

2009

# Kevan Francis v. The State of Utah : Reply Brief

Utah Court of Appeals

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Peggy E. Stone; assistant attorney general; attorney for appellees.

Allen K. Young; Young, Kester and Petro; Jonah Orlosfsky; attorneys for appellants.

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IN THE UTAH SUPREME COURT

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KEVAN FRANCIS, et al.,

Plaintiffs-Appellants,

vs.

THE STATE OF UTAH, et al.,

Defendants-Appellees.

:  
:  
: **REPLY BRIEF OF**  
: **PLAINTIFFS-APPELLANTS**  
:

:  
: No. 20090256  
:

:  
: Oral argument requested  
:

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Appeal from the Judgment of the Fourth Judicial District Court,  
Utah County  
The Honorable Gary D. Stott, District Court Judge, Presiding  
District Court Case No. 080401029

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Peggy E. Stone  
Assistant Utah Attorney General  
P.O. Box 140856  
160 East 300 South, 6th Floor  
Salt Lake City, Utah 84114-0856

Attorney for Defendants-Appellees

Allen K. Young  
YOUNG KESTER & PETRO  
75 South 300 West  
Provo, Utah 84601

Jonah Orlofsky  
LAW OFFICES OF JONAH ORLOFSKY  
122 South Michigan Ave., Suite 1850  
Chicago, Illinois 60603

Attorneys for Plaintiffs-Appellants

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Peggy E. Stone  
Assistant Utah Attorney General  
P.O. Box 140856  
160 East 300 South, 6th Floor  
Salt Lake City, Utah 84114-0856

Attorney for Defendants-Appellees

Allen K. Young  
YOUNG KESTER & PETRO  
75 South 300 West  
Provo, Utah 84601

Jonah Orlofsky  
LAW OFFICES OF JONAH ORLOFSKY  
122 South Michigan Ave., Suite 1850  
Chicago, Illinois 60603

Attorneys for Plaintiffs-Appellants

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## **INTRODUCTION**

Two important points emerge from the State's Brief. First, the State has largely abandoned the District Court's decision. Two of the State's three arguments on appeal – the lack of a duty – and the “natural causes” exception to the Immunity Act – are, by the State's own admission, entirely new arguments presented for the first time on appeal.

Second, the State does not dispute, for the purposes of this appeal, the District Court's statement that the State “did not follow [its] internal regulation.” This is not a case, therefore, where the State's failed to protect the public from a general risk of wildlife attack. Rather, the State enacted a specific regulation setting out what was required in this kind of situation, and it failed to follow its own standard of care.

## **ARGUMENT**

### **Preliminary Note On The State's Regulation**

The State suggests that the black bear incident regulation quoted in the District Court's Opinion is “not part of the record.” (State Br. at 13, n.3) The entire regulation was handed to the District Court judge during oral argument (R000112), but never made an exhibit. The entire regulation, therefore, is not formally part of the record, but the relevant portions were read into the record in open court (R000112), and the portion most relevant to the issues on appeal was quoted by the District Court in its Opinion. (Op. at Add. 7-8) All of the relevant portions of the regulation, therefore, are part of the record.

## **I. The State Owed Plaintiffs And Their Son A Duty Of Care**

In *Webb v. University of Utah*, 125 P.3d 906 (Utah 2005), the Court thoroughly analyzed the question of when the State owes a duty to a citizen sufficient to support a tort claim. The Court held that there must be a “special relationship” between the State and the plaintiff that goes beyond the duty the government owes to the public at large. Then, citing its prior decision in *Day v. State*, 980 P. 2d 1171 (Utah 1999), the Court held that a special relationship can be established in at least four circumstances (*Id.* at 912):

A special relationship can be established (1) by a statute intended to protect a specific class of persons of which the plaintiff is a member from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and (4) under certain circumstances, when the agency has actual custody of the plaintiff or of a third person who causes harm to the plaintiff.

