

A Deep Dive Into Utah's Governmental Immunity Act

Utah Code §§ 63G-7-101, et seq.

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HISTORY – PRE-UGIA

[Public Trauma: Why Utah Should Waive Immunity for Mental Anguish Injuries \(byu.edu\)](#), Adam Reed Moore (2022)

“The King Can Do No Wrong” –Maybe?

“For every right, there is a remedy.”—Maybe?

- Sovereign Immunity becomes established in the U.S., but reasons are less than clear.
- *U.S. v. Lee*, 106 U.S. 196, 207 (1882): “And while the exemption of the United States and of the several states from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.”

Utah

- **1895 Constitution** - Created Board of Examiners authorized to “examine all claims against the State,” and make recommendations to the legislature. Const. of the State of Deseret, art. V § 18
- ***Wilkinson v. State*, 134 P. 626 (Utah 1913)**
 - “. . . in the absence of either express constitutional or statutory authority an action against a sovereign state cannot be maintained.”
 - “. . . it is made doubly clear that it was not intended to confer jurisdiction upon the courts of this state to entertain suits against the state by what is contained in both the Constitution and statutes of this state.”
- **Municipalities initially treated differently—then this liability bled into actions against the State**

See *DeBry v. Noble*, 889 P.2d 426, 436 (Utah 1995) for discussion.

- **Individuals**

May be liable if negligently performing ministerial acts, and possibly for discretionary acts—if they acted willfully or with malice. *Frank v. State*, 613 P.2d 517 (Utah 1980); *Cornwall v. Larsen*, 571 P.2d 925 (Utah 1977).

UTAH GOVERNMENTAL IMMUNITY ACT

Utah Code §§ 63-30-10 to -38 (1965)

No express immunity for employees.

“The [UGIA] applies only to entities and does not include individuals (employees) . . . and the Act contains no language exempting employees from suit. It only insulates an employee by barring any action against him after judgment is had and obtained against the entity and if no judgment is obtained against the entity, it follows that an aggrieved party may proceed against an employee thereof. Such legislative intent is clearly expressed in that portion of Act which allows the entity to insure its employees against liability for their negligent acts.”

Cornwall v. Larsen, 571 P.2d 925, 927 (Utah 1977)



1978 - LEGISLATURE RESPONDS

Utah Code § 60-30-4:

The remedy against a governmental entity or its employee for an injury caused by an act or omission which occurs during the performance of such employee's duties ... is, after the effective date of this act, exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless the employee acted or failed to act through gross negligence, fraud, or malice.

An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring during the performance of the employee's duties ... unless it is established that the employee acted or failed to act due to gross negligence, fraud or malice.

LEAVING 1978...WHERE ARE WE TODAY?

Broad Immunity under the current UGIA:

Governs all claims against governmental entities and employees arising out of the performance of the employee's duties. Utah Code § 63G-7-101(2)(b).

A governmental entity and an employee of a governmental entity retain immunity from suit unless that immunity has been expressly waived. Utah Code § 63G-7-101(3).



THE FAMILIAR THREE-PART TEST. *See Peck v. State*, 191 P.3d 4, 7 (Utah 2008)

1. Was there a governmental function? If not, the UGIA doesn't govern or immunize.

§ 63G-7-102(5)(a)-(c) - includes each activity, undertaking, operation, or failure to act by a governmental entity, or department, agency, employee, agent, or officer of a governmental entity.

2. Does the UGIA waive immunity? § 63G-7-301.

Examples-§ 63G-7-301(2)(i) “subject to Subsections 63G-7-101(4) and 63G-7-201(4), as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment.” Other subsections list exceptions to this waiver.

3. If waived, is there an *exception* to the waiver? Here are a few:

§ 63G-7-201(3)- “any injury if the injury arises out of or in connection with, or results from” latent conditions.

§ 63G-7-201(4)- “any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment, **if the injury arises out of or in connection with, or results from**” a litany of cases, including:

- (b) except as provided in Subsections 63G-7-301(2)(j), (3), and (4) [concerning sexual battery in educational settings], 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
- (f) a misrepresentation by an employee whether or not the misrepresentation is negligent or intentional

“Arises out of or in connection with, or results from” – § 63G-7-102(1)(a)-(c)

BROADLY defined:

“Arises out of or in connection with, or results from,” when used to describe the relationship between conduct or a condition and an injury, means that:

- (a) there is some causal relationship between the conduct or condition and the injury;
- (b) the causal relationship is more than any causal connection but less than proximate cause; and
- (c) the causal relationship is sufficient to conclude that the injury originates with, flows from, or is incident to the conduct or condition.”

