

2000

Reed Thornock, individually and as guardian for his minor daughter, Hanna Thornock, and as personal representative for the estate of Debra Thronock v. Daniel D. Christensen, M.D.; Wyeth-Ayerst Research Labs; University of Utah Medical Center; and, the State of Utah : Petition for Writ of Certiorari

Utah Supreme Court

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DOCKET NO. 20000180



IN THE UTAH SUPREME COURT

REED THORNOCK, individually and as guardian for his minor daughter, Hanna Thornock, and as personal representative for the estate of Debra Thornock

Plaintiffs,

vs.

DANIEL D. CHRISTENSEN, M.D.; WYETH-AYERST RESEARCH LABS; UNIVERSITY OF UTAH MEDICAL CENTER; and, THE STATE OF UTAH,

Defendants.

Case No. 981474-CA

20000180 -SC

Priority No. 15

PETITION FOR WRIT OF CERTIORARI

Appeal of the Decision of the Honorable Timothy Hanson Third Judicial District Court, Salt Lake County, Utah

Petition from Order of the Utah Court of Appeals, Judges Billings, Davis and Wilkins Affirming Decision of the Trial Court

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FILED

MAR 06 2000

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Pursuant to Utah R. App. P. 45, Plaintiff/Appellant Reed Thornock hereby petitions this Court for issuance of a writ of certiorari.

Questions Presented for Review

1. Whether the Limitation of a Therapist's Duty to Warn Act shields a pharmaceutical investigator from liability where that investigator is participating in a double-blind research study?
2. Whether Richard Dunn sufficiently distinguished himself from other patients as to represent a threat to a reasonably identifiable victim?

Court of Appeals Decision

The decision rendered by the Utah Court of Appeals is attached as Exhibit "A."

Statement of Jurisdiction

On February 3, 2000, the Utah Court of Appeals entered a decision affirming a grant of summary judgement by Judge Timothy Hanson in favor of Defendant/Appellees.

Jurisdiction of this Court is proper under Utah R. App. P. 45 and Utah Code Ann. § 78-2-2(5) (1999). This petition for certiorari is timely filed pursuant to Utah R. App. P. 48.

Statutes at Issue

Utah Code Ann. § 78-14a-101

Utah Code Ann. § 78-14a-102

True and correct copies of the foregoing statutes are attached as Exhibit "B."

Statement of the Case

A. Nature of the Case.

This is a wrongful death action and claim for injuries brought against Dr. Daniel D. Christensen, Wyeth-Ayerst Research Labs, University of Utah Medical Center, and, the State of Utah. The claims arise from the Defendant/Appellants' failure to conduct and control a pharmaceutical research program in a reasonably safe manner. Specifically, Defendant/Appellants removed Mr. Richard Dunn from his previously effective medication and enrolled him in an experimental drug program. As a part of the 'double-blind' study, Mr. Dunn was to either receive (1) the experimental drug, or (2) a placebo. In either case, Mr. Dunn's previously controlled obsessive compulsive disorder¹ ("OCD") returned within one week of his enrollment. As a result of his inability to function on an occupational level, Mr. Dunn lost control of his vehicle while returning from Bear Lake through Logan Canyon. Mr. Dunn's vehicle crossed the center line and struck Reed Thornock's vehicle head-on, killing his wife Deborah and seriously injuring his young daughter.

B. Course of the Proceedings and Disposition in the Lower Courts.

On February 2, 1998, Reed Thornock filed a Complaint against the Defendant/Appellees. (R. at 4). On March 2, 1998, Defendants filed their Answer. (R. at 11-15). Subsequently, on March 5, 1998, Defendants filed a Motion to Dismiss and

¹ OCD is defined as "[a]n anxiety disorder characterized by obsessions, compulsions, or both, that... interfere significantly with normal routine [and] occupational functioning." *American Psychiatric Glossary*, 143 (7th ed. 1994).

Memorandum in Support. (R. at 16-33). On April 22, 1998, Reed Thornock filed Memorandum in Opposition to Defendants' Motion to Dismiss. (R. at 42-52). Defendants then filed a Reply on May 13, 1998. (R. at 61-93).

