by the people of this state. As we have seen, the Constitution says "the right of action" shall not be abrogated; hence the right referred to must be deemed to be the right as it then existed and not merely an abstract right.

178 P. at 59 (emphasis added) (striking down limitation of damages for death claims under workers compensation statute).

No right of action in wrongful death existed against the state at the time the Constitution was adopted because the state was then absolutely immune from all damages claims. Sovereign immunity was a settled feature of the common law when Utah became a state and adopted the Constitution. See, e.g., Bingham v. Board of Educ., 223 P.2d 432, 435 (Utah 1950) ("without legislative enactment we are unable to impose any liability or obligation upon [departments of the state]"); State v. Dist. Court, 78 P.2d 502, 504 (Utah 1937) ("the state cannot be sued unless it has given its consent or has waived immunity"); Campbell Bldg. Co. v. State Road Comm'n, 70 P.2d 857, 861 (Utah 1937) ("action may not be maintained [against the State Road Commission] unless the State has, through legislative or constitutional action, given consent to be sued"); Wilkinson v. State, 134 P. 626, 630 (Utah 1913) ("in the absence of either express constitutional or statutory authority an action against a sovereign state cannot be maintained"). Therefore, by retaining immunity from claims such as the Tiedes', the Utah Governmental Immunity Act does not abrogate any previously existing claim.

Moreover, the Tiedes' negligence claims in this case implicate the State's performance of a governmental, as opposed to proprietary, function. Therefore, even if the State's immunity at common law was limited to governmental functions, the State would have been immune from the Tiedes' claims. See Condemarin v. University Hosp., 775 P.2d 348, 349 (Utah 1989) (reasoning that in treating patient, state-funded hospital was performing proprietary function for which it would not have been immune at common law).² In Standiford v. Salt Lake City, 605 P.2d 1230, 1236-37 (Utah 1980), this Court defined governmental function as an activity "of such a unique nature that it can only be performed by a governmental agency or that is essential to the core of governmental activity."³ Without question, law enforcement is an activity "essential to the core of governmental activity." See Condemarin v. University Hosp., 775 P.2d 348, 353 (Utah 1989)

²Contrary to the suggestion in Condemarin, the proprietary-governmental function distinction applied only to municipalities at common law. See authorities cited in Brief of Appellant Roger Sharp, Brief of Appellant Tim Healy and Brief of Intervener State of Utah, filed in Hipwell v. Sharp, Supreme Court No. 920218.

³In Standiford, the Court interpreted the term "governmental function" as it appeared in section 63-30-3 of the pre-1987 version of the Utah Governmental Immunity Act. The version of the Act in effect at the time the Tiedes' claims arose, however, expressly defined the term "governmental function" as "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, 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) (1989). Clearly, the State's alleged negligence in failing to prevent the Tiedes' injuries involved a governmental function under this definition.

(noting that law enforcement is a "'core' or 'essential' function of government" under Standiford definition). The State's alleged negligence in failing to prevent the murders, assaults and kidnappings of the Tiedes and their decedents obviously implicates the function of law enforcement. Therefore, even if the State's immunity at common law were limited to the performance of a governmental function, the State would have been immune from liability for the Tiedes' injuries.

Accordingly, the State's statutory immunity from the Tiedes' claims does not abrogate any previously existing right of action. Therefore, such immunity does not infringe upon the wrongful death provision of the Utah Constitution and the trial court properly denied the Tiedes' motion for a new trial against the State.

CONCLUSION

The Tiedes' injuries arose out of assault, battery and false imprisonment and the State is immune from liability for such injuries under section 63-30-10(2) of the Utah Governmental Immunity Act. Such immunity does not infringe upon any right protected by the wrongful death provision of the Utah Constitution. Accordingly, this Court should affirm the district court's order denying the Tiedes' motion for a new trial against the State.

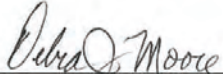
REQUEST FOR ORAL ARGUMENT AND PUBLISHED OPINION

The State requests this Court to hear oral argument and issue a published opinion in this case. This case presents an issue of

first impression under the wrongful death provision of the Utah Constitution. In addition, both of the issues presented are of interest to other governmental entities and to other potential litigants against governmental entities.

RESPECTFULLY SUBMITTED this 22 day of May, 1995.