When your client is a governmental employee

1. Typically, no individual liability. Utah Code § 63G-7-202(4):

“Except as permitted in Subsection (3)(c), no employee may be joined or held personally liable for acts or omissions occurring:

- (a) during the performance of the employee's duties;
- (b) within the scope of employment; or
- (c) under color of authority.”

2. What is Subsection 3(c)? Sometimes called the “exclusive remedy” provision of the UGIA:

“A plaintiff may not bring or pursue any civil action or proceeding based upon the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless: . . . ”

- (i) the employee acted or failed to act through fraud or willful misconduct[.]”

3. Willful misconduct is defined in § 63G-7-102(11): “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.”

PAIR-UP/GROUP-UP HYPOTHETICAL

- An assistant to the cantankerous and demanding Vice President of Happy Valley City College filed a complaint with the Utah Antidiscrimination and Labor Division and the College administration alleging gender discrimination and sexual harassment, claiming he often made unwanted advances to her.
- Internal College procedures require an employee to report harassment to the College, and that the employee “can” file a Complaint with the UALD.
- A confidential internal investigation into the factual basis for the assistant’s allegations was unable to substantiate them.
- The assistant then gave information about the EEOC complaint to the media, who in turn filed GRAMA requests to obtain a trove of documents.
- The College administration granted the request, then individual leaders (who disliked the VP) held press conferences and commented on social media to deride the VP and express dismay in the allegations.
- The VP denied the assistant’s allegations, claiming they were maliciously fabricated, false, and made against him for malicious and improper purposes, including to retaliate against a difficult boss, and to force a settlement and/or avoid a termination for which the boss had begun to ‘paper the file.’
- He filed suit against the College, its administrators, and the assistant, making all these allegations to support his claims for defamation and false light.
- The Defendants filed a Motion to Dismiss under Rule 12(b)(6)-asserting Governmental Immunity and that the VP had not and could not plead that they acted with actual malice.
- Is there immunity for the assistant? For the administrators? (Ignore the College.)



**Everyone is right under the
Graves I and Graves II
decisions! Or is no one right?**

Graves v. Utah County Government I, 2023 UT App 73

- 1. “No Immunity for Governmental Employees Committing Willful Misconduct.”** ¶ 19. Graves’ claims are for intentional conduct. The Act does not “immunize governmental employees for their own intentional conduct. Section 63G-7-202(3)(c)(i) speaks to that.” The court recites that provision, and the statutory definition of “willful misconduct” and concludes: “The only thing this can mean is that individual immunity is waived for the acts of a governmental employee if those acts are fraudulent or the result of willful misconduct.” ¶ 22. For support, the court cites several cases from the state and federal courts in Utah, including *Salo v. Tyler*, 2018 UT 7.
- 2. Graves’ Claims against Taylor.** Taylor’s UALD Complaint was a governmental function; unclear if media leaks were. But this is immaterial because Graves adequately alleged “fraud or willful misconduct” under 63G-7-202(3)(c)(i).
- 3. Graves’ Claims against the Commissioners.** Their publication of an unredacted internal report, press and social media statements were allegedly fraudulently and willfully made to force Graves’ resignation. Thus, the claims survive under 63G-7-202(3)(c)(i).

Graves v. Utah County Government II, 2024 UT App 80

Immunity under the three-part test for all Defendants.

- 1. Defendants meet standard of governmental function.** Statutory definition is broad. Under it, “all the complained-of actions of the Commissioners and Taylor were governmental functions.” ¶ 15. The Commissioners even acted in their official capacity when they held a press conference and posted on social media about a governmental complaint and investigation following a meeting concerning the GRAMA request. ¶ 16. Graves argues otherwise not under the governing statutory definition, but a prior standard from *Sandiford v. Salt Lake City Corp.*, 605 P.2d 1230 (Utah 1980).
- 2. No waiver in the UGIA for Graves’ false light, defamation, and slander/libel per se claims—ie, for intentional torts.** ¶¶ 19-21.
- 3. Thus, evaluation of exceptions to the *negligence* waiver are inapplicable, where Graves “does not allege that he was injured by a negligent act[.]”** ¶ 21.

From *Graves I*:

“In *Salo v. Tyler*, 2018 UT 7, a case involving a defamation claim in the context of summary judgment, our supreme court confirmed this understanding [that immunity is waived for fraudulent acts or willful misconduct] when it explained that individual employees could be liable under the GIA for intentionally making a defamatory statement they knew to be false.” 2023 UT App 73 ¶ 22 (citing *Salo*, 2018 UT 7 ¶ 44 (“A defamatory statement is wrongful only if it is false. And defamation is intentional (and thus willful) only if the defendant had knowledge of its falsity.”)).

