

KYLE J. KAISER (13924)  
DARIN B. GOFF (11355)  
RACHEL GEORGE TERRY (10769)  
Assistant Utah Attorneys General  
SEAN D. REYES (7969)  
Utah Attorney General  
160 East 300 South, Sixth Floor  
P.O. Box 140856  
Salt Lake City, Utah 84114-0856  
Telephone: (801) 366-0100  
Facsimile: (801) 366-0101  
E-mail: [kkaiser@agutah.gov](mailto:kkaiser@agutah.gov)  
[dgoff@agutah.gov](mailto:dgoff@agutah.gov)  
[rachelterry@agutah.gov](mailto:rachelterry@agutah.gov)

*Attorneys for University of Utah, Dale Brophy, Kory Newbold, Miguel Deras, Todd Justesen, Heather McCarthy, and Emily Thompson*

---

IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

---

JILL McCLUSKEY and MATTHEW  
McCLUSKEY, individually and for and on  
behalf of LAUREN McCLUSKEY, deceased,

Plaintiffs,

v.

STATE OF UTAH, UNIVERSITY OF UTAH,  
ET AL.

Defendants.

**MEMORANDUM IN PARTIAL  
OPPOSITION TO PLAINTIFFS'  
MOTION FOR LEAVE TO AMEND**

Case No. 2:19-cv-00449-HCN-PMW

Judge Howard C. Nielson, Jr.  
Chief Magistrate Judge Paul M. Warner

---

**TABLE OF CONTENTS**

LEGAL STANDARD..... 1

    I. Plaintiffs’ Proposed Wrongful Death Claim Cannot Withstand a Motion to Dismiss..... 2

        A. The Immunity Act Prohibits Plaintiffs’ Proposed Wrongful Death Claim Against the University Because It Arises from an Assault or Battery..... 5

        B. The Immunity Act Bars Claims Against the University Staff Members..... 6

    II. Plaintiffs’ Proposed Cause of Action for Unconstitutional Policies or Customs Cannot Withstand a Motion to Dismiss..... 9

CONCLUSION..... 10

## TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Adkins v. Uncle Bart's, Inc.</i> , 2000 UT 14, 1 P.3d 528 .....	7
<i>Amundsen v. Univ. of Utah</i> , 2019 UT 49, 448 P.3d 1224 .....	3
<i>Barneck v. Utah Dep't of Transp.</i> , 2015 UT 50, 353 P.3d 140 .....	5
<i>Chief v. W. Valley City</i> , 2013 WL 6146061 (D. Utah Nov. 21, 2013) .....	8
<i>DeBry v. Noble</i> , 889 P.2d 428 (Utah 1995) .....	3
<i>Dettle v. Richfield City</i> , 2014 WL 4354424 (D. Utah Sept. 2, 2014) .....	8
<i>Epting v. State</i> , 546 P.2d 242 (Utah 1976) .....	3
<i>Hall v. Utah State Dep't of Corr.</i> , 2001 UT 34, 24 P.3d 958 .....	2
<i>J.W. v. Utah</i> , 647 F.3d 1006 (10th Cir. 2011) .....	6
<i>Kabwasa v. Univ. of Utah</i> , 785 F. Supp. 1445 (D. Utah 1990) .....	4
<i>Ledfors v. Emery Cnty. Sch. Dist.</i> , 849 P.2d 1162 (Utah 1993) .....	6
<i>Maddocks v. Salt Lake City Corp.</i> , 740 P.2d 1337 (Utah 1987) .....	6
<i>Mecham v. Frazier</i> , 2008 UT 60, 193 P.3d 630 .....	4
<i>Moss v. Pete Suazo Utah Athletic Comm'n</i> , 2007 UT 99, 175 P.3d 1042 .....	3
<i>Moya v. Garcia</i> , 895 F.3d 1229 (10th Cir. 2018) .....	1
<i>Salo v. Tyler</i> , 2018 UT 7, 417 P.3d 581 .....	4, 7, 8
<i>Serna v. Colo. Dep't of Corr.</i> , 455 F.3d 1146 (10th Cir. 2006) .....	9
<i>The Siren</i> , 74 U.S. (7 Wall.) 152 (1868) .....	3

