

FILED 1-30-09  
Fourth Judicial District Court  
of Utah County, State of Utah

*Linman* Deputy

**IN THE FOURTH JUDICIAL DISTRICT COURT,  
UTAH COUNTY, STATE OF UTAH**

<p>KEVAN FRANCIS, et al.,  Plaintiffs,  vs.  THE STATE OF UTAH, et al.,  Defendants</p>		<p><b>RULING</b></p> <p>Date: January 29, 2009</p> <p>Case No.: 080401029</p> <p>Judge: Gary D. Stott</p>
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This matter comes before the Court on a Motion for Judgment on the Pleadings ("Motion") filed by Defendants State of Utah, the Utah Division of Wildlife Resources, and John Does 1-X ("State").

Kevan Francis and other relatives of the late Samuel Ives ("Plaintiffs") filed a Complaint against the State on March 28, 2008, alleging negligence causing the wrongful death of the deceased, an 11-year-old boy killed by a black bear in American Fork Canyon on June 17, 2008. In its Amended Answer of April 24, 2008, the State asserted immunity from suit, pursuant to Utah Code Annotated section 63G-7-301. The State also filed this Motion on June 23, 2008. Plaintiffs responded (with the Court's permission for an extension of time) on July 21, 2008, with an opposition memorandum. The State replied on August 11, 2008, then filed a Request for Oral Arguments on August 12, 2008. Counsel for both sides came to the Court on January 13, 2009, and

argued the Motion. Having heard the arguments and read the memoranda provided by both parties, the Court rules on the Motion as follows.

Rule 12(c) of the Utah Rules of Civil Procedure provides that any party may move for a judgment on the pleadings after the pleadings are closed and within such time as to not delay trial. See Utah R. Civ. P. 12(c). "A court may enter judgment on the pleadings when the moving party is entitled to judgment on the face of the pleadings themselves." See *Mountain America Credit Union v. McClellan*, 854 P.2d 590, 591 (Ut. Ct. App. 1993). A judgment on the pleadings, which effectively amounts to a dismissal, is proper "only if, as a matter of law, the nonmoving party . . . could not prevail on the facts alleged." *Id.* Further, a court should "accept the factual allegations in the complaint as true, and consider them, and all reasonable inferences to be drawn from them, in the light most favorable to the non-moving party." *Krouse v. Bower*, 2001 UT 28, ¶ 2.

The State's Motion is based on governmental immunity. "Immunity is an affirmative defense which must be proved by the defendant." *Nelson ex rel. Stuckman v. Salt Lake City*, 919 P.2d 568, 574 (Utah 1996). A governmental immunity analysis is typically preceded by a liability/negligence analysis. See *Ledfors v. Emery County Sch. Dist.*, 849 P.2d 1162, 1163-1164 (Utah 1993); see also *Rollins v. Petersen*, 813 P.2d 1156, 1162 (Utah 1991). However, the State admitted negligence for the purposes of its Motion, so this Court does not need to analyze duty and breach. See *Lyon v. Burton*, 2000 UT 19, ¶ 12. Therefore, the Court analyzes whether or not the State is entitled to governmental immunity.

A governmental immunity analysis requires three steps: "(1) whether the activity undertaken

is a governmental function; (2) whether governmental immunity was waived for the particular activity; and (3) whether there is an exception to that waiver." *Blackner v. State*, 2002 UT 44, ¶ 10.

First, a governmental function is broadly defined as any "activity, undertaking, or operation of a governmental entity." U.C.A. § 63G-7-102(4)(a). It also "includes a governmental entity's failure to act." *Id.* § 63G-7-102(4)(c). Operating a camp site, as well as the corresponding duties concerning responses to nuisance bears, fall under the ambit of governmental function. At the time of argument, neither party contended that the State was not performing a government function.

Second, immunity is generally waived for negligent conduct committed within the scope of the government worker's employment. *See id.* § 63G-7-301(4). For the purposes of its Motion, the State conceded negligence.

Third, governmental immunity is not waived if there is a statutory exception to immunity. Here, the State alleges that a specific provision of U.C.A. § 63G-7-301(5) applies, which reads:

Immunity from suit of each governmental entity is not waived under Subsections (3) and (4) if the injury arises out of, in connection with, or results from: . . . (c) 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 . . .

*Id.* § 63G-7-301(5)(c) (emphasis added).

The State argues that the injury, Samuel Ives's death, arose out of or in connection with the State's failure to revoke the permit or authorization to camp in the danger area. That is, had the State revoked its permission to allow Plaintiffs' to camp in the site, the bear attack would not have happened and the injury would not have occurred. Further, the statute is plain and unambiguous,

and an immunity waiver exception should not be qualified without "textual justification." *Moss v. Pete Suazo Athletic Comm'n*, 2007 UT 99, ¶ 13. The State contends that the broad language of the statute allows immunity whenever the injury arises out of or in connection with the failure to revoke authorization, meaning that there only need be "some causal nexus" between the injury and the failure. See *Blackner*, 2002 UT at ¶ 15. The injury had at least some causal relation to the State's failure to revoke its camping authorization to Plaintiffs. Thus, through this exception to the immunity waiver, Plaintiffs' suit must be dismissed.