Judge Timothy Hanson heard oral argument on the Motion to Dismiss on July 17, 1998. (R. at 106). Subsequently, Judge Hanson granted the Defendants' Motion to Dismiss finding that, as health care providers, Defendant/Appellees owed no duty of care to control the conduct of their test subjects. (R. at 107-110). Reed Thornock then filed a Notice of Appeal on August 13, 1998. (R. at 113-116). The appeal was poured over to the Utah Court of Appeals. The Utah Court of Appeals affirmed the trial court's dismissal of the case by written opinion filed on February 3, 2000.

Relevant Facts

1. Mr. Richard Dunn, a retired school principal, began treatment for depression, anxiety and obsessive compulsive disorder in June of 1992. (R. at p. 42).
2. Defendant Christensen is a psychiatrist. (Id.).
3. Mr. Dunn's care continued in 1993. Mr. Dunn remained depressed, anxious and compulsive. (Id.).
4. In January of 1995, Mr. Dunn was pursuing an LDS Mission outside the state of Utah and was sent home early from his mission due to an automobile accident. (Id. at 42-43).
5. By January, 1996, Mr. Dunn was out of control and potentially suicidal. (Id. at 43).
6. Mr. Dunn's severe depression and suffering from obsessive compulsive disorder required

- hospitalization for treatment from January 23 to January 30, 1996. (Id.).
7. Dr. Christensen discharged Mr. Dunn with instructions not to drive. (Id.).
 8. Gradually, over the next six months, on a stable medication regime, Mr. Dunn's condition began to stabilize and improve. (Id.).
 9. By July 2, 1996, the chart notes of Joseph Poteet, the Defendant's assistant, reflect that Mr. Dunn's depression had progressed from severe depression to a mild depression; Mr. Dunn no longer was having suicidal ideation; his anxiety and obsessive compulsive disorder had decreased; and, he was active in volunteer church duties. (Id.).
 10. Defendant Wyeth-Ayerst Reserach Labs was conducting an experimental drug study on the drug venlafaxine which showed potential for controlling severe depression. (Id. at 2).
 11. Defendant Christensen was in charge of the Wyeth-Ayerst experimental drug study at the University of Utah and screened and enrolled Mr. Dunn in the study. (Id.).
 12. Dr. Christensen enrolled Mr. Dunn in the experimental drug study on August 2, 1996. (Id. at 2)
 13. Because the study was double blind, whether Mr. Dunn was given either a placebo or the experimental medication is unknown. (Id. at 43).
 14. By August 9, 1996, Mr. Dunn's mental state had rapidly deteriorated. He was demonstrating markedly increased aggression; his depression was deepening; his sleep was no longer good; and, he refused to go to his volunteer jobs. (Id. at 2, 43).
 15. Mr. Dunn's adverse reaction to the investigational study resulted in a return to his prior emotional and cognitive dysfunction. (Id. at 43).
 16. Dr. Christensen's diagnosis was "markedly ill." (Id.).

17. Because of Mr. Dunn's severe reaction, the Defendant discussed with Mrs. Dunn the possibility of putting Mr. Dunn back in the hospital. (Id.).
18. Instead of hospitalizing or returning Mr. Dunn to his prior, successful medication, Defendants sent Mr. Dunn home with his wife. (Id. at 44).
19. On August 12, 1996, Mr. Dunn was taken to Bear Lake by his family. He insisted on driving home over Logan Canyon. His family assented. During the course of the drive home, he was involved in the high speed accident, which killed Reed's wife, Deborah, and seriously injured his daughter, Hanna Thornock.. (Id.).

ARGUMENT

I. WHETHER THE LIMITATION OF A THERAPIST'S DUTY SHIELDS PHARMACEUTICAL INVESTIGATORS FROM LIABILITY FOR THE HARMFUL EFFECTS OF THEIR EXPERIMENT PRESENTS AN IMPORTANT QUESTION OF STATE LAW.