“In sum, immunity is waived for individual employees when they commit willful misconduct by making and maliciously repeating false claims, as *Graves* alleged happened here.” 2023 UT App 73 ¶ 24.

Footnote 5 from *Graves II*:

In our previously issued opinion, we concluded that subsection 63G-7-202(3)(c)(i) of the UGIA waived immunity for the [defendants’] alleged intentional conduct. Subsection 63G-7-202(3) provides that “an action under [the UGIA] against a governmental entity for an injury caused by an act or omission that occurs during the performance of an employee’s duties, within the scope of employment . . . is a plaintiff’s exclusive remedy” and precludes “any civil action or proceeding based upon the same subject matter against the employee . . . whose act or omission gave rise to the claim.” Utah Code § 63G-7-202(3)(a), (c). The provision then lists exceptions to this general rule, including cases where “the employee acted or failed to act through fraud or willful misconduct.” *Id.* § 63G-7-202(3)(c)(i). The Appellees asked us to reconsider our conclusion, and, after hearing from both sides, we conclude that we misapprehended the nature and function of this subsection of the UGIA. Properly understood, this provision reflects an exception to a statutory exclusive remedy, not a blanket waiver of immunity for governmental employees for any fraud or willful misconduct.

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HOW HAS -202(3)(C) BEEN APPLIED? SOME EXAMPLES IN ADDITION TO *GRAVES*.

Salo v. Tyler, 2018 UT 7. Reviewing summary judgment, rejecting plaintiff's argument that fact issue existed as to whether defendants had "engaged in willful misconduct." *Id.* ¶ 40. "Willful misconduct" is defined as "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.* ¶ 41 (quoting Utah Code. § 63G-7-102(11)). Thus, the court explained, "willfulness requires a showing (1) that the government actor intentionally performed a wrongful act (2) with an awareness that injury will likely result." *Id.* The plaintiff could not make these showings as he lacked evidence the defendants knew their statements were false, such that a jury verdict in his favor would be reasonable. *Id.* ¶ 53.

Pingree v. University of Utah, 2022 WL 1307902 (D.Utah May 2, 2022) (Judge Parrish) At Motion to Dismiss, plaintiff's allegation that the government employee defendants had willfully defamed her were insufficient to bring her within the subsection: "Though the plaintiff had alleged that the statements the Utah employee made were untrue, without factual basis, and that the employee knew they were false when he intentionally made them, the court concluded those statements were 'mere conclusory allegations' and insufficient to support a claim." *Id.* *4.

Rossi v. Dudek, 2024 WL 1160229 (D.Utah Mar. 18, 2024) (Judge Stewart), 2016 WL 3570620 (D.Utah June 24, 2016) (Judge Waddoups) At Motion to Dismiss, rejecting argument that UGIA barred a state law defamation claim against Dudek under the exceptions to the immunity waiver for "any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment" arising from, among others, "libel, slander, deceit" and "misrepresentation." Utah Code § 63G-7-201(4)(b), (f). Judge Waddoups stated that in view of the Plaintiff's "plausible factual allegations that Dr. Dudek engaged in willful misconduct related to his conflict of interest," and subsection 202(3)(c)(i), reliance on UGIA "is misplaced and cannot support dismissal of this claim."

Later, Judge Stewart denied a Rule 50 Motion made after evidence at trial, finding sufficient evidence was presented for a jury to find that based on Dudek's malice and excessive publication, the alleged defamatory statements were not privileged, and that under the subsection, he acted willfully and with knowledge his statements were false and would harm the plaintiff, such that he "is not entitled to governmental immunity." Indeed, the jury later returned a verdict finding he had acted willfully, was not entitled to immunity, and awarded the plaintiff \$160,000.

CONSIDER IF PRIVILEGES OR IMMUNITIES OUTSIDE THE UGIA APPLY

Judicial Proceedings Privilege. “. . . An absolute privilege is available to protect participants in judicial proceedings from claims for damages stemming from their actions.” *Cline v. State*, 2005 UT 498 ¶ 36 (citing *Price v. Armour*, 949 P.2d 1251, 1256 (Utah 1997) (“[J]udges, jurors, witnesses, litigants, and counsel in judicial proceedings have an absolute privilege against defamation.” (quotations and citations omitted)). To establish it, statements “must be (1) made during or in the course of a judicial proceeding; (2) have some reference to the subject matter of the proceeding; and (3) be made by someone acting in the capacity of judge, juror, witness, litigant, or counsel.” *Pratt v. Nelson*, 2007 UT 41 ¶ 28.