JAN GRAHAM
Attorney General



DEBRA J. MOORE
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing **BRIEF OF APPELLEES** was mailed this 22 day of May, 1995, postage prepaid, to:

Allen K. Young
YOUNG & KESTER
101 East 200 South
Springville, UT 84663



ADDENDA

A

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

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

- (1) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;
- (2) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or civil rights;
- (3) the issuance, denial, suspension, or revocation of or by the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization;
- (4) a failure to make an inspection or by making an inadequate or negligent inspection of any property;
- (5) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;
- (6) a misrepresentation by the employee whether or not it is negligent or intentional;
- (7) or results from riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;
- (8) or in connection with the collection of and assessment of taxes;
- (9) the activities of the Utah National Guard;
- (10) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;
- (11) any natural condition on state lands or as the result of any activity authorized by the Board of State Lands and Forestry;
- (12) research or implementation of cloud management or seeding for the clearing of fog; or
- (13) the activities of:
 - (a) providing emergency medical assistance;
 - (b) fighting fire;
 - (c) regulating, mitigating, or handling hazardous materials or hazardous wastes;
 - (d) emergency evacuations; or
 - (e) intervening during dam emergencies.

History: L. 1965, ch. 139, § 10; 1975, ch. 194, § 11; 1982, ch. 10, § 1; 1985, ch. 169, § 1; 1989, ch. 185, § 1; 1989, ch. 187, § 3; 1989, ch. 268, § 29; 1990, ch. 15, §§ 1, 2; 1990, ch. 319, §§ 1, 2.

Amendment Notes. — The 1990 amendment by ch. 15, effective July 1, 1990, deleted the subsection designation (1) from the beginning of the section, redesignated former Subsections (1)(a) to (1)(k) as Subsections (1) to (13) and made related changes, and deleted former

Subsection (2), waiving immunity from suit for violation of Fourth Amendment rights and making the provisions of Chapter 16 of Title 78 the exclusive remedy for injuries caused by such violations.

The 1990 amendment by ch. 319, effective July 1, 1990, added Subsection (13)(e) and made a related stylistic change.

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

Sec. 5. [Injuries resulting in death — Damages.]

The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law.

History: Const. 1896; L. 1919 (S.S.), S.C.R.
1.

B

BARBARA E. OCHOA - 4102
Assistant Attorney General
JAN GRAHAM - 1231
Attorney General
Attorneys for State Defendants
330 South 300 East
Salt Lake City, Utah 84111
Telephone: (801) 575-1600

No.

FILED

AUG 9 1994

Clerk of Summit County

By
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

ROLF TIEDE, Individually, and
as the guardian of PATRICIA
TIEDE and SHAWN ROLF TIEDE,
LINA TIEDE, SUE ELLEN REEDER,
BARBARA NORIEGA, CLAUDIA
GOATES, and KENNETH TIDWELL,

Plaintiffs,

vs.

THE STATE OF UTAH, THE UTAH
STATE DEPARTMENT OF
CORRECTIONS, FREMONT COMMUNITY
CENTER, ORANGE STREET
COMMUNITY CENTER, VON TAYLOR,
EDWARD DELI, and JOHN DOES
I-V,

Defendants.

ORDER

Civil No. 920311400 PI

Judge David S. Young

This matter came before the Court June 17, 1994 on Plaintiffs' Motion for New Trial. Plaintiffs were represented by counsel, Allen K. Young and Troy K. Fitzgerald, and the State defendants were represented by Barbara E. Ochoa, Assistant Attorney General.

The Court, having reviewed the memoranda submitted on behalf of the parties and having heard oral argument, now rules as

BOOK R PAGE 458

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follows:

Plaintiffs did not dispute that the operation of correctional facilities is a governmental function, nor that the State defendants are immune from actions where the injury arises out of assault, battery, or false imprisonment. Instead, plaintiffs argue that murder and kidnapping are not covered by the exceptions to the waiver of immunity for the negligent acts or omissions of governmental employees found in U.C.A. § 63-30-10(2). Plaintiffs also argued that to apply this section to a wrongful death action would be unconstitutional.

In analyzing immunity under § 63-30-10, the proper inquiry is on the conduct or situation out of which the injury arose, not on the theory of liability crafted by the plaintiff or the type of negligence alleged. Likewise, the issue of immunity does not turn on the resulting injury to the victim, but on the conduct or situation out of which the injury arose.