Extending the limited duty owed by medical care providers to scientific researchers improperly broadens the definition of 'therapist' to protect parties wholly undeserving of the protection. The Utah Court of Appeals found that the Appellants in this case were shielded from liability for the death of Deborah Thornock and injury to Reed Thornock's daughter under case and statutory authority limiting the duty of therapists. Specifically, the court found a limited duty applied to Dr. Christensen and the others because "Appellant's wife and daughter were not victims who reasonably could have been identified by Appellees [therefore] Appellees had no duty protect Appellant's wife and daughter from Dunn." *Thornock v. Christensen, et. al.*, 2000 UT App 14, ¶ 4. Dr. Christensen, Wyeth-Ayerst and

the other Appellants were in the process of conducting a medical experiment, not engaged in the treatment of Mr. Dunn. Indeed, Mr. Dunn's condition became severely exacerbated under the experimental regimen. Clearly, no therapist or medical care provider would continue a 'treatment' which harmed the patient's well-being. Nonetheless, the Court of Appeals found "this factual distinction is legally irrelevant." *Id.* at ¶ 5. In so holding, the Court of Appeals conferred the benefit of a limited duty upon parties who were not acting, even remotely, as therapists.

It is well recognized within the field of psychotherapy that 'physicians' engaged in 'research' are not working to cure their patients. Rather, such investigators gain an enhanced reputation "increas[ed] prospects for promotion, tenure, salary increases, and other forms of recognition." David S. Schimmm and Roy G. Spece, Jr., *Conflicts of Interest and Informed Consent in Industry-Sponsored Clinical Trials*, 12 J. Legal Med. 477, 481-82 (1991). Additionally, the investigator receives a "cash payment often made in exchange for enrolling patients in pharmaceutical manufacturer-sponsored trials [which can yield] the investigator a windfall of \$75,000 to \$225,000 for a study enrolling 50 patients, and up to \$457,000 for a study enrolling 100 patients." *Id.*

Finally, "[i]nvestigators... are competing harder for a shrinking pool of peer-reviewed grant dollars. Contract work for pharmaceutical manufacturers therefore presents the investigator with an attractive alternative." *Id.* Therefore, "any investigator with an eye to the future knows that failure to fulfill a study quota will reduce the chances of obtaining

further funding from the manufacturer.” *Id.* Consequently, “[t]his situation is considered to represent an ethically suspect temptation to the investigator to transgress fiduciary obligations to the patient.” *Id.* “A dilemma confronts physician-investigators to the conduct of research with patient-subjects. As physicians, they are dedicated to caring for their patients, healing their pain, and reducing their suffering. As investigators, they are dedicated to caring for their research, advancing knowledge for the benefit of science and future patients.” Jay Katz, *Human Experimentation and Human Rights*, 38 St. Louis U. L.J. 7, 7-8 (1993).

In this case, Dr. Christensen and the others were clearly ‘dedicated to caring for their research’ and wholly uninterested in ‘caring for Mr. Dunn, healing his pain, and reducing his suffering.’ Specifically, Mr. Dunn’s debilitating occupational disorder, which kept him from functioning on a day-to-day basis, had been successfully treated by an FDA approved medication. Mr. Dunn had been going to church, participating in volunteer activities and resumed normal relations with those around him. Dr. Christensen then enrolled Mr. Dunn in the experimental treatment program. Dr. Christensen removed Mr. Dunn from his normal and effective medication. Mr. Dunn was then either (1) given a placebo or (2) given an experimental drug manufactured by Wyeth-Ayerst Labs. Within one week of his entrance into the program, Mr. Dunn once again became a victim of his psychological disorder, unable to make rational choices or focus on occupational activities.

Importantly, Dr. Christensen visited with Mr. Dunn three days before the fatal

accident. Dr. Christensen recognized the return of symptoms and knew Mr. Dunn had been involved in a prior auto accident. Additionally, Dr. Christensen knew Mr. Dunn was forced to return early from an LDS mission due to his condition. Indeed, Dr. Christensen was so alarmed by the return of symptoms that he considered hospitalization for observational purposes. Unfortunately, Dr. Christensen cared more for his research than for the well-being of his patient. Rather than restore Mr. Dunn's previously effective medication, Dr. Christensen unleashed his experiment on an unsuspecting and innocent public.