Plaintiffs argue that the Complaint alleges many acts of negligence other than simply failing to close or restrict the campground. Further, strict application of the waiver exception in this case would be inappropriate and frustrate the purposes of the immunity statute. Plaintiffs argue that such an expansive application here would cause the exception to swallow the rule, and this was certainly not what the Legislature intended. Specifically, section 63G-7-301(5)(c) refers to deliberative, regulatory acts in which immunity from lawsuits affords the government wide latitude to engage in policy-making decisions. For example, a boxer's death following the Pete Suazo Utah Athletic Commission's negligent decision to allow him to compete was held to result from an approval or similar authorization permitting the boxer to fight; thus, immunity applied. See *Moss*, 2007 UT 99 at ¶ 29. However, in emergent situations, such as when a dangerous bear is at large, the statute was not intended to immunize the government for its failure to remove attractants or warn the public. Plaintiffs argue that because the State's own regulations require its employees to take certain steps upon discovery of a nuisance bear, then there is no discretion or deliberation involved. Rather, the

employees must follow the rules in handling dangerous bears to avoid harm to others. Plaintiffs argue that handling a nuisance bear is similar to re-installing a downed stop sign. It is mandatory and not discretionary, therefore a government cannot be immune for injuries resulting from its employees' failure to put the stop sign back in its place. *See, e.g., Richards v. Leavitt*, 716 P.2d 276, 279 (Utah 1985) (holding that "the maintenance and repair of traffic signs is a governmental function for which immunity from suit has been expressly waived and which is not within the discretionary function exception.") However, the decision whether to put a stop sign in a particular place is purely discretionary. Thus, the government is immune from suit if injuries arose from the government's failure to place a stop sign at a dangerous intersection. *See U.C.A. § 63G-7-301(5)(a)*. Similarly, the State's decisions once it was on notice of a dangerous bear are not discretionary, but mandatory. Therefore, the State cannot rely on a statute that pertains to licensing and other types of decisions to be immune from suit.

Neither party fully argued the discretionary function exception, which allows the state to retain immunity if the injury arose out of the exercise or failure to exercise a discretionary function. *See U.C.A. § 63G-7-301(5)(a)*. Presumably, this is because section 63G-7-301(5)(c) is more directly applicable to the case. For that matter, the fact that the first provision of the immunity exception statute, section 63G-7-301(5)(a), restores governmental immunity based on the performance or failure to perform any discretionary function means that the discretionary function issue is irrelevant to the other provisions in the same statute, as any of those statutory exemptions are independently sufficient for the State to have immunity. In other words, if the State proves that it has immunity

based on section 63G-7-301(5)(c), then it does not need to even delve into the question of whether the injury arose from the exercise of a discretionary function. In arguing against the application of Subsection 301(5)(c), Plaintiffs characterized it as relating only to deliberative functions, stating that in emergent situations the provision is inapplicable. However, Plaintiffs have pointed to no cases showing that regarding non-deliberative decisions or emergent situations, the immunity waiver exception found in Subsection 301(5)(c) does not apply. Thus, this Court is constrained to apply the exception as written, and as it has been interpreted by the Utah Supreme Court. This Court hesitates to "place a condition on the applicability of the exception without any textual justification." *Mass*, 2007 UT 99 at ¶ 13.

The Utah Supreme Court clarified the breadth of the causation requirement built into the waiver exception provision of the Utah Governmental Immunity Act in *Taylor ex rel Taylor v. Ogden School District*, 927 P.2d 159, 164 (Utah 1996). Taylor, a mother, sued on behalf of her son Zachary after he was pushed into an allegedly unsafe window at a state-owned school. *Id.* at 159-160. The broken glass damaged nerves and tendons in Zachary's hand. *Id.* at 160. Taylor argued that Zachary's injuries "arose out of" the defendant's negligent failure to install safety plate glass in the school. *Id.* at 161. The defendant argued that the injuries "arose out of" an assault and battery, thus rendering the state immune under U.C.A. § 63-30-10(2). The Utah Supreme Court found the phrase "arising out of" to be "very broad, general and comprehensive." *Id.* at 163. That is, there only need be "some causal relationship between the injury and the risk [provided for]." *Id.*

The court continued:

Taylor maintains that the assault exception should not apply because Zachary's injuries have a greater link to the dangerous window in the restroom than to Trenton's assault. However, "arises out of" within the assault exception "is a phrase of much broader significance than "caused by."'" *National Farmers Union [Property & Cas. Co. v. Western Cas. & Sur. Co.]*, 577 P.2d [961] at 963 [(Utah 1978)] (quoting *Hartford Accident & Indem. Co. v. Civil Serv. Employees Ins. Co.*, 33 Cal. App. 3d 26, 108 Cal. Rptr. 737, 741 (Ct. App. 1973)). Under the phrase's ordinary meaning, the assault need not be the sole cause of the injury to except the governmental entity from liability for the injury. *See id.* The language demands "only that there be some causal relationship between the injury and the risk" provided for. *Id.* (emphasis added) (quoting *Lawyer*, 238 N.W.2d at 518). In this case, there is undoubtedly "some" causal relationship between Zachary's injury and Trenton's assault upon him.