The first two circumstances are present here. With respect to the first, the State’s internal regulation required it to clear the campsite of attractants – campers are attractants – until the bear had been dealt with. This regulation, therefore, was intended to protect a specific class of persons – individuals seeking to use the campsite in the period between the first attack and the time the bear was destroyed – from a particular type of harm – an attack by a Level III bear. Although the *Webb* decision refers to statutes intended to protect specific people, the courts traditionally afford regulations the same impact as statutes in determining tort duties. *E.g.*, *Slisze v. Stanley-Bostitch*, 979 P.2d 317, 321 (Utah 1999) (“In determining the appropriate standard of conduct, the Restatement permits courts to adopt the standard from a legislative enactment or an administrative



regulation”). The State’s internal regulation, therefore, created the necessary special relationship between the State and Plaintiffs.

The second listed circumstance is also applicable, because the State undertook specific action to protect people who might seek to use the campsite. It is undisputed the State attempted to track and kill the bear. The State also admitted in its Answer that it checked on the campsite in question when terminating the search. (R000029) While the State failed to post a notice for those who might arrive later, there can be no denying that the State undertook specific actions to protect campers at that campsite.

The facts pled in the Complaint, therefore, establish the necessary special relationship under two of the four circumstances stated in *Webb*. This would be a different situation were Plaintiffs contending that the State did not do enough to protect the public from bears in general. Such a claim might lack the necessary special relationship. Here, however, the essence of the claim is that the State had a specific regulation that it failed to comply with, and that the State undertook actions intended to protect the specific individuals who might use the campsite.

All of the allegedly contrary authority cited by the State is not on point. The State first cites authority for the propositions that the owner of a land is not liable for harm done by wild animals (State Br. at 9), and that the State’s statutory ownership of wildlife creates no duty. (State Br. at 10). These principles, however, are irrelevant, because Plaintiffs are not asserting a duty based on landownership or statutory ownership of wildlife. The State’s duty arises out of the fact that the State undertook, through its regulation, the joint responsibility with the federal government specifically to manage

problem black bears: “By memorandum of understanding, the Division and the Wildlife Services have agreed to share the responsibility for handling nuisance and depredating black bear incidents....” (R000112)

Next, the State cites several cases for the proposition that governments are not liable for a failure to control wildlife. (State Br. at 11) These cases, however, involve the general risk of wildlife, which is not the situation here. For example, in the case the State considers the most factually similar, *Gadd v. United States*, 971 F.Supp. 502 (D.Utah 1997), a camper was severely injured by a bear attack in a U.S. Forest. The Plaintiff alleged that the injury was due to negligence in the government’s general management of that national forest. There had been no prior attacks in the area, nor was there any reason to suspect such an attack, apart from the generalized risks that bears present. The court ruled that the federal government was immune from suit, but carefully noted that there had been no danger associated with the site of the attack:

Therefore, where a hazard such as bears, ***is not a known natural hazard directly associated with a particular site***, the decision whether to post warning signs would be discretionary. *Id.* at 508; emphasis added.

In contrast to the cases cited by the State, the Alaskan Supreme Court reviewed the relevant case law on state liability for animal attacks and concluded:

The few cases that have considered similar facts, however, appear to agree that, if a landowner knows that a wild animal is creating a dangerous situation on his property, he has a duty either to remove the danger or to warn the people who may be threatened by the danger.

*Carlson v. Alaska*, 598 P.2d 969, 974 (Alaska 1979).

## **II. The Permit Exception Does Not Apply**

### **A. No “Permit” or “Order” was Involved**

The State vacillates between arguing that Section 301(5)(c) is triggered because this claim involves a failure by the federal government to issue an “order” closing the campground, or alternatively, the claim involves the failure to revoke an “authorization” to use the campground. We will separately examine these two arguments. For either argument, the State bears the burden of proof, because governmental immunity is an affirmative defense. *Buckner v. Kennard*, 99 P.3d 842, 851 (Utah 2004).

#### **1. There was no failure to issue an “order.”**

The State argues that for the federal government to close the campsite while the bear was being hunted, it would have had to issue a “formal closure order” under 36 C.F.R. § 261.50(a). (State Brief at 20) The Complaint, however, does not allege that the Forest Service would or should have issued such an order. Consequently, the State bases its argument on the following federal regulation, which empowers U.S. Forest Service officials to issue formal written orders closing or restricting access to federal land:

The Chief, each Regional Forester, each Experiment Station Director, the Administrator of the Lake Tahoe Basin Management Unit and each Forest Supervisor may issue orders which close or restrict the use of described areas within the area over which he has jurisdiction. An order may close an area to entry or may restrict the use of an area by applying any or all of the prohibitions authorized in this subpart or any portion thereof. (36 C.F.R. § 261.50(a))

As a threshold matter, the State bears the burden of proof that the “order” provision of the Act applies, and the citation of this section does not satisfy that burden.