Clearly, Dr. Christensen, Wyeth-Ayerst and the other Appellants cannot possibly be entitled to protection under the Act or our case law where none of them provided 'treatment' of any sort. Put simply, the trial court and the Utah Court of Appeals conferred a statutory limitation of liability on undeserving individuals and corporations. The Court of Appeals decision creates a precedent under which future scientific explorers might also find shelter when their experiments go awry and injure members of the community. Whether such a precedent stands and becomes law is a question of paramount concern which must be fully addressed by this Court. *See*, Utah R. App. P. 46(a)(4) (1999).

II. MR. DUNN WAS REASONABLY IDENTIFIABLE AS A THREAT TO PARTIES EXPOSED TO HIS OCCUPATIONAL DISORDER.

Mr. Dunn distinguished himself from the other test subjects as a very specific threat. Arguably, the Therapist's Duty to Warn Act, Utah Code Ann. §78-14a-101, 102 (1999) is wholly inapplicable to Dr. Christensen in this case. Specifically, the Act applies to limit the duties of a therapist only with regard to "violent behavior." No allegation has ever existed

that Mr. Dunn acted ‘violently.’ Hence, the limited duty under a ‘special relationship’ of a therapist is the only applicable limitation of duty in this case.

A proper analysis under the case authority reveals that Mr. Dunn distinguished himself as a unique threat to identifiable victims. Relying on *Rollins v. Petersen*, 813 P.2d 1156 (Utah 1991) the Court of Appeals found no duty owed because “Dunn did not set himself apart in terms of dangerousness to [the Thornocks] any more than he did to other users of public roads.” *Thornock*, 2000 UT App 14, ¶ 4. In so holding, the Court of Appeals misconstrued this Court’s prior decisions. A mental health care provider owes a duty depending on whether he or she:

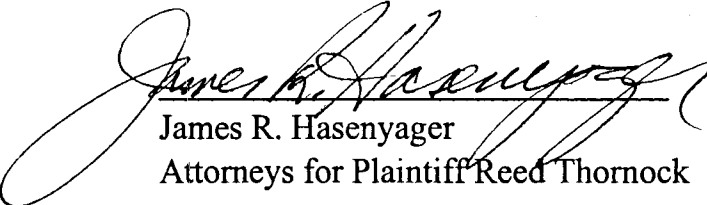
knew or should have known that unless steps were taken to protect others from the [patient], he or she was likely to cause bodily harm to persons who were reasonably identifiable... as members of a distinct group [and] [f]or a... group to be reasonably identifiable, the bodily harm caused will be of a type that the custodian knew or should have known the [patient] was likely to cause if not controlled.

Wilson v. Valley Mental Health, 939 P.2d 416, 420 (Utah 1998)(internal quotations and citations omitted). Dr. Christensen knew that the experimental program compromised Mr. Dunn’s ability to function on an occupational level. Dr. Christensen knew of Mr. Dunn’s prior auto accident. Hence, Dr. Christensen knew or should have known that Mr. Dunn posed a threat of bodily harm arising from operation of an automobile to members of a distinct group. Accordingly, Dr. Christensen’s failure to take steps to control or prevent Mr. Dunn from becoming involved in another accident violated his duty arising from his special relationship to Mr. Dunn.

CONCLUSION

Allowing the Court of Appeals and trial court to characterize Dr. Christensen and pharmaceutical investigators ignores that fact that “[b]asic biological research may create the potential for widespread, grave physical injuries.” Robert J. Levine, *Ethics and Regulation of Clinical Research*, p. 52 (2d ed. 1986). Pharmaceutical investigators pursuing scientific knowledge owe a duty to conduct their experiments in reasonably safe manner and should not receive protection under the limited duty afforded therapists who are treating their patients. Additionally, Mr. Dunn had sufficiently distinguished himself as a threat to the motoring public where Dr. Christensen knew of his prior auto accident and also knew that the experimental program severely compromised Mr. Dunn’s ability to function on an occupational level. Resolution of these issues represents an important question of state law previously undecided by this Court. Accordingly, it is respectfully requested that Reed Thornock’s Petition for Certiorari be granted on all of the issues for which review is sought.

DATED this 3 day of March, 2000.