*Thomson v. Salt Lake Cnty.*,  
 584 F.3d 1304 (10th Cir. 2009)..... 5, 7

*Tiede v. State*,  
 915 P.2d 500 (Utah 1996) ..... 5

*Tindley v. Salt Lake City Sch. Dist.*,  
 2005 UT 30, 116 P.3d 295 ..... 3

*United States ex rel. Barrick v. Parker-Migliorini Int’l, LLC*,  
 878 F.3d 1224 (10th Cir. 2017)..... 1

*Van de Grist v. State*,  
 2013 UT 11, 299 P.3d 1043 ..... 6

Statutes

Utah Code Title 63G, Chapter 7 ..... 2

Utah Code Ann. § 63G-7-101 (2018) ..... 2, 6

Utah Code Ann. § 63G-7-101(4) ..... 5

Utah Code Ann. § 63G-7-202(1), (3)..... 4

Utah Code Ann. § 63G-7-102(2)(a)..... 3

Utah Code Ann. § 63G-7-102(3)(a)..... 4

Utah Code Ann. § 63G-7-102(11) ..... 8

Utah Code Ann. § 63G-7-301(2)(i) ..... 5

Utah Code Ann. § 78B-3-106 ..... 7

2018 Utah Laws Ch. 415 (S.B. 12) § 94..... 5

Rules

Fed. R. Civ. P. 15(a)(2)..... 1

Other Authorities

Harold J. Krent, *Reconceptualizing Sovereign Immunity*,  
 45 Vand. L. Rev. 1529 (1992)..... 3

Defendant University of Utah and Defendants Dale Brophy, Kory Newbold, Miguel Deras, Todd Justesen, Heather McCarthy, and Emily Thompson (the “University Staff Members”) oppose, in part, Plaintiffs’ Motion Seeking Leave to File Amended Complaint (Doc. 36).

The University and its Staff Members do not oppose Plaintiffs’ request to eliminate their prior Third Cause of Action for § 1983 municipal liability against the University and their Fifth Cause of Action for interest on special damages, which the Plaintiffs concede are both subject to dismissal. Additionally, even though the University and its Staff Members deny most of the added factual allegations and legal conclusions asserted by Plaintiffs, they generally do not oppose Plaintiffs’ request to include newly discovered allegations in an amended complaint.

But the University and its Staff Members do oppose the addition of Plaintiffs’ proposed wrongful death claim because that claim is barred by the Governmental Immunity Act of Utah. They also oppose the additional § 1983 cause of action alleging unconstitutional policies, because a supervisory liability claim such as that one can only stand when there has been proof of (or at least sufficient allegations of) an underlying constitutional violation, and Plaintiffs have not provided such proof (or allegations).

### **LEGAL STANDARD**

Plaintiffs seek leave to amend their complaint. “The court should freely give leave when justice so requires.” *Fed. R. Civ. P. 15(a)(2)*. However, a proposed amended complaint that, “as amended[,] would be subject to dismissal” is considered legally “futile” and should not be allowed. *Moya v. Garcia*, 895 F.3d 1229, 1239 (10th Cir. 2018); *United States ex rel. Barrick v.*

*Parker-Migliorini Int'l, LLC*, 878 F.3d 1224, 1230 (10th Cir. 2017) (citations and quotations omitted).

**I. Plaintiffs' Proposed Wrongful Death Claim Cannot Withstand a Motion to Dismiss.**

Plaintiffs' proposed Fifth Cause of Action is a claim for wrongful death brought under Utah state common law. Plaintiffs assert the claim "against Defendants," presumably both the University and the University Staff Members. Plaintiffs should not be allowed to add that claim in an amended complaint because the claim could not withstand a motion to dismiss. The Governmental Immunity Act of Utah prohibits such a claim brought against both the University and the Staff Members because the claim arises out of an assault and battery—Melvin Rowland's murder of Lauren McCluskey.

The Immunity Act, Utah Code Title 63G, Chapter 7, "governs all claims against governmental entities or against their employees or agents arising out of the performance of the employee's duties, within the scope of employment, or under color of authority." [Utah Code Ann. § 63G-7-101 \(2018\)](#).<sup>1</sup> The Immunity Act provides immunity "from suit for any injury that results from the exercise of a governmental function." *Id.* § 63G-7-201(1). It applies to any acts that "occur[] during the performance of an employee's duties, within the scope of employment, or under color of authority...." *Id.* § 63G-7-202(3)(a).

The Immunity Act is "essential to the protection of [governmental] entities in rendering ... governmental services." *See Hall v. Utah State Dep't of Corr.*, 2001 UT 34, ¶ 14,

---

<sup>1</sup> Because Plaintiffs' claims arose in 2018, the 2018 version of the Governmental Immunity Act applies to their case. Except as otherwise noted, all citations will be to the 2018 version of the Act.