The fact that the federal officials have the power to issue written orders does not prove that an order was required or appropriate in this situation.

More fundamentally, the cited federal regulation concerns the issuance of formal, written orders for long-term policies concerning an area of federal land. The orders contemplated by this section are not appropriate for the kind of immediate steps that were necessary to quickly ensure no campers used the campsite in question until the bear had been eliminated. In these kinds of situations, campers need quick notice of the danger, and the need to stay away from the campsite will not likely last more than a day or two, until the bear is located and dealt with.

The inapplicability of the formal written orders contemplated by this regulation can be seen by looking at the procedures involved in issuing such an order (261.50(c)):

(c) Each order shall:

- (1) For orders issued under paragraph (a) of this section, describe the area to which the order applies;
- (2) For orders issued under paragraph (b) of this section, describe the road or trail to which the order applies;
- (3) Specify the times during which the prohibitions apply if applied only during limited times;
- (4) State each prohibition which is applied; and
- (5) Be posted in accordance with Sec. 261.51.

The last section requires posting in accordance with Sec. 261.51, which provides:

Posting is accomplished by:

- (a) Placing a copy of the order imposing each prohibition in the offices of the Forest Supervisor and District Ranger, or equivalent officer who have jurisdiction over the lands affected by the order, and

(b) Displaying each prohibition imposed by an order in such locations and manner as to reasonably bring the prohibition to the attention of the public.

The bureaucratic machinery contemplated by this Section has no application to a situation such as the presence of Level III bear, anymore than it would the danger presented by the escape of a violent criminal or a traffic accident. By the time the Forest Service would have drafted a written order and posted it in compliance with the requirements of these provisions, the bear could have killed multiple campers.<sup>1</sup>

The State's argument that a formal order was required illustrates the State's attempt to over expand the language of Section 301(5)(c) of the Immunity Act. As Plaintiffs demonstrated in their initial Brief, the language "permit, license, certificate, approval, order or similar authorization" refers to instances in which the government is given the authority to make a deliberative decision as to who gets to undertake a regulated activity, based on statutory or administrative criterion. The kind of deliberative process, which results in the issuance of a formal, written order, does not apply to the facts of this case, which is nothing more than a brief closure of a campsite while a particular danger was being eliminated. This has nothing to do with the kind of process the government must go through in deciding whether to issue a license, permit or similar authorization.

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<sup>1</sup> Plaintiffs provided the District Court an example (R 00052) of an "order" issued by the federal Forest Service for the Uinta National Forest pursuant to 36 C.F.R. 261.50(a). The order closes a number of trails for an indefinite period of time until the completion of a construction project that will set a new waterline in Slate Canyon. The Order was duly published on May 30, 2006, and posted in the required manner.

**2. There was no “authorization” to revoke.**

The State next argues that:

“Once the public pays the entrance fee, the federal government gives its authorization, albeit implicit, to stay in the area and hike, picnic, or camp. That authorization is sufficient to fall within the permit exception. (State’s Br. at 20)

There are multiple problems with this argument. First, there is no evidence in the record that Plaintiffs paid a fee to use the campsite.<sup>2</sup> The State cites a provision of the Code of Federal Regulations, 36 C.F.R. §261.17 (incorrectly cited as “§ 261.15”), which makes it unlawful to fail to pay a required fee. (State Br. at 20) That, however, does not establish that an entrance fee was paid or required. Indeed, the only relevant evidence in the record is the State’s admission that the campsite in question was an “unimproved” campsite (00030), which suggests no fee was paid to use that campsite.

The more fundamental problem with this argument, however, is that payment of an entrance fee (if one was paid) would not constitute a license, permit or similar authorization under Section 301(5)(c). The Act does not contain an exception to the waiver of immunity for claims arising out of situations in which the government charges a fee, and charging a fee is not the same as issuing a permit, license or similar kind of authorization. The State is attempting to add a new category that is not in the Act.