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Certificate of Mailing

I hereby certify that on ____ day of March, 2000, I mailed postage pre-paid, first class, two true and correct copies of the foregoing to the following:

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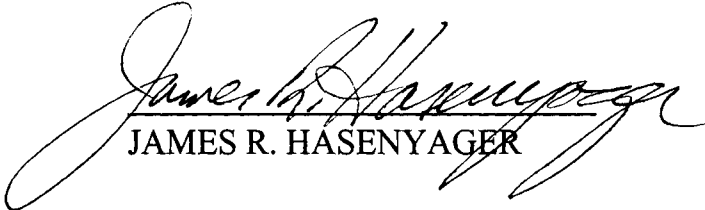

JAMES R. HASENYAGER

EXHIBIT "A"

FILED

FEB 03 2000

IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

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Reed Thornock, individually)
and as guardian for his minor)
daughter, Hanna Thornock, and)
as personal representative for)
the estate of Debra Thornock,)

Plaintiff and Appellant,)

v.)

Daniel D. Christensen, M.D.;)
Wyeth-Ayerst Research, a)
division of Wyeth)
Laboratories, Inc.; University)
of Utah Medical Center; and)
State of Utah,)

Defendants and Appellees.)

MEMORANDUM DECISION
(Not For Official Publication)

Case No. 981474-CA

F I L E D
(February 3, 2000)

[2000 UT App 014]

Third District, Salt Lake Department
The Honorable Timothy R. Hanson

Attorneys: James R. Hasenyager, Ogden, and Peter W. Summerill,
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Elliott J. Williams, Kurt M. Frankenburg, J. Anthony
Eyre, Terence L. Rooney, and David G. Williams, Salt
Lake City, for Appellees

Before Judges Billings, Davis, and Wilkins.¹

BILLINGS, Judge:

Reed Thornock appeals the trial court's dismissal of his complaint against Dr. Daniel D. Christensen, a psychiatrist, Wyeth Laboratories, Inc., and the University of Utah Medical Center (Appellees). Thornock's wife was killed and his daughter seriously injured when the car of Richard Dunn struck Thornock's car in Logan Canyon. At the time of the accident, Dunn was Dr.

1. Justice Wilkins heard the arguments in this case and participated in its resolution prior to his swearing-in as a member of the Utah Supreme Court.

Christensen's psychiatric patient and was also enrolled in a study supervised by Dr. Christensen to investigate a drug manufactured by Wyeth. Thornock's complaint alleges that Dr. Christensen negligently failed to hospitalize Dunn when Dunn was enrolled in the investigational drug study, and that Christensen's breach of duty caused the accident.²

To establish a claim for negligence, a plaintiff must show, as a threshold matter, that the defendant owed him a duty. See Ferree v. State, 784 P.2d 149, 151 (Utah 1989). In Utah, one has no duty to protect others from harm by a third party unless one has a special relationship to the third party or to a reasonably identifiable victim. See Wilson v. Valley Mental Health, 969 P.2d 416, 419-20 (Utah 1998); Higgins v. Salt Lake County, 855 P.2d 231, 236-37 (Utah 1993); Rollins v. Petersen, 813 P.2d 1156, 1159-60 (Utah 1991). Wilson, Higgins, and Rollins recognize that therapists and mental health institutions have a special relationship with--and thus a duty to protect--potential victims only when they know or should know³ that a third person presents a "likely danger to an individual or distinct group of individuals." Wilson, 969 P.2d at 420 (citing Higgins, 855 P.2d at 240).

In Rollins, the court found that the State Mental Hospital owed no duty to a motor vehicle accident victim who died after being struck in a head-on collision by an escaped inmate. See

2. The theory of recovery against the University of Utah Medical Center and Wyeth Laboratories is largely derivative of the claim against Dr. Christensen. We need not reach these claims as our holding precludes liability against all defendants.

3. In Wilson, the court acknowledged that Utah case law imposes a broader duty upon therapists than Utah Code Ann. § 78-14a-102(1) (1996). See Wilson, 969 P.2d at 420. Under the statute, therapists have a duty only when they have actual knowledge of a threat:

A therapist has no duty to warn or take precautions to provide protection from any violent behavior of his client or patient, except when that client or patient communicated to the therapist an actual threat of physical violence against a clearly identified or reasonably identifiable victim.