24 P.3d 958, 963 (quoting *Epting v. State*, 546 P.2d 242, 243 (Utah 1976)). It “protects an entity’s operating budget from the possibility of substantial damage awards and the financial havoc they may wreak.” *Tindley v. Salt Lake City Sch. Dist.*, 2005 UT 30, ¶ 32, 116 P.3d 295, 303, *holding modified by Moss v. Pete Suazo Utah Athletic Comm'n*, 2007 UT 99, ¶ 22, 175 P.3d 1042.

The Act’s benefits extend beyond protecting Utahns’ tax dollars. It also protects the public from circumstances where government resources are frozen because of litigation. *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868). It respects separation of powers by limiting reallocation of public funds by the judicial branch away from their original purposes chosen by elected representatives. *See id.*; *see also, e.g., Harold J. Krent, Reconceptualizing Sovereign Immunity*, 45 Vand. L. Rev. 1529, 1530–31 (1992). And it permits the government to provide services to the public without fear that the services would expose the government to unreasonable risks of lawsuits and judgments. “It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of government.” *The Siren*, 74 U.S. (7 Wall.) at 154.

In this case, the Immunity Act applies to the proposed wrongful death claim brought against both the University and the Staff Members. First, the Act applies to the claims against the University if the University is part of the definition of “State” in the Act, and if the acts at issue are “governmental functions.” Utah Code Ann. § 63G-7-102(2)(a), -102(5), -102(9). Both requirements are met here. *See Amundsen v. Univ. of Utah*, 2019 UT 49, ¶ 29, 448 P.3d 1224, 1232, (applying the Immunity Act to a claim brought against the University); *DeBry v. Noble*,

889 P.2d 428, 434 (Utah 1995) (recognizing that, when the legislature enacted the definition of “governmental function” in a previous version of the Immunity Act, it made “all government acts subject to immunity...”).

The Act applies to the Staff Members if they were “employees” of the University at the time of the events in question. *Utah Code Ann. § 63G-7-202(1), (3)*. Under the Act, “employees” of a governmental entity include “a governmental entity’s officers, employees, servants, trustees, or commissioners,” who took actions “within the scope of employment, or under color of authority ....” *Id. §§ 63G-7-102(3)(a), -202(3)*.

Each of the University Staff Members was an employee of the University at the relevant time. And the facts on which Plaintiffs base their wrongful death cause of action—decisions about intervening in a student’s housing, and how to investigate a complaint brought to police—concern acts within the scope of the University Staff Members’ employment. Therefore, the Immunity Act applies to the wrongful death claim against the University Staff Members. *Utah Id. § 63G-7-202(3)(a); Salo v. Tyler*, 2018 UT 7, ¶¶ 35–36, 417 P.3d 581, 589; *Mecham v. Frazier*, 2008 UT 60, ¶ 14, 193 P.3d 630, 633 (“By making suing under the [Immunity Act] a plaintiff’s sole remedy against a government employee, the legislature intended to extend to government employees the blanket immunity from suit that was explicitly granted to government entities”); *Kabwasa v. Univ. of Utah*, 785 F. Supp. 1445, 1446–47 (D. Utah 1990) (applying a previous version of the Act to claims brought against the University and its employees).



***A. The Immunity Act Prohibits Plaintiffs’ Proposed Wrongful Death Claim Against the University Because It Arises from an Assault or Battery.***

The Immunity Act prohibits claims against the University under the circumstances of this case because the wrongful death claim asserted by the Plaintiffs arise out of an assault or battery. The Immunity Act’s waiver of immunity when a plaintiff alleges that a state employee acted negligently, *see Utah Code Ann. § 63G-7-301(2)(i)*, does not apply “if an injury arises out of or in connection with, or results from,” among other things “assault, battery, ... deceit... infliction of mental anguish, or violation of civil rights[.]” *Id.* §§ 63G-7-101(4), -201(4)(b). The phrase “arises out of or in connection with, or results from” means that there is “some causal relationship between the conduct ... and the injury ... more than any causal connection but less than proximate cause ... sufficient to conclude that the injury originates with, or flows from, or is incident to the conduct or condition.” *Id.* § 63G-7-102.<sup>2</sup>

