

1996

# Loni F. DeLand v. Uintah County : Reply Brief

Utah Court of Appeals

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## Recommended Citation

Reply Brief, *Loni F. DeLand v. Uintah County*, No. 960801 (Utah Court of Appeals, 1996).  
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**UTAH COURT OF APPEALS  
BRIEF**

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**IN THE UTAH COURT OF APPEALS**

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LONI F. DeLAND,	)	
	)	
Plaintiff/Appellant,	)	Case No. 960801-CA
	)	
vs.	)	Priority No. 15
	)	
UINTAH COUNTY,	)	
	)	
Defendant/Appellee.	)	

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**REPLY BRIEF OF APPELLANT**

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ON APPEAL FROM THE JUDGMENT OF THE EIGHTH JUDICIAL  
DISTRICT COURT OF UINTAH COUNTY, STATE OF UTAH  
THE HONORABLE JOHN R. ANDERSON, JUDGE

---

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MAY 22 1997

COURT OF APPEALS

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### **RESPONSE TO APPELLEE'S STATEMENT OF FACTS**

The county makes assertions on pages 6 and 7 of its appellee's brief to the effect that the criminal charges against Sheriff Meacham arose out of a contract between the United States Forest Service and Uintah County. Appellant, DeLand's, response in the trial court was that these assertions are immaterial.

The essential fact, as stated by DeLand below, is that "members of the Uintah County Sheriff's Department were engaged by Uintah County and paid through the Uintah County Treasurer to perform the work of peace officers. The fact that Uintah County had a separate contract with the Forest Service which reimbursed it for these or any such payments is immaterial to the issues presented in this litigation." (R. 233).

Moreover, the county's references on pages 6 and 7 of appellee's brief to the opening statement of the prosecution at the preliminary hearing of Sheriff Meacham constitutes scant evidence. (See references to R. 175). Nevertheless, assuming such factual assertions to be correct, Mr. DeLand asserts again on appeal that such evidence, even if not controverted, is immaterial to this litigation.

### **SUMMARY OF ARGUMENT**

I. Reimbursement of defense costs is appropriate with respect to each count of an information which is dismissed.

Nothing within the plain language of § 63-30a-2, U.C.A., requires "complete dismissal" of a multi-count information in order to call for reimbursement. The more sensible and fair interpretation is to provide for reimbursement of attorney's fees, as may be determined, for each count dismissed. The fact that more than one count may be joined as part of a "single criminal episode" is irrelevant. The case cited by the County for illumination of legislative history, Hulbert v. State, 607 P.2d 1217 (Utah 1980), is of no precedential value, as all charges against Hulbert were dismissed. There is no authority for the county's argument that "complete vindication" by dismissal of all counts of a multi-count information is required by § 63-30a-2, U.C.A. As to those counts which are dismissed there is complete vindication and reimbursement of defense costs should be provided.

**II. The information was filed against Sheriff Meacham in connection with or arising out of an act or omission of Sheriff Meacham during the performance of his duties, within the scope of his employment or under color of his authority.**

The county seems to be arguing that if Sheriff Meacham committed any illegal act, he was not acting within the course of employment. Appellant's position is that but for the fact that the information alleged acts or omissions in connection with the course and scope of his employment, or under color of authority, Sheriff Meacham would not have been charged with

felony misuse of public moneys. The allegations themselves require that he be a "public officer" and such charges could not otherwise arise but under color of authority. The fact that the charges were unfounded and dismissed do not alter the fact that he was a public officer and was charged as a result thereof and therefore charged "in connection" with alleged acts or omissions occurring under color of authority. The reimbursement statute is therefore satisfied.

#### **ARGUMENT**

##### **POINT I**

**THE DISTRICT COURT ERRED IN NOT ALLOWING ATTORNEY'S FEES WITH RESPECT TO CHARGES DISMISSED AGAINST SHERIFF MEACHAM.**

A. The plain language of § 63-30a-2, U.C.A., does not require complete dismissal of a multi-count information in order to trigger reimbursement.

Both appellant and appellee agree on the law in Utah with regard to statutory construction. The primary objective of courts in interpreting the plain language of a legislative enactment is to give effect to the legislature's intent. State Farm Mut. Auto Ins. Co. v. Clyde, 920 P.2d 1183, 1186 (Utah 1996).

The legislature in its enactment of § 63-30a-2, U.C.A., said nothing with respect to situations giving rise to multi-count informations, nor did it attempt to formulate any theories of possible recovery wherein the charges brought



arose from a "single criminal episode." The statute simply does not specifically address itself to multi-count informations.