In the present case, the deaths of Beth Potts and Kaye Tiede were caused by gunshot wounds inflicted by defendants Taylor and/or Deli. Plaintiff Rolf Tiede was also shot and gravely injured. All of these injuries arose out of an assault and battery and the State defendants therefore retain immunity under the provisions of U.C.A. § 63-30-10(2). Plaintiffs Linae Tiede and Patricia Tiede were taken by force from the family's cabin by Taylor and/or Deli. Their injuries arose out of false imprisonment and the State defendants retain immunity under U.C.A. § 63-30-10(2) for their claims as well.

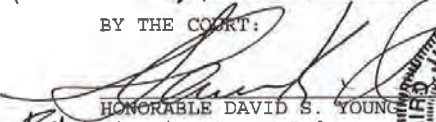
Finally, plaintiffs contend that precluding their wrongful death claim under the Governmental Immunity Act violates Art. XVI, § 5 of the Constitution of the State of Utah. Sovereign immunity was a well-settled principle at common law and the Utah Constitution did not create a remedy against the State where none previously existed. Moreover, the supervision of parolees such as defendants Taylor and Deli is a governmental, as opposed to proprietary, function of the State. Since plaintiffs had no remedy in wrongful death against the State at common law, the Legislature is free to limit the State's liability for damages in wrongful death without implicating Article XVI section 5. Therefore, the Governmental Immunity Act, including its application to the facts of this case, is constitutional.

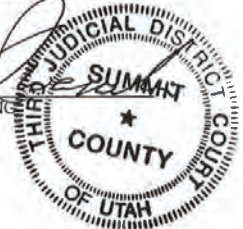
For the reasons stated above, the Court enters the following Order:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:
Plaintiffs' Motion for New Trial is hereby denied.

DATED this 9th day of August, 1994.

BY THE COURT:


Hon. DAVID S. YOUNG
District Court Judge



Approved as to form:


ALLEN K. YOUNG
Attorney for Plaintiff

C

1 IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
2 IN AND FOR SUMMIT COUNTY, STATE OF UTAH

3 * * *

4
5 ROLF TIEDE, ET AL.,)
6 PLAINTIFF,)
7 -VS-)
8 THE STATE OF UTAH,)
9 DEFENDANT.)

Original
92-03-11400
CIVIL NO. ~~C-92-031-1400~~

PLAINTIFF'S MOTION FOR
A NEW TRIAL

No. **FILED**

DEC 27 1994

11 * * *

Clerk of Summit County

12 BE IT REMEMBERED THAT ON FRIDAY, ~~THE 17TH DAY OF~~
13 JUNE, 1994, COMMENCING AT THE HOUR OF 8:30 O'CLOCK A.M.,
14 THE ABOVE-ENTITLED MATTER CAME ON FOR HEARING IN THE
15 COURTROOM OF THE THIRD JUDICIAL DISTRICT, IN AND FOR
16 SUMMIT COUNTY, STATE OF UTAH; SAID CAUSE BEING HELD BY THE
17 HONORABLE DAVID S. YOUNG, JUDGE IN THE THIRD JUDICIAL
18 DISTRICT COURT, STATE OF UTAH.

19 * * *

20
21
22
23
24
25 EILEEN M. AMBROSE, C.S.R.

1

000294

1 A DIFFERENCE. IT'S NOT THE EARNED RESULT OF THE INJURY,
2 IT DOESN'T SAY WHAT YOUR INJURY IS, THE STATUTE PROVIDES
3 WHAT DID YOUR INJURY ARISE OUT OF. AND THAT'S THE KEY
4 LANGUAGE. THAT'S THE LANGUAGE IN LEDFORD AND THE OTHER
5 CASES WE HAVE CITED IN OUR MEMORANDUM.

6 MOST IMPORTANTLY I WANT TO EMPHASIZE THE MALCOLM
7 CASE. THAT WAS ONE THAT WAS JUST RECENTLY DECIDED LAST
8 MONTH WHERE THE PLAINTIFFS ATTEMPTED TO ARGUE THAT RAPE
9 AND AGGRAVATED SEXUAL ASSAULT WERE NOT AMONG THE LIST OF
10 ITEMIZED TORTS UNDER SUBSECTION 10. AND THE COURT FOUND,
11 WITHOUT ANY DIFFICULTY, THAT RAPE AND AGGRAVATED SEXUAL
12 ASSAULT ARE JUST SOME OF THE FORMS OF ASSAULT AND BATTERY.
13 THE LEGISLATURE DID NOT TAKE THE TIME TO LIST EVERY POSSI-
14 BLE FORM OF ASSAULT AND BATTERY OR EVERY POSSIBLE RESULT.