In this case the “causal relationship” between Melvin Rowland’s conduct and Lauren McCluskey’s injury is evident from Plaintiffs’ proposed amended complaint. Rowland’s murder of Ms. McCluskey bears “more than any causal connection” with her death; that tragic outcome “originate[d] with” and “flow[ed] from” his actions.<sup>3</sup>

---

<sup>2</sup> The Utah Supreme Court had previously interpreted the phrase “arises out of or in connection with, or results from” to equate to a proximate cause. *See Barneck v. Utah Dep’t of Transp.*, 2015 UT 50, ¶ 44, 353 P.3d 140, 151. This definition was modified by statute in 2018. *See 2018 Utah Laws Ch. 415 (S.B. 12) § 94*. The new statute was made effective on March 22, 2018, before Melvin Rowland murdered Lauren McCluskey.

<sup>3</sup> *See, e.g., Thomson v. Salt Lake Cnty.*, 584 F.3d 1034, 1323 (10th Cir. 2009) (concluding that wrongful death claim arising out of fatal shooting by law enforcement officers was barred by the assault and battery exclusion in the Immunity Act); *Tiede v. State of Utah*, 915 P.2d 500, 502–03 (Utah 1996) (concluding that wrongful death claim against the state arising out of fatal shooting by inmates who walked away from halfway house was barred by the Immunity Act).

Because Ms. McCluskey's death originated from Rowland's murder (an assault and battery), the Immunity Act prohibits the University from being liable for Plaintiffs' wrongful death claims, even if Plaintiffs' claims sound in negligence. *Maddocks v. Salt Lake City Corp.*, 740 P.2d 1337, 1340 (Utah 1987). Federal and state courts have repeatedly applied the assault and battery exemption in similar cases where the ultimate harm was caused by a battery, including situations where the attacker is a third party unaffiliated with the State or the University, as in this case. *See, e.g., J.W. v. Utah*, 647 F.3d 1006, 1009–11 (10th Cir. 2011) (applying the assault exception to prohibit negligence claims against the state from negligence claims arising out of physical and sexual assaults on a child by a foster child placed in the home); *Van de Grist v. State*, 2013 UT 11, ¶¶ 9–11, 299 P.3d 1043, 1046–47; *Ledfors v. Emery Cnty. Sch. Dist.*, 849 P.2d 1162, 1166–67 (Utah 1993) (holding that the battery exception barred claims against a school when a plaintiff-student was repeatedly assaulted by classmates and sued for negligent supervision).

The assault and battery exception would apply to Plaintiffs' proposed wrongful death claim contained in the proposed amended complaint. Since the claim could not withstand a motion to dismiss, Plaintiffs should not be given leave to amend their complaint to include it.

***B. The Immunity Act Bars Claims Against the University Staff Members for the Same Reasons.***

The Immunity Act also bars Plaintiffs' proposed wrongful death claim against the University Staff Members. Because the Immunity Act applies to the University and to its employees, *Utah Code Ann. § 63G-7-101*, Plaintiffs' proposed claim cannot be brought against the University Staff Members for the same reason that it cannot be brought against the

University—Plaintiffs’ injury arose out of Melvin Rowland’s assault, battery, and murder of Ms. McCluskey.

No provision of the Immunity Act changes that general rule. The Immunity Act permits claims against an employee when “the employee acted or failed to act through fraud or willful misconduct.” *Id.* § 63G-7-202(3)(c)(i). “‘Willful misconduct’ means the intentional doing of a wrongful act, or the wrongful failure to act, without just cause or excuse, where the actor is aware that the actor’s conduct will probably result in injury.” *Id.* § 63G-7-102(11). A plaintiff must meet the burden to at least plead facts both “(1) that the government actor intentionally performed a wrongful act [and] (2) ... an awareness that injury will likely result.” *Salo, 2017 UT 7, ¶ 41, 417 P.3d at 590.*

Here, the Immunity Act bars the state law negligence claim against the University Staff Members. Plaintiffs perfunctorily plead that they “have a cause of action against Defendants for wrongful death associated with Ms. McCluskey’s underlying claims under Title IX and under the equal protection clause ....”<sup>4</sup> But Courts must “focus[] on the conduct out of which the injury arose rather than the theory of liability argued by the plaintiff.” *Thomson v. Salt Lake Cnty., 584 F.3d 1304, 1323 (10th Cir. 2009)*. The factual allegations actually sound in negligence—allegations that the University Staff Members did not take complaints seriously, did not do a proper investigation, and did not ensure the safety of Ms. McCluskey. *See, e.g., Utah Code Ann. § 78B-3-106–10; Adkins v. Uncle Bart’s, Inc., 2000 UT 14, ¶ 36, 1 P.3d 528* (“It must be shown that a defendant negligently breached some duty owed ... and that breach proximately caused the death.”). As a negligence cause of action, it “facially fail[s] to satisfy the willful misconduct

---

<sup>4</sup> Pls.’ Prop. Am. Compl. ¶ 200.

requirement” because the allegations relate to an alleged failure to act reasonably. *Dettle v. Richfield City*, No. 2:13-CV-357DAK, 2014 WL 4354424, at \*10 (D. Utah Sept. 2, 2014).