That fact however does not preclude a logical, sensible interpretation, within the plain meaning of the statute, that where multiple offenses are alleged in a multi-count information, the public employee is entitled to recover attorney's fees regarding the counts, "informations" as it were, which are dismissed or result in acquittal. As used in § 63-30a-2, U.C.A., for purposes of multi-count informations, the word "information" means in effect each count of the information. The reimbursement statute is as much or more amenable to this interpretation as to that which the county urges.

Uintah County's analysis along the lines of "single criminal episode" is more confusing than helpful. Appellee's position, by interjecting the "single criminal episode" concept, is a red herring and fosters a reading of the statute which the legislature clearly did not intend. The county's argument is that if a public employee is charged with many counts related to a single criminal episode, required to be filed in a single document, that document being entitled an "Information", no matter how meritorious the public employee's defense of all counts, save perhaps one, if all other counts are dismissed save the one, the public employee should not

recover attorney's fees for all the others which were dismissed. Such construction renders the statute "unreasonably confused, inoperable, or in blatant contravention of the express purpose of the statute." State Farm Mut. Auto. Ins. Co. v. Clyde, supra, at 1186.

The central fact which should be borne in mind relative to dismissed counts is that the accused, as a matter of law and common sense, did not commit the offense alleged. This is what the court in the criminal matter involving Sheriff Meacham ruled in dismissing the misuse of public money felony counts: he did not commit this offense. The acts or omissions giving rise to this offense did not take place; that is why it was dismissed. The legal status of the dismissed charge is no different where it is one count of many, than it would be as a separate free standing one count information.

So, whether the allegation was one of several arising from a "single criminal episode" or was one of several which did not, the fact remains: Sheriff Meacham did not commit the felony crimes alleged. There was no factual support to find him guilty. That is why they were dismissed. That is why he is entitled to reimbursement for his defense of these dismissed charges.

**B. The legislative history of § 63-30a-2, U.C.A., demonstrates a legislative intent to reimburse a public employee's legal fees when he has prevailed.**

The county goes to great length to somehow establish that Hulbert v. State, 607 P.2d 1217 (Utah 1980), should be applied prospectively in some fashion because "the court in Hulbert noted that 'the result of this vigorous defense was the exoneration of plaintiff on all 12 indictments.'". (Appellee's Brief, p. 16) This clarifies nothing. Had Mr. Hulbert been charged in a single indictment with 12 separate counts, all of which he was acquitted, the result no doubt would have been the same.

Had Mr. Hulbert been convicted on one of the indictments, would the Supreme Court still have applied § 63-30a-2, U.C.A., retroactively? It would be speculation to assert that the court would or would not have done so based on the decision in Hulbert. Likewise, had Mr. Hulbert been charged in 12 counts joined in a single information, all but one of which were dismissed, it would be equally speculative to attempt to guess what the court would have ruled as Hulbert does not address the issue at all. Thus, Hulbert v. State has dubious precedential value to the case at hand.

The county also attempts to engraft sections of the public employees civil reimbursement statutes, § 63-30-36 and § 63-30-37, U.C.A., onto the criminal reimbursement statute, § 63-30-a-2, U.C.A. The two statutory schemes are apples and oranges. They deal with separate and distinct circumstances.

For example, under Chapter 30 the civil employee is not entitled to be provided a defense, or reimbursement for a defense if the entity refuses to defend, if the injury or damage resulted from fraud or malice of the employee (§ 63-30-36(3)(b), U.C.A.) or resulted from injury or damage on which the claim resulted from the employee driving under the influence of alcohol or controlled substances (§ 63-30-36(3)(c), U.C.A.).

Chapter 30a with respect to reimbursement of legal fees and costs to officers and employees has no similar limitations or restrictions. Chapter 30a deals with charges of criminal behavior and only if the public employee obtains a dismissal or acquittal may he recover. The two enactments deal with separate and distinct circumstances. Confusion can only result from attempting a comparison, drawing conclusions from, or engrafting portions of one upon the other. Extrapolating from what is said in the civil reimbursement statute to explain whatever the county feels should have been, but clearly was not, stated in the criminal reimbursement statute is more confusing than helpful.

The appellee's statement that it "would be unfair to allow Meacham reimbursement of his defense fees . . . when another county employee sued civilly because of fraudulent conduct, would not be allowed a defense at government expense." (Appellee's Brief, p. 17). First this statement

begs the questions of whether or not Mr. Meacham might not have been entitled to legal counsel and/or reimbursement for a defense of the particular charges under hypothetical circumstances.

The felony charges were dismissed. So if a civil complaint containing like charges were likewise dismissed, why should he not be entitled to his attorney's fees? Moreover, assuming arguendo that he might be denied his fees in such a civil situation, that does not mean, under the separate criminal reimbursement statute, that it would be "unfair" to pay for a criminal defense. There is no realistic or helpful comparison between the two statutory schemes.