A fee is collected when the State decides to charge for an activity. A fee can be charged in conjunction with issuing a permit, license, or authorization, but it can also be charged in situations where there is no permit, license or similar authorization required.

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<sup>2</sup> The case was dismissed pursuant to the State’s Motion for Judgment on the Pleadings, so the payment of a fee would have to appear in the Complaint or Answer.

County recorders can charge a fee for providing copies of documents. Utah Code Ann. §17-21-18.5. The Utah Code broadly allows counties to charge fees for services provided by various county officers. *State v. Kearns*, 153 P.3d 731, 735-36 (Utah App. 2006). In these situations, there is no permit, license or similar authorization involved; the government is simply charging a fee for providing a service.

The assumption underlying the State’s argument is that if you pay a fee for an activity, you have been implicitly “authorized” to undertake that activity.<sup>3</sup> There is no basis for this assumption. Paying a fee is paying a required charge; it does not involve the government deciding whether you qualify to undertake an activity.

The State’s proposed interpretation of the term “authorization” ignores the fact that the Act provides immunity for claims arising out of the issuance or failure to revoke any “permit, license, certificate, approval, order, *or similar* authorization.” (§301(5)(c); emphasis added.) The Act does not apply to anything that might colloquially be referred to as an authorization, but only authorizations that are similar to the issuance of a permit, license, certificate, approval, or order.

As Plaintiffs showed in their initial brief, the unifying trait in these terms is that they refer to situations where the State must make a determination as to whether an individual qualifies to undertake a regulated activity. Since the State makes no claim here that any decision was made that Plaintiffs qualified to camp at the campsite in question, there is no basis for applying Section 301(5)(c).

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<sup>3</sup> “Once the public pays the entrance fee, the federal government gives its authorization, *albeit implicit*, to stay in the area and hike, picnic, or camp.” (State Br. at 20; emphasis added)

The State tries to argue that the terms permit, license, certificate, approval and order are not limited to such situations, but its examples do not support its argument. The State's first example is a fishing license. While fishing licenses have very few requirements, there are age and residence requirements for the various kinds of fishing licenses. [http://wildlife.utah.gov/licenses/license\\_fees.php](http://wildlife.utah.gov/licenses/license_fees.php). However minimal, the State is not merely charging a fee, but determining whether you qualify for the particular license you choose to purchase.

The State next points out that for birth certificates, one does not have to "qualify" to be born. The purpose of a birth certificate, however, is the creation of a record that certifies the true facts relating to a birth, and, as the State concedes, a birth certificate will not be issued unless it meets a very long list of requirements. Utah Code Ann. §26-2-5. Thus, the State does, in fact, determine what qualifies as a valid birth certificate, pursuant to a long list of qualifications.

The State then points to the permits issued by Utah County for an event, such as a race, that requires the use of a county road. While the State claims that no qualifications except payment of a fee are required (State Br. at 21), this is incorrect. The County ordinance provides that: "Prior to issuance of the event permit, the application shall be approved by the Utah County Public Works Department, the Utah County Sheriff's Office, and the Utah County Attorney's Office as necessary." Utah County Code § 12-8-2-(c). Thus, contrary to what the State suggests, one has to run a gauntlet of approval before obtaining such a permit.



Finally, the State claims that this Court examined a certificate that is issued without the need to meet any qualifications. The case is *Metropolitan Fin. Co. v. State*, 714, P.2d 293 (Utah 1986), and the certificate that is purportedly issued without looking at qualifications is a certificate of title for an automobile. In fact, the relevant section of the Utah code lists a host of qualifications that the owner must meet before a car can be properly registered. Utah Code Ann. § 41-1a-203(1). The certificate of title at issue in *Metropolitan Fin. Co.* is a document whereby the State certifies that a car is duly registered to a particular individual, and it can only be issued if the State has found that a person meets all the qualifications to register an automobile.

The State's "examples," therefore, confirm that permits, certificates, licenses orders and approvals involve situations in which the State has to determine whether someone meets the qualifications to undertake a regulated activity. The term "authorization" only applies to approvals by the State that, while not called certificates, orders, licenses, permits or approvals, are functionally the same. Consequently, even if a fee was collected from Plaintiffs to use the campsite, there was no act that would constitute an "authorization" under Section 301(5)(c).