15 JUDGE YOUNG: THANK YOU, MS. OCHOA. THE COURT
16 FINDS THAT THE MOTION FOR A NEW TRIAL SHOULD BE, AND THE
17 SAME IS, HEREBY DENIED. I'LL ASK YOU TO PREPARE AN ORDER
18 CONSISTENT BOTH WITH THE RULING AND WITH YOUR PLEADINGS.

19 LET ME MAKE ONE OTHER COMMENT THAT THE--IT IS AN
20 INTERESTING PROBLEM WHEN YOU DEAL WITH THE ISSUE OF THE
21 LAW OF THE CASE WHEN YOU HAVE THE ROTATING ASSIGNMENTS
22 HERE IN SUMMIT COUNTY. HOWEVER, AND IT MAY BE CONVENIENT
23 FOR JUDGE ORME TO SAY THAT IT WOULD BE WELL FOR ONE TO
24 CORRECT AN ERROR IF THEY SAW IT, BUT I DO THINK THAT THAT
25 HAS GOT TO BE A PRETTY FLAGRANT ERROR BECAUSE, IF NOT, YOU

1 WOULD OTHERWISE HAVE TO FACE HERE THE POTENTIAL OF HAVING
2 NEW MOTIONS FOR SUMMARY JUDGMENT COME UP EVERY SIX MONTHS
3 WHEN YOU HAVE A DIFFERENT JUDGE WHEN ONE BELIEVES THAT THE
4 RULING OF THE PRIOR JUDGE WAS INACCURATE OR IN ERROR FOR
5 SOME REASON. AND SO, IN ESSENCE, EVEN THOUGH THERE IS,
6 THEORETICALLY, NO MOTION TO RECONSIDER UNDER OUR RULES OF
7 PRACTICE, THERE HAS FREQUENTLY BEEN OPPORTUNITY FOR SOME-
8 THING OF THAT ILK CONSTRUED BY A COURT AND REQUESTED BY
9 COUNSEL. I'M NOT MAKING THE DECISION ON THE BASIS OF THE
10 LAW OF THE CASE IN THIS CASE BUT I DO FEEL THAT JUDGE
11 NOEL'S RULING IS ACCURATE, THAT THE WRONGFUL DEATH OF THE
12 OTHER PARTIES WAS ANTICIPATED TO BE INCLUDED IN THE
13 GOVERNMENTAL IMMUNITY ACT, WHICH IS AN INTERESTING NAME,
14 BECAUSE IT IS REALLY A GOVERNMENTAL LIABILITY ACT. BUT,
15 IN ANY EVENT, THAT RULING REMAINS. THE MOTION FOR A NEW
16 TRIAL IS HEREIN DENIED AND IF YOU WILL PREPARE THE ORDER
17 CONSISTENT, MS. OCHOA?

18 MS. OCHOA: I WILL. THANK YOU, YOUR HONOR.

19 MR. YOUNG: THANK YOU, YOUR HONOR. AND I WOULD
20 SAY THANK YOU FOR RULING.

21 JUDGE YOUNG: YES.

22 (WHEREUPON, THE HEARING WAS CONCLUDED).
23
24
25

* * *

D

THIRD JUDICIAL DISTRICT
SUMMIT COUNTY
STATE OF UTAH

FILE NO. 92-11400

TITLE: (✓ Parties Present)	COUNSEL: (✓ Counsel Present)
ROLF TIEDE, Individually, & as the	EDWARD P. MORIARITY
guardian of PATRICIA TIEDE, ET AL :	SPENCE, MORIARIY & SCHUSTER
	15 S JACKSON
	JACKSON, WY 83001
VS	
THE STATE OF UTAH, ET AL	SCOTT A. CALL
	ASST ATTY GEN
	236 STATE CAPITOL, SLC 84114

JOYE D. OVARD

CLERK

HON. FRANK G. NOEL

REPORTER

JUDGE

DATE: SEPTEMBER 15, 1992

BAILIFF

The Court now has before it the defendant THE STATE OF UTAH and UTAH STATE DEPARTMENT OF CORRECTIONS' MOTION TO DISMISS. The court has reviewed the memos filed in connection therewith, has heard oral argument and after having taken the matter under advisement now rules as follows:

The plaintiffs in this action are relatives of the deceased Beth Potts and Kaye Tiede. They bring this action for, among other things, damages occurring as a result of the wrongful death of Beth Potts and Kaye Tiede at the hands of the defendants Von Taylor and Edward Deli at a time when Mr. Taylor and Mr. Deli had walked away from a halfway house while in the custody of the State of Utah and the Utah State Department of Corrections. The facts of this case have been adequately set forth in the memos filed in connection with this motion and the Court will not attempt a lengthy repeat of those facts.