Furthermore, for the “willful misconduct” waiver of immunity to apply, Plaintiffs must plead and prove facts showing each of the following: (a) an intentional action or inaction; (b) lack of just cause; and (c) actual knowledge of likely injury on the part of each individual employee whom they seek to hold liable. Utah Code Ann. § 63G-7-102(11); *Salo*, 2017 UT 7, ¶ 41, 417 P.3d at 590; *see also Chief v. W. Valley City*, No 2:11–CV–643 TS, 2013 WL 6146061, at \* 12 (D. Utah Nov. 21, 2013) (not selected for publication) (concluding that a wrongful death claim could not be brought against officers who shot the decedent because there was no proof of willful misconduct during an officer-involved shooting). Plaintiffs have not pleaded the required facts. Even assuming some of the University Staff Members made errors in judgment while dealing with the information available to them at the time, or that some officers could have been more zealous in investigating Ms. McCluskey’s allegations or more proactive in offering protection for her, those actions (or inactions) are not “willful misconduct” as defined by the Immunity Act.

Plaintiffs cannot move forward with a claim against the University because the harm complained of was caused by Melvin Rowland’s murderous actions. They cannot move forward with claims alleging “willful misconduct” against the University Staff Members when the facts supporting those claims all sound in negligence. The wrongful death claim against the University and its Staff Members would be barred by the Immunity Act, and Plaintiffs should not be allowed to amend the complaint to add such a claim.

**II. Plaintiffs' Proposed Cause of Action for Unconstitutional Policies or Customs Cannot Withstand a Motion to Dismiss.**

Plaintiffs should not be allowed to assert their new Fourth Cause of Action, alleging supervisory liability for an “unconstitutional policy or custom.” “Supervisors are only liable under § 1983 for their own culpable involvement in the violation of a person’s constitutional rights.” *Serna v. Colo. Dep’t of Corrs.*, 455 F.3d 1146, 1151 (10th Cir. 2006). “In order to establish a § 1983 claim against a supervisor ... a plaintiff must first show the supervisor’s subordinates violated the constitution. Then, a plaintiff must show an affirmative link between the supervisor and the violation, namely the active participation or acquiescence of the supervisor in the constitutional violation by the subordinates.” *Id.* (citations and quotations omitted).

Plaintiffs’ new claim fails at the first element. For the reasons stated in the University and its Staff Members’ Motion to Dismiss and the Reply Memorandum filed in support of the Motion,<sup>5</sup> Plaintiffs have not adequately pleaded that any individual employed by the University personally violated Ms. McCluskey’s constitutional rights. Their allegations against the individuals are perfunctory or based on generic stereotypes not specifically tied to any of the University Staff Members. Because Plaintiffs cannot plead causes of action against the government agents who actually interacted with Ms. McCluskey and her friends, they cannot plead a cause of action for supervisory liability.

---

<sup>5</sup> See Mot. to Dismiss at 22–24, 28.

**CONCLUSION**

The law's preclusion of the proposed wrongful death and supervisory liability claims in no way diminishes the deep and ongoing commitment of the University and its employees to student safety and to preventing assaults and batteries against members of its community. But Plaintiffs cannot move forward with legally insufficient claims barred by the Immunity Act and federal law. The University and its Staff Members therefore respectfully request that the Court deny those portions of Plaintiffs' Motion for Leave to Amend seeking to add a wrongful death claim and a supervisory liability claim.

DATED this 27<sup>th</sup> day of January 2020.

OFFICE OF THE UTAH ATTORNEY GENERAL

*/s/ Kyle J. Kaiser*  
\_\_\_\_\_  
KYLE J. KAISER  
DARIN B. GOFF  
RACHEL GEORGE TERRY  
Assistant Utah Attorneys General  
*Attorneys for University of Utah and University Staff Members*