The appellee cannot logically justify its statement that "[T]he legislative changes in 1987 [to the civil reimbursement statute] further limiting the situation when a governmental entity is required to defend an employee, support the narrow interpretation the trial judge made of § 63-30a-2. . . ." (Appellee's Brief, p. 17). It is difficult to understand in any sense how changes made to another statute, the civil reimbursement statute, could in any way effect the interpretation of the criminal reimbursement statute.

Similar alterations could arguably have been made by the legislature to the criminal reimbursement statute, but specifically were not. No reference to the changes made in the civil reimbursement scheme was made by the legislature to

or from the criminal reimbursement statute. They are two distinct and separate statutes in substance and comparisons of the sort encouraged by the county can only result in confusion. The better argument is that since the legislature did not make similar changes to the criminal reimbursement statute, the legislature specifically intended no such changes to apply to it.

**C. The criminal reimbursement statute does not require a blanket "vindication".**

The county cites the plurality opinion in Salmon v. Davis County, 916 P.2d 890 (Utah 1996), for the proposition that there must be complete vindication (in the sense of having all counts of a multi-count indictment dismissed) of the public employee otherwise recovery may not be had. Nowhere in Salmon's various opinions does such a statement or proposition appear.

The facts in Salmon are that the defendant Salmon, a Davis County deputy sheriff was charged with two counts of assault. "Both counts arose out of actions allegedly taken by Salmon in the course of his employment." It is not entirely clear whether there were two counts filed in one information or actually two informations. (See Justice Durham's recitation of facts, Salmon at 891). At any rate, Salmon prevailed on each count and sued for attorney's fees.

Nowhere in any of the plurality opinion is there any

statement to the effect that if Mr. Salmon had not prevailed on one of the informations, or one of the counts, that he should not be entitled to attorney's fees on the other. Complete vindication of the employee as a good person in a global sense is not necessary. Neither is it necessary in this particular situation involving Sheriff Meacham.

As to the three felony counts against Sheriff Meacham which were dismissed upon motion of Mr. DeLand, he was completely vindicated. Reimbursement for his attorney's fees should consequently be allowed.

#### POINT II

**THE INFORMATION WAS FILED AGAINST SHERIFF MEACHAM IN CONNECTION WITH OR ARISING OUT OF AN ACT OR OMISSION OF SHERIFF MEACHAM DURING THE PERFORMANCE OF HIS DUTIES, WITHIN THE SCOPE OF HIS EMPLOYMENT OR UNDER COLOR OF HIS AUTHORITY.**

But for the fact that Sheriff Meacham was a public official the unfounded felony allegations could not have been leveled against him. The felony section he was criminally charged under, § 76-8-404, U.C.A., focuses its attention on "any public officer who shall make a profit out of public monies . . . ." The court in Meacham's criminal case ruled that he did not commit this offense as a matter of law and dismissed.

A reasonable interpretation of § 63-30a-2, U.C.A., would certainly be that if the allegations direct themselves to acts or omissions in connection with or arising out of performance

of duty, scope of employment or color of authority, the public employee is entitled to be reimbursed defense costs upon dismissal or acquittal. The facts of Salmon v. Davis Co., *supra*, fully bear this out.

When a public officer, after having been acquitted of a criminal charge comes before the court to ask for reimbursement, it is because he has won the case, *i.e.*, for one reason or another he is "vindicated" of the allegations lodged against him. Under one interpretation of the county's argument, the accused officer or employee would often be put in the position of having to prove his guilt with respect to the criminal allegations which had been dismissed by showing he committed the act alleged as a prerequisite to reimbursement. The argument being that if he didn't commit the act, it wasn't in the course of employment. This is, of course, an untenable position. Mr. Salmon, for instance, didn't commit assault, but the Supreme Court allowed his fees nonetheless. Salmon v. Davis Co., *supra*.

The allegations in the felony matters charged against Sheriff Meacham set forth acts which were at the very least committed under color of authority. In Nielson v. Gurley, 888 P.2d 130 (Ut. App. 1994), the appellate court described a failure of Officer Gurley to comply with regulations pertaining to any peace officer or special function officer as conduct that Gurley engaged in while in the performance of his



duties as a state employee and done under color of that authority. 888 P.2d at 134. Gurley recognized that failing to do what is required by the job can be an act or omission occurring under color of authority.

Color of authority is defined as "that semblance or presumption of authority sustaining the acts of a public officer which is derived from his apparent title to the office . . . ." Black's Law Dictionary, Abridged 5th Edition.