The moving defendants in this case argue that they are immune from suit under the facts of this case and pursuant to Utah Code Annotated 63-30-3. The plaintiffs argue that the State has waived immunity for certain negligent acts of state employees and the State has countered by arguing that the State's waiver of immunity does not

THIRD JUDICIAL DISTRICT
SUMMIT COUNTY
STATE OF UTAH

FILE NO. 92-11400

TITLE: (✓ Parties Present)

COUNSEL: (✓ Counsel Present)

CLERK

REPORTER

BAILIFF

HON.

DATE: 9-15-92

JUDGE

apply "if the injury arises out of:...(2) assault, battery, false imprisonment..."
Utah Code Annotated 63-30-10. The defendants argue, therefore, that immunity is re-
stored and the State cannot be sued by virtue of legislative decree if the injury
complained of arises out of the intentional acts just mentioned.

The defendants also argue that the State is immune from liability because the governmental act referred to above also insulates the State from any injuries arising out of "incarceration of any person in any State Prison, County or City jail or other place of legal confinement". Utah Code Annotated 63-30-10(10). The Court does not feel that it is necessary to address this second argument made by the defendant in as much as the first argument is dispositive of the matter.

Plaintiff argues that the governmental immunity act referred to above which re-
stores immunity for assault is not applicable in as much as Beth Potts and Kaye Tiede
died at the hands of the individual defendants Taylor and Deli. Plaintiffs argue that
since Mrs. Potts and Mrs. Tiede were "murdered", they were not "assaulted" within the
meaning of the Statute. Plaintiffs point out that had the legislature intended to im-
munize the State for acts constituting murder they would have so stated and would not

THIRD JUDICIAL DISTRICT
SUMMIT COUNTY
STATE OF UTAH

FILE NO. 92-11400

TITLE: (✓ Parties Present) COUNSEL: (✓ Counsel Present)

=====

CLERK
HON. _____
REPORTER
DATE: 9-15-92 JUDGE
BAILIFF
=====

have limited the immunity to "assault". Further Plaintiffs agree that if Mrs. Potts and Mrs. Tiede had somehow survived the actions of Taylor and Deli that they would not have had a cause of action because then Taylor and Deli's actions would have amounted only to an "assault" and would not have amounted to murder. Indeed Plaintiffs concede that Rolf, Linae and Patricia Tiede who were assaulted by Taylor and Deli but survived, do not have a cause of action against the state for the assault and agree that that portion of their claim may be dismissed.

The Defendants urge the Court, however, to rule that since Mrs. Potts and Mrs. Tiede did not survive the actions of Taylor and Deli amounted to murder and were not a mere "assault" and therefore the state does not have immunity. The Court is of the opinion that the comparison made by Plaintiffs between murder and assault is a distinction without a legal difference. Murder is a criminal term whereas assault is a term that is used in civil law. The murder of Mrs. Potts and Mrs. Tiede was clearly the result of or arose out of an assault by Taylor and Deli. The Court does not feel that the legislature intended to immunize the state in one case where the victim of an assault survives but to impose liability where under identical circumstances and

THIRD JUDICIAL DISTRICT
SUMMIT COUNTY
STATE OF UTAH

FILE NO. 92-11400

TITLE: (✓ Parties Present)

COUNSEL: (✓ Counsel Present)

CLERK

REPORTER

BAILIFF

HON.

JUDGE

DATE: 9-15-92

an identical type of assault the victim does not survive.

Two of the plaintiffs, Lanae Tiede and Patricia Tiede, have also claimed injuries as a result of their having been kidnapped by Taylor and Deli. The State argues that since their injuries arose out of "false imprisonment" the governmental immunity act has granted immunity to the state and that cause of action should be dismissed as well. Plaintiffs argument in this regard is similar to the argument previously made. That is plaintiffs argue that "false imprisonment" and "kidnapping" are different terms and that the legislature did not intend to immunize the state against actions arising out of a kidnapping. The Court points out that the term kidnapping is a criminal term whereas the term "false imprisonment" is used in civil law. The Court is of the opinion that the actions of Taylor and Deli in kidnapping Lanae and Patricia Tiede fall within the "false imprisonment" provisions of the governmental immunity act and that therefore the state is immune from liability for any injuries arising out of those actions.