Utah Code Ann. § 78-14a-102(1) (1996). Under our case law, a therapist also has a duty when he "should have known" of a threat. Wilson, 969 P.2d at 420. In the present case, there is clearly no duty under the statute because no threat was communicated against an identifiable victim.

Rollins, 813 P.2d at 1162. The victim "was simply a member of the public, no more distinguishable to the hospital than to any other person. . . . [The escaped patient] had not set himself apart in terms of dangerousness to [the victim] personally or to any distinct group of which [the victim] was a member. Therefore, the hospital owed no duty to [the victim]." Id.

In the instant case, as in Rollins, Appellant's wife and daughter were not victims who reasonably could have been identified by Appellees. Dunn did not set himself apart in terms of dangerousness to them any more than he did to other users of public roads. We conclude that this case is indistinguishable from Rollins and hold that Appellees had no duty to protect Appellant's wife and daughter from Dunn.

We decline Appellant's invitation to distinguish this case from Wilson, Higgins, or Rollins based upon the distinction that Appellees were also engaged in an investigational drug study rather than solely in the standard diagnosis, treatment, and cure of an illness. We conclude this factual distinction is legally irrelevant. Accordingly, we hold that Appellees had no duty to the Thornocks, and affirm the trial court's dismissal of Thornock's complaint.

Judith M. Billings
Judith M. Billings, Judge

I CONCUR:

James Z. Davis
James Z. Davis, Judge

I CONCUR IN THE RESULT:

Michael J. Wilkins
Michael J. Wilkins, Judge

EXHIBIT "B"

TEXT

UTAH CODE, 1953

TITLE 78. JUDICIAL CODE

PART II. Actions, Venue, Limitation of Actions

CHAPTER 14a. LIMITATION OF THERAPIST'S DUTY TO WARN

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Current through End of 1999 General Session

78-14a-102 Limitation of therapist's duty to warn.

(1) A therapist has no duty to warn or take precautions to provide protection from any violent behavior of his client or patient, except when that client or patient communicated to the therapist an actual threat of physical violence against a clearly identified or reasonably identifiable victim. That duty shall be discharged if the therapist makes reasonable efforts to communicate the threat to the victim, and notifies a law enforcement officer or agency of the threat.

(2) No cause of action arises against a therapist for breach of trust or privilege, or for disclosure of confidential information, based on a therapist's communication of information to a third party in an effort to discharge his duty in accordance with Subsection (1).

(3) This section does not limit or effect a therapist's duty to report child abuse or neglect in accordance with Section 62A-4a-403.

CREDIT

History: C. 1953, 78-14a-102, enacted by L. 1988, ch. 89, s 2; 1994, ch. 260, s 124.

U.C.A. 1953 s 78-14a-102

UT ST s 78-14a-102

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UT ST s 78-14a-101

U.C.A. 1953 s 78-14a-101

TEXT

UTAH CODE, 1953

TITLE 78. JUDICIAL CODE

PART II. Actions, Venue, Limitation of Actions

CHAPTER 14a. LIMITATION OF THERAPIST'S DUTY TO WARN

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Current through End of 1999 General Session

78-14a-101 Definitions.

As used in this chapter, "therapist" means:

(1) a psychiatrist licensed to practice medicine under Section 58-67-301, Utah Medical Practice Act or under Section 58-68-301, Utah Osteopathic Medical Practice Act;

(2) a psychologist licensed to practice psychology under Section 58-61-301;

(3) a marriage and family therapist licensed to practice marriage and family therapy under Section 58-60-304;

(4) a social worker licensed to practice social work under Section 58-60-204; and

(5) a psychiatric and mental health nurse specialist licensed to practice advanced psychiatric nursing under Title 58, Chapter 31b.

CREDIT

History: C. 1953, 78-14a-101, enacted by L. 1988, ch. 89, s 1; 1989, ch. 42, s 15; 1996, ch. 248, s 57; 1999, ch. 21, s 106.

U.C.A. 1953 s 78-14a-101

UT ST s 78-14a-101

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UT ST s 78-14a-102

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