Quasi-judicial immunity. Shields those who (1) perform a traditional adjudicatory function, “(2) decide cases of sufficient controversy that, in the absence of quasi-judicial immunity, would subject them to numerous actions for damages by disappointed parties, and (3) sufficient safeguards exist within the regulatory framework to protect constitutional rights.” *See Ambus v. Utah State Bd. of Educ.*, 858 P.2d 1372, 1378–79 (Utah 1993).

Judicial Immunity. “[J]udicial officers are absolutely immune from liability for damages for acts performed in their judicial capacities and committed within their judicial jurisdiction. *Sanders v. Leavitt*, 2001 UT 78, ¶ 19.

ARE THE EXCEPTIONS TO WAIVER OF IMMUNITY AND THE FRAUD/WILLFUL MISCONDUCT EXCLUSIVE REMEDY PROVISIONS IN CONFLICT?

Utah Code 63G-7-201(4)(b), (f)

(4) A governmental entity, its officers, and its employees are immune from suit, and immunity is not waived, for any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment, if the injury arises out of or in connection with, or results from:

(b) except as provided in Subsections 63G-7-301(2)(j), (3), and (4), 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;

(f) a misrepresentation by an employee whether or not the misrepresentation is negligent or intentional;

Utah Code 63G-7-202(3)

(3)(a) Except as provided in Subsection (3)(c), an action under this chapter against a governmental entity for an injury caused by an act or omission that occurs during the performance of an employee's duties, within the scope of employment, or under color of authority is a plaintiff's exclusive remedy.

(b) Judgment under this chapter against a governmental entity is a complete bar to any action by the claimant, based upon the same subject matter, against the employee whose act or omission gave rise to the claim.

(c) A plaintiff may not bring or pursue any civil action or proceeding based upon the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless:

(i) the employee acted or failed to act through fraud or willful misconduct;

A FEW RECENT DEVELOPMENTS

Cunningham v. Weber County, 506 P.3d 575 (Utah 2022), 2022 UT 8

Immunity is waived under the UGIA for gross negligence and loss of consortium claims.

A Layton City firefighter was paid by his employer to get SWAT training, conducted by Weber County and which included detonating an explosive. He was injured by shrapnel. He and his wife sued Weber County, asserting gross negligence and loss of consortium claims. The County obtained summary judgment in the trial court on the grounds that the firefighter signed a pre-injury release, and because the government immunity did not expressly waive immunity for gross negligence or loss of consortium claims.

The Supreme Court reversed, finding the release was unclear and therefore unenforceable, and that Under Utah Code 63G-7-301(2)(i)'s waiver of immunity for "any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment" waived immunity for gross negligence (which differs "only in degree, and not in kind" from simple negligence), and loss of consortium—simply a type of *injury* that might be caused by the non-immune negligence.

Mariani v. Utah Dept. of Public Safety-Driver License Div., 2023 UT App 79

Utah Court of Appeals applied exception to immunity waiver found in Utah Code § 63G-7-201(4)(c) [“the issuance, denial, suspension, or revocation of, or the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order or similar authorization”), and the new (ok, 2017) statutory definition of “arises out of or in connection with, or results from” found at Utah Code 63G-7-102(1)(a)-(c). The new, broad definition is met “wherever ‘the causal relationship is sufficient to conclude that the injury originates with, flows from, or is incident to the conduct or condition.’” § 63G-7-102(1)(C)

Under it, the court found that the DLD was immunized under the licensing exception for injuries a citizen sustained during a motorcycle endorsement driving test when her scooter went over soft, hot asphalt tar in the test range, largely addressing only part (c) of the definition: “these provisions mean that the DLD is immune from Mariani’s lawsuit if [her] injury was at least ‘incident to’ the DLD’s denial of her request for a motorcycle endorsement.” 2023 UT App ¶ 16. That is the part (C) of the statutory definition.

Utah Supreme Court has accepted cert.

Appellant argues in part that under a prior licensing exception case, *Thayer*, the exception only applies to formal decisions about licensing, and that any formal decision about a motorcycle license was not a “substantial causal factor” sufficient to meet the statutory definition.

Notably--State’s response argues that the traditional 3-part test to find immunity is no longer required in view of the amended Act—just skip to exceptions.