It is clear that plaintiffs have suffered much as a result of the actions of Taylor and Deli. The legislature, however, has granted specific immunity to the State

THIRD JUDICIAL DISTRICT
SUMMIT COUNTY
STATE OF UTAH

FILE NO. 92-11400

TITLE: (✓ Parties Present)

COUNSEL: (✓ Counsel Present)

CLERK

HON.

REPORTER

JUDGE

DATE:

BAILIFF

of Utah for such actions, and therefore the Court has no choice but to grant the defendants' MOTION TO DISMISS.

Counsel for defendants THE STATE OF UTAH AND THE UTAH STATE DEPARTMENT OF CORRECTIONS is to prepare an order consistant with this ruling, submit it to opposing counsel for approval as to form and then to the Court for signature.

COPIES MAILED TO COUNSEL AS SHOWN ON PAGE 1.ON SEPT. 30, 1992.

E

R. PAUL VAN DAM - #3312
Attorney General
SCOTT A. CALL - 0544
Assistant Attorney General
Attorneys for Defendants
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1016

NO.
FILED

NOV 9 1992

Clerk of Summit County

BY.....
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

ROLF TIEDE, Individually, and	:	
as the guardian of PATRICIA	:	
TIEDE and SHAWN ROLF TIEDE,	:	ORDER OF DISMISSAL
LINAE TIEDE, SUE ELLEN REEDER,	:	WITH PREJUDICE
BARBARA NORIEGA, CLAUDIA	:	
GOATES, and KENNETH TIDWELL,	:	
	:	
Plaintiffs,	:	Civil No. 9211400
	:	
vs.	:	
	:	Judge Frank G. Noel
THE STATE OF UTAH, THE UTAH	:	
STATE DEPARTMENT OF	:	
CORRECTIONS, FREMONT COMMUNITY	:	
CENTER, ORANGE STREET	:	
COMMUNITY CENTER, VON TAYLOR,	:	
EDWARD DELI, and JOHN DOES	:	
I-V,	:	
Defendants.	:	
	:	

On August 24, 1992, at approximately 4:00 p.m.,
defendants The State of Utah and The Utah State Department of
Corrections' Motion to Dismiss came on for hearing before the
Honorable Frank G. Noel. Defendants The State of Utah and The
Utah State Department of Corrections were represented by
Assistant Attorney General Scott A. Call; and plaintiffs were
represented by Allen K. Young of Young & Kester. The Court,
having reviewed the memoranda and pleadings filed by the parties,

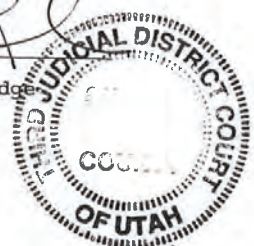
having heard oral argument thereon, and being fully advised in the premises, hereby makes and enters the following order on the defendant The State of Utah and The Utah State Department of Corrections' Motion to Dismiss;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant The State of Utah and The Utah State Department of Corrections are immune from the claims alleged in the plaintiffs' Complaint under Utah Code Ann. § 63-30-10(2) because the plaintiffs' injuries all arise out of assault, battery and false imprisonment. Therefore, the plaintiffs' Complaint against The State of Utah and The Utah State Department of Corrections is hereby dismissed with prejudice.

DATED this 9th day of Nov. ~~October~~, 1992.

BY THE COURT:


FRANK G. NOEL
District Court Judge



Approved as to form:

Allen K. Young
Young & Kester
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing **ORDER OF DISMISSAL WITH PREJUDICE** was mailed, postage prepaid, this one 2nd day of October, 1992, to the following:

EDWARD P. MORIARITY
J. DOUGLAS McCALLA
SPENCE, MORIARITY & SCHUSTER
15 South Jackson
Jackson, Wyoming 83001

ALLEN K. YOUNG
YOUNG & KESTER
101 East 200 South
Springville, UT 84663

Scott L. Lusk

ORIGINAL

IN THE UTAH SUPREME COURT

ROLF TIEDE, Individually, and as the
guardian of PATRICIA TIEDE and
SHAWN ROLF TIEDE, LINA TIEDE,
SUE ELLEN REEDER, BARBARA
NORIEGA, CLAUDIA GOATES, and
KENNETH TIDWELL,

Case No. 940425

Plaintiffs/Appellants,

vs.