**B. Even If The Permit Exception Applied, It Would  
Not Bar Plaintiffs' Alternative Failure To Warn Claim.**

If the Court were to find, contrary to the argument just made, that closing the campsite would have involved the issuance of an "order," or the revoking of an "authorization," that ruling should not apply to the alternative claim that the State is liable for its failure to warn Plaintiffs of the known danger at the campsite.

The State does not dispute that, standing on its own, a claim based on a failure to warn would not be subject to Section 301(5)(c). The State's position is that having pled one theory of liability that is subject to immunity, all other alternative theories of liability for that incident are barred by the Statute. Alternative pleading, according to the State, is not permitted under the Act. There is, however, neither logic nor legal authority supporting the notion that the "arising out of" language in §301(5) precludes alternative pleading. As Plaintiffs pointed out in their initial brief:

Utah law specifically permits alternative pleading, even if one theory contradicts the other. For example, in *Benjamin v. AMICA Mut. Ins. Co.*, 140 P.3d 1210 (Utah 2006), the plaintiff pled a cause of action for both negligent and intentional infliction of emotional distress. The Court, citing Utah R. Civ. P. 8(a), held that even though the crux of a claim for negligent infliction of emotion distress was unintentional action, plaintiff could plead both that and a claim that the conduct was intentional. *Id.* at 1214. Here, Plaintiffs have pled alternative theories, one that the State was negligent for failing to secure the closure of the campground, and the other for failing to warn potential campers.

The State has offered no response to this argument. Furthermore, the only case cited, *Taylor v. Ogden Sch. Dist.*, 927 P.2d 159 (Utah 1996), did not involve alternative and independent theories of liability. In *Taylor*, plaintiff was involved in a fight (an assault) in a school, and his injuries were exacerbated by the fact that he crashed into a window. Since claims arising out of an assault are immune, plaintiff tried to fashion a non-immune claim by focusing on the fact that the State was negligent for not using safer glass in its windows. Plaintiff could not avoid, however, the fundamental fact that the injury was caused solely by the fight, and thus arose exclusively out of an immune category. The claim, therefore, arose out of an immune event, and plaintiff could not

allege a theory of liability that was independent of that immune event. Here, in contrast, the theory of liability based on the failure to warn is a complete and independent theory of liability that is not tied in any way to the failure to close the campsite.

Utah has long permitted the pleading of alternative theories of liability, even if the facts of the alternative theories are contradictory. There is no basis for interpreting the “arising out of” language as overriding this basic rule of pleading.

**C. The Permit Exception Should Not Apply To Federal Conduct**

Plaintiffs argued in their opening Brief that Section 301(5)(c) should not apply because the entity that allegedly would have issued an “order” or revoked an “authorization” was the federal government, and Section 301(5)(c) should apply on to Utah’s failure to issue an order or revoke an authorization. The State has not offered any justification for applying the exception to situations arising out of actions by the federal government, other states, or even other countries.

**III. The Natural Condition Exception Does Not Apply**

For the first time on appeal, the State argues that Section 301(5)(k)<sup>4</sup> provides immunity, because it creates an exception for claims that arise out of:

(k) any natural condition on publicly owned or controlled lands;

This provision does not apply because the State enacted a policy designed to protect the public from dangerous bears, and this case arises out of the State’s failure to properly implement its own policy. This Court previously dealt with a conceptually

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<sup>4</sup> This provision is generally referred to in case law by its prior number, Utah Code Ann §63-30-10(11).

identical claim in *Stuckman ex rel. Nelson v. Salt Lake City*, 919 P.2d 568 (Utah 1996), and rejected a claim of immunity under Section 301(5)(k). In *Nelson*, a young child was playing in a park near the Jordan River. The mother believed it was safe for the child because the State had erected a fence between the park and the river. The child found its way to the river and drowned, allegedly because there was a breach in the fence. The Plaintiff sued, alleging, much like here, both a failure to warn of a dangerous condition, and a failure to take adequate protective measures. *Id.* at 570-72. The State argued that it was immune because the river was a natural condition under Section 301(5)(k). While the Court agreed that the river was a natural condition, it held that 301(5)(k) did not apply (*Id.* at 575):

By constructing the fence that separates Riverside Park from the Jordan River Parkway, the City of State undertook to provide protection. Having done so, the responsible party is obligated to exercise reasonable care in maintaining the fence. [citation omitted] Failure to do so could give rise to liability on the part of the responsible party.