*Id.*

Although *Taylor* discussed the "arose out of" phrase as it relates to assault, the phrase is found in the provision heading to all 21 immunity waiver exceptions found in section 63G-7-301(5). Thus, this Court interprets it in Section 301(5)(c) in the same manner as the Utah Supreme Court interpreted it in Section 301(5)(b). In the instant case, Plaintiffs have alleged other possible causes of injury, such as the negligent failure to notify potential campers or the negligent failure to remove attractants. Certainly, the injury derives from these causes just as much as it does from the government's failure to revoke camping authorization. But the immune situation need not be the sole cause of injury, nor is the government required to prove more than "some" causal link to the immune situation.

The State's policy on handling black bear incidents contains this rule of procedure:

Division employees should request that land management agencies close or restrict the use of campgrounds where nuisance black bears are active until the source of the problem (attractant) has been removed and/or the offending bear has been removed.

State of Utah Division of Wildlife Resources Administration, Handling Black Bear Incidents 7, No. WSWLD-3 (June 9, 2005).

Although Plaintiffs are correct that the State did not follow this internal regulation, the State's own negligence in disregarding necessary safeguards is irrelevant. Indeed, the *Moss* court found the Pete Suazo Utah Athletic Commission immune under section § 63-30-10(3)<sup>1</sup> despite its failure to follow at least five of its own safety rules. *See Moss*, 2007 UT 44 at ¶¶ 3-6. Further, the Utah Governmental Immunity Act "immunizes many governmental acts or omissions that impact life and safety." *Id.* at ¶ 13; *See, e.g.*, U.C.A. § 63G-7-301(5)(b) (assault and battery); *id.* § 63G-7-301(5)(g) (riots, mob violence, and civil disturbances); *id.* § 63G-7-301(5)(s) (emergency medical assistance, fire fighting, and regulating hazardous materials).

The Utah Supreme Court also noted in *Taylor* that sovereign immunity even applied where a plaintiff's injuries arose out of an assault by a non-government assailant. *See Taylor*, 927 P.2d at 164. The court stated that "[t]he Act and [the Utah Supreme Court's] prior decisions demand that the act be strictly applied to preserve sovereign immunity." *Id.* Hence, this Court strictly applies the Act.

This Court observes that sovereign immunity cases often seem unfair to plaintiffs who have suffered wrongs which could otherwise be righted against private parties. The Utah Supreme Court recognized this as well, in a case in which a school district was immunized from a suit arising out of the vicious beating of one of its students. *See Ledfors v. Emery County Sch. Dist.*, 849 P.2d 1162,

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<sup>1</sup> This statute is identical to U.C.A. § 63G-7-301(5)(c) (2008).

1162-63 (Utah 1993). The Supreme Court concluded its decision with this paragraph:

In reaching this decision, we are sympathetic to Richie's plight. It is unfortunate that any parent who is required by state law to send his or her child to school lacks a civil remedy against negligent school personnel who fail to assure the child's safety at school. Nevertheless, the legislature has spoken with clarity on the question of immunity, and we are constrained by the plain language of the Act and our prior case law on this point. However, as we stated in *O'Neal v. Division of Family Services*, "Certainly, the legislature is not so constrained as we." 821 P.2d 1139, 1145 (Utah 1991). It is entirely within the legislature's power to permit all plaintiffs to whom the government owes a duty of care based on a special relationship to bring suit for injuries arising out of a breach of that duty. Or the legislature could tailor the waiver of immunity more narrowly; the state could permit suit by or on behalf of public school children injured as a result of such a breach of duty. Its power to craft waivers of immunity is far superior to ours.

*Id.* at 1167.

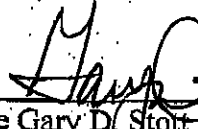
As in *Ledfors*, this Court sympathizes with Plaintiffs' heartbreaking situation. But, it is not within the authority of this Court to craft exceptions to exceptions on which the Legislature has spoken plainly and the Utah Supreme Court has interpreted broadly. True, the Legislature probably did not foresee that section 63G-7-301(5)(c) would one day be applied in a bizarre case involving a tragic bear attack. Nevertheless, this Court is "constrained by the plain language of the Act." And the relevant provision of the Act simply states that if the injury complained of arises out of or is connected with a failure to revoke a permit, approval or similar authorization, then the State is immune.

The State failed to revoke authorization for Plaintiffs to camp at their chosen site. Samuel Ives was killed by the bear at that camp site where, this Court assumes, Plaintiffs would not have camped had the State revoked authorization. Thus, the State is immune from any action based on

the injuries.

Therefore, the State's Motion for Judgment on the Pleadings is granted. Counsel for the Defendants shall prepare the appropriate order and submit it for this Court's signature.

Dated this 30 day of January, 2008.

  
Judge Gary D. Stott  
Fourth Judicial District Court



A certificate of mailing is on the following page.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 080401029 by the method and on the date specified.

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Dated this 2 day of February, 2009.

*Sumner*  
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