THE STATE OF UTAH, THE UTAH
STATE DEPARTMENT OF
CORRECTIONS, FREMONT
COMMUNITY CENTER, ORANGE
STREET COMMUNITY CENTER,
VON TAYLOR, EDWARD DELI, and
JOHN DOES I-V,

Priority 15

Defendants/Appellees.

REPLY BRIEF OF APPELLANTS

Appeal from a Final Order of the Third Judicial District Court, Summit County,
State of Utah, the Honorable David S. Young, presiding

ALLEN K. YOUNG (A3583)
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101 East 200 South
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Telephone: (801) 489-3294
Attorney for Appellants

Debra J. Moore (4095)
Jan Graham (1231)
330 South 300 East
Salt Lake City, Utah 84111
Telephone: (801) 575-1600
Attorneys for Appellees

FILED

JUN 21 1995

CLERK SUPREME COURT
UTAH

Date
Case No.

6/21/95

UTAH SUPREME COURT
CHECKLIST FOR BRIEFS

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CONTENT REQUIREMENTS - IN ORDER STATED

- List of all parties.
- Table of Contents with page references.
- Table of Authorities.
- Jurisdictional Statement. (Mandatory for Appellant)
- Statement of Issues & Standard of Review.
- A. Citation to record showing issue preserved in trial court; OR
- B. Statement of grounds for seeking review of issue not preserved in trial court (Mandatory for Appellant)
- Constitutional or statutory provisions.
- Statement of Case. (Mandatory for Appellant)
- Statement of Facts.
- Summary of Argument.
- Argument.
- Conclusion.
- Signature of counsel of record or party if pro se.
- Proof of Service.
- Addendum. (Mandatory for Appellant)

IN THE UTAH SUPREME COURT

ROLF TIEDE, Individually, and as the
guardian of PATRICIA TIEDE and
SHAWN ROLF TIEDE, LINA TIEDE,
SUE ELLEN REEDER, BARBARA
NORIEGA, CLAUDIA GOATES, and
KENNETH TIDWELL,

Plaintiffs/Appellants,

vs.

THE STATE OF UTAH, THE UTAH
STATE DEPARTMENT OF
CORRECTIONS, FREMONT
COMMUNITY CENTER, ORANGE
STREET COMMUNITY CENTER,
VON TAYLOR, EDWARD DELI, and
JOHN DOES I-V,

Defendants/Appellees,

Case No. 940425

Priority 15

REPLY BRIEF OF APPELLANTS

Appeal from a Final Order of the Third Judicial District Court, Summit County,
State of Utah, the Honorable David S. Young, presiding

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ARGUMENT

A. THE STATE OF UTAH IS NOT IMMUNE FROM WRONGFUL DEATH CLAIMS UNDER THE GOVERNMENTAL IMMUNITY ACT.

Utah Code Ann. section 63-30-10 (Supp. 1992) states "[i]mmunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of [the following exceptions]." Therefore, the defendant has waived immunity for suit unless there is a specific exemption under which the state has retained its sovereign immunity. The State has indicated that the Utah Supreme Court has found the State immune from some wrongful death claims under certain exceptions to Utah Code Ann. § 63-30-10 (Supp. 1992). Importantly, the State cites no case where the Court has determined immunity exists for wrongful death as a result of Utah Code Ann. § 63-30-10(2) (Supp. 1992).

The clear statutory language provides that anyone may bring an action against the State for negligently caused injuries up to and including death. The State argues that "'wrongful death' [is] and alternative legal theor[y] for describing conduct already encompassed within the express wording of the statute. Appellee's Brief, page 12. If assault and battery equate to wrongful death, why is there a separate and distinct cause of action for the tort? Utah Code Ann. § 63-30-10 (Supp. 1992) When a defendant commits a civil assault and battery which injures the plaintiff, the plaintiff can not bring an action for wrongful death. Yet, the State continues to argue that the words are interchangeable.

Governmental immunity “has become riddled with exceptions” which operate illogically. Condemarin v. University Hospital, 775 P.2d 348 (Utah 1989). In Condemarin, the Court details instances where the State is liable injuries occurring in a theater in the park, but is not liable for injuries at a playground in the park. The Governmental Immunity Act works similarly here. It allows recovery for wrongful death, but not for assault and battery. Such is the simple wording of the statute. However, contrary to the illogical result of similar cases, the distinction here is based upon the Constitution of Utah.