The Court reaffirmed this holding in its most recent ruling on the natural conditions clause of the Act, *Grappendorf v. Pleasant Grove City*, 173 P.3d 166, 170 (Utah 2007):

Similarly, in *Stuckman ex rel. Nelson*, we recognized that a river was a natural condition, but ultimately held that the city was not immune from suit because it undertook a duty to protect citizens from the river by building a fence.

The same concept is applicable here. Assuming a bear is a natural condition,<sup>5</sup> the State undertook a duty to protect citizens from a Level III bear by enacting a policy, and there is no reason why the policy at issue here is any different than the fence the State built in *Nelson*. In both cases, the claim no longer arises out of the natural condition, but rather out of the State's failure to fulfill a duty it undertook to protect citizens from a particular danger.

The *Nelson* decision recognized that § 301(5)(k) is important because:

The State and other governmental entities cannot be expected to erect a fence around every waterway or potentially hazardous condition located on public property.

919 P.2d at 575. The critical fact that eliminated the application of §301(5)(c) was that the State had undertaken steps to protect the public from a specific danger. *Id.*

This fact distinguishes the State's primary authority, *Blackner v. Dept. of Transportation*, 48 P.3d 949 (Utah 2002), a case involving motorists who were injured in second avalanche when State officials were on the scene attempting to clear a road after the initial avalanche. In *Blackner*, there was no fence, or policy, or any allegation that the State had undertaken no steps to protect motorists in such a situation, or that the State had failed to follow its own policies or procedures. Rather, the allegation was that State officials, who were on the scene because of the first avalanche, were negligent in not protecting the motorists from a second avalanche. The Court did not cite *Nelson* in *Blackner*, no doubt because there was no basis for applying that decision. Furthermore,

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<sup>5</sup> No court of this State has yet decided whether wildlife constitutes a "natural condition on the land."


as noted above, this Court reaffirmed the *Nelson* holding, subsequent to *Blackner*, in *Grappendorf*.<sup>6</sup>

### CONCLUSION

For the reasons stated in this brief and their opening brief, Plaintiffs-Appellants respectfully request that the Court reverse the District Court's ruling granting Defendants' Motion for Judgment on the Pleadings and remand this case for further proceedings.

YOUNG, KESTER & PETRO

By: \_\_\_\_\_

  
Allen K. Young  
Attorney for Plaintiffs

Allen K. Young  
YOUNG, KESTER & PETRO  
75 South 300 West  
Provo, Utah 84601  
801-379-0700

Jonah Orlofsky  
LAW OFFICES OF JONAH ORLOFSKY  
122 South Michigan Ave., Suite 1850  
Chicago, Illinois 60603  
312-566-0455

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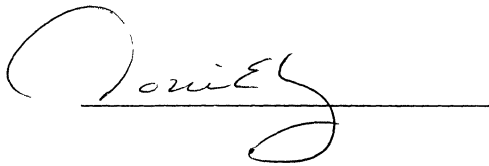
<sup>6</sup> This *Nelson* approach is implicit in a federal district court case addressing the applicability of the State Act to a claim based on a college student who fell while climbing cliffs on a student trip, *Apffel v. Huddleston*, 50 F.Supp.2d 1129, 1141 (D.Utah 1999). The Court held that Section 301(5)(k) applied because “the court has already concluded that the dangerous condition which resulted in the death of Jason Apffel was the naturally occurring sandstone cliffs, ***rather than the act of planning a party in their vicinity....***” (emphasis added)

**CERTIFICATE OF SERVICE**

I hereby certify that I mailed a true and correct copy of the foregoing, postage pre-paid,

this 5 day of October, 2009, to the following:

Reed Stringham  
Assistant Utah Attorney General  
160 East 300 South  
P.O. Box 140856  
Salt Lake City, Utah 84114-0856

A handwritten signature, appearing to be "David", is written over a horizontal line.