The statement of facts set forth by the county evince a course of action on the part of Sheriff Meacham, i.e., the submittal of time cards for the purpose of being paid by his employer, although more than he was entitled, which was clearly "in connection with" the performance of his duty and under color of his authority. Factually and legally, the acts or omissions of the sheriff in working for Uintah County as a public officer and accepting monies on its payroll or submitting time sheets for monies from the county treasurer as a public officer, were acts or omissions "in connection with or arising out of" his duties, employment, or under color of his authority as alleged in each of the felony counts.

The fact that these acts may have been fraudulent does not thereby exclude them from being under color of authority. It has been specifically recognized that a public employee may participate in fraudulent acts within the scope of employment or under color of authority. For example, under the

governmental immunity act, § 63-30-4, U.C.A., a plaintiff may not bring or pursue a civil action or proceeding against the employee of a governmental entity unless the employee acted or failed to act through fraud or malice in the course and scope of his employment. § 63-30-4(3)(b)(i), U.C.A. See, Ross v. Schackel, 920 P.2d 1159, 1160, 1161-1162 & 1176 (Utah 1996); Baker v. Angus, 910 P.2d 427, ftn. 4 (Ct. App. 1996); DeBry v. Noble, 889 P.2d 428, 442-443 (Utah 1995). If a fraudulent act of an employee, solely by virtue of the fraudulence, excluded it from being within the course and scope of employment, performance of duties, or under color of authority, this Utah statute and case law construing it would undoubtedly have so indicated.

What Sheriff Meacham was accused of doing was profiting from public moneys under § 76-8-402, U.C.A. These felonies were dismissed. He did not commit these offenses. Had he done so, it would have been as a result of his office; it could not be otherwise. The county's argument that it was an ultra vires act is illogical in the context of the criminal reimbursement statute and would yield a result where no public employee or official could ever obtain reimbursement, viz., Mr. Salmon's alleged assault in Salmon v. Davis Co., supra.

The county's position that what Sheriff Meacham did or was alleged to have done was not in connection with or arising out of the performance of his duty, in the course and scope of

his employment, or under color of authority would clearly have excluded Mr. Salmon in Salmon v. Davis Co., *supra*, from reimbursement of his attorney's fees, because assault is not an act done in the course and scope of employment. Again, the county continues to overlook the fact that Meacham obtained a dismissal. He did not commit the offense.

If Sheriff Meacham had not allegedly been doing or failing to do something under color of his authority, or in connection with or arising out of the scope of his employment or the performance of his duties for Uintah County he would not have been charged under § 76-8-404, U.C.A. This should be sufficient to trigger the requirement of reimbursement once the Information is dismissed.

Uintah County's argument is circular and contradictory. The county argues in essence that if the public employee is not convicted of the act charging him with violation arising under color of authority, then he could not have been acting under color of authority. It seems to be that only if Sheriff Meacham were convicted of the felony misuse of public monies, pursuant to the statute under which he was charged, could it be said then that he acted in connection with the performance of his duty, within the scope of his employment, or under color of authority. If he did not commit this crime, he did not so act. Yet the county maintains, if he did commit a crime, any crime, since what he did do was illegal, it could

not have been within the scope of employment, in the performance of duty, or under color of authority. This is a catch-22.

The felony charges which were dismissed required as a premise that the individual be a public officer and that he profit as a result thereof. By definition the alleged crime would at least have to be committed under color of authority. It could occur in no other way.

The examples appellee cites, Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989), and J.H. by D.H. v. West Valley City, 840 P.2d 115 (Utah 1992), are inapposite. In both of these cases sexual abuse was the underlying offense committed by the public employee. Sheriff Meacham was not charged with any such thing so remote and removed from his employment. He was charged with profiting from his public employment, and by virtue of his public office. Those charges were dismissed. Nevertheless, but for the alleged acts in connection with the performance of his duty, scope of his employment, or color of his authority as a Uintah County Sheriff's Department officer, he could not and no doubt would not have been charged.

#### CONCLUSION

Mr. DeLand should be reimbursed for the attorney's fees incurred by Sheriff Meacham pursuant to the assignment. The trial court should be reversed and this court should determine the further attorney's fees which Mr. DeLand is entitled to

for the necessity of bringing this appeal pursuant to Salmon  
v. Davis County, supra.

RESPECTFULLY SUBMITTED this 22 day of May, 1997.

  
HERSCHEL BULLEN  
Attorney for Appellant

**CERTIFICATE OF MAILING**

I hereby certify that on the 22 day of May, 1997, I  
caused to be served two (2) true and accurate copies of the  
foregoing Reply Brief of Appellant by mailing same, postage  
prepaid, to:

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By: 