Appellants believe that the rules of statutory construction and the trial court’s interpretation of legislative intent result in adequate cause for reversal of the trial court’s opinions and rulings. Appellants further believe that these topics have been adequately discussed in their initial brief. Simply put, the trial court’s decision should be reversed for failure to properly follow the rules of statutory construction. If properly followed, the State is liable for wrongful death.

B. THE CONSTITUTION OF UTAH PROHIBITS THE ABROGATION OF A RIGHT OF ACTION TO RECOVER DAMAGES FOR INJURIES RESULTING IN DEATH.

The State of Utah is liable under the Constitution and the Governmental Immunity Act. The State claims that there is no liability because of the common law and historic sovereign immunity. However, the State neglects key information in the holding of the Court in Garfield Smelting Co. v. Industrial Commn. of Utah, 178 P.2d 57 (Utah 1918)

which indicates the State’s liability for wrongful death.

In Garfield Smelting, the Utah Supreme Court discussed Article XVI, section 5 of the Constitution of Utah. Therein, the Court found that a cause of action for wrongful death existed by statute prior to the Constitution. 2 Comp. Laws of Utah 1888, §§ 3178 and 3179 provided an express cause of action for wrongful death. Furthermore, it is clear that the Territory of Utah and its employees were not completely immune from suit. At common law, government officers could be held liable for the negligent performance of ministerial functions. Restatement (Second) of Torts 895D (1965); W. Page Keeton et al. § 132 at 1059. Utah’s common law was similar. In Madsen v. Borthick, 658 P.2d 627, 632 (Utah 1983), the Utah Supreme Court stated at common law “‘a governmental agent performing a discretionary function [was] immune from suit for injury arising therefrom, whereas an employee acting in a ministerial capacity, even though his acts may [have] involve[d] some decision making, [were] not so protected.’” id., quoting Frank v. State, 613 P.2d 517, 520 (Utah 1980). Therefore, a claim for wrongful death was an existing right and the State could be sued, under certain circumstances for the tort.

More important is the language in Garfield Smelting. Therein, the Utah Supreme Court held that “the Legislature ordinarily may nevertheless enlarge existing rights; that is, such rights, if otherwise proper subjects of legislation, while they may not be destroyed or abridged, may nevertheless be enlarged or augmented by legislative enactment.” Garfield Smelting, 178 P. at 59. In the instant case, the legislature clearly and unequivocally

established a right to sue for "injury proximately caused by a negligent act or omission of an employee committed within the scope of employment." Utah Code Ann. § 63-30-10 (Supp. 1992). This enactment established the right of an individual to sue the government for the tort of wrongful death. This legislation enlarged the existing right to sue for wrongful death. At this point, the Constitutional provision prevents the government from abrogating the right to sue for wrongful death or to limit the amount of damages.

The Court has repeatedly declared laws unconstitutional where the statute violates Article XVI, section 5 of the Constitution. See e.g. Malan v. Lewis, 693 P.2d 661 (Utah 1984) (Declaring guest statute unconstitutional); Johnson v. Stoker, 685 P.2d 539 (Utah 1984) (Declaring aircraft guest statute unconstitutional). In Malan, the Court asserted that

It was the manifest intention of the constitutional provision quoted to allow an action to be maintained whenever the death of a person was caused by the negligent or wrongful act of another and it is not within the power of the Legislature to deny this right of action. This section is as comprehensive as language can make it. The words 'negligence' and 'wrongful act' are sufficiently broad to embrace every degree of tort that can be committed against the person.

Malan, 693 P.2d at 667 quoting Ludwig v. Johnson, 243 Ky. 533, 536-37, 49 S.W.2d 347, 349 (1932). In this regard, the appellants believe that the legislature was correct in leaving the tort of wrongful death from the exceptions in subsection 2 of Utah Code Ann. § 63-30-10 (Supp. 1992). Like nuisance and other torts not included in the list, the Utah Governmental Immunity Act allows the government to be found liable for torts not included in the exclusions. Therefore, the Utah Governmental Immunity Act would be unconstitutional only of the tort of wrongful death is read in as an exclusion.

CONCLUSION

The trial court divined legislative intent and added words to a clear and easily read statute. Furthermore, the interpretation given by the trial court violates law and the Constitution of Utah. Therefore, the trial court's dismissal of the case as to the State defendants should be reversed and the matter remanded for trial.

DATED this 21 day of June, 1995.



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