

1987

Morris Brinkerhoff, et al. and the Estate of  
Jacquelyn Brinkerhoff v. Walter K. Christensen,  
Conrad Christensen, Alexander J. Aerts, and Allen  
Forsyth : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT  
BRIEF

UTAH

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DOCKET NO.

870364

IN THE SUPREME COURT OF THE STATE OF UTAH

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MORRIS BRINKERHOFF, et al.,	:	
individuals and heirs of the	:	
Estate of Decedent	:	Case No. 870364
JACQUELYN BRINKERHOFF,	:	
	:	
Plaintiffs/Appellants,	:	
	:	
vs.	:	
	:	
WALTER K. CHRISTENSEN,	:	
CONRAD CHRISTENSEN,	:	Category 14b
ALEXANDER J. AERTS and	:	
ALLEN FORSYTH,	:	
	:	
Defendants/Respondent.	:	

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BRIEF OF RESPONDENT

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Attorneys for Plaintiffs/  
Appellants

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CLERK OF COURT

IN THE SUPREME COURT OF THE STATE OF UTAH

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MORRIS BRINKERHOFF, et al.,	:	
individuals and heirs of the	:	
Estate of Decedent	:	Case No. 870364
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	:	
Plaintiffs/Appellants,	:	
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	:	
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CONRAD CHRISTENSEN,	:	Category 14b
ALEXANDER J. AERTS and	:	
ALLEN FORSYTH,	:	
	:	
Defendants/Respondent.	:	

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Defendant-Respondent Allen Forsyth (Forsyth), by and through his undersigned counsel, submits the following brief.

#### JURISDICTION

Jurisdiction in this Court is proper pursuant to Article VIII, Section 3 of the Constitution of Utah, Utah Code Ann. §78-2-2 (1953 as amended), and Rule 3 of the Rules of the Utah Supreme Court.

#### NATURE OF THE PROCEEDINGS BELOW

The proceedings below consisted of plaintiffs' motion for partial summary judgment and Forsyth's motion for summary judgment. The lower court granted Forsyth's motion and denied plaintiffs' motion.

#### STATEMENT OF ISSUES

1. Should this Court affirm the trial court's ruling that pursuant to Utah Code Ann. §32-11-2, Forsyth is not subject to dram shop liability and plaintiffs may not maintain their action against Forsyth?

2. Should this Court affirm the trial court's ruling that Forsyth is immune from suit pursuant to the provisions of §63-30-10(1)(i) of Utah's Governmental Immunity Act?

#### DETERMINATIVE STATUTES

The following provisions from Utah Code Annotated are considered determinative of this appeal. The provisions are set

forth below as they existed in July 1984 at the time the accident which gave rise to this action occurred.

**32-11-1. Liability for injuries resulting from illegal sale or other distribution of intoxicating liquors - Injured person's cause of action against intoxicated person or person who provided liquor - Survival of action.** (1) Any person who gives, sells, or otherwise provides intoxicating liquor to another contrary to subsection 16-6-13.1(8)(d), subsection 32-1-36.5(1)(1), section 32-7-14 or subsection 32-7-24(b) or (c), and thereby causes the intoxication of the other person, is liable for injuries in person, property, or means of support to any third person, or the spouse, child, or parent of that person, resulting from the intoxication.

(2) A person who suffers an injury referred to in subsection (1) of this section, shall have a cause of action against the intoxicated person and the person who provided the intoxicating liquor in violation of subsection (1) above, or either of them.

(3) If a person having rights or liabilities under this section dies, the rights or liabilities provided by this section shall survive to or against that person's estate.

**32-11-2. Immunity of state, state agencies and employees, and political subdivisions.** No provision of this act shall create any civil liability on the part of the state, its agencies, employees, or political subdivisions, arising out of their activities in regulating, controlling, authorizing, or otherwise being involved in, the sale or other distribution of intoxicating liquor.

**63-30-3. Immunity of governmental entities from suit.** Except as may be otherwise provided in this



chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

The management of flood waters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

**63-30-10. Waiver of immunity for injury caused by negligent act or omission of employee--Exceptions--Waiver for injury caused by violation of fourth amendment rights.** (1) Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury:

. . .  
(i) arises out of the activities of the Utah National Guard. . . .

#### STATEMENT OF THE CASE

##### A. NATURE OF THE CASE

This is an action seeking damages resulting from the death of plaintiffs' decedent, Jacquelyn Brinkerhoff. Jacquelyn Brinkerhoff was killed while riding a bicycle when struck by a vehicle owned by defendant Walter K. Christensen and driven by defendant Alexander J. Aerts (Aerts). Plaintiffs' complaint sought damages against Aerts for negligent operation of the

vehicle and against defendant Walter K. Christensen and defendant Conrad Christensen, a passenger in the vehicle, under a theory of negligent entrustment. The complaint also sought damages against Forsyth pursuant to Utah's Dram Shop Act, Utah Code Ann. §32-11-1 et seq.

B. COURSE OF PROCEEDINGS

Defendants Christensens and Aerts settled with plaintiffs by payment of \$150,000, and the case has been dismissed as to those defendants. Following that dismissal, the case continued solely against Forsyth. Plaintiffs filed a motion for partial summary judgment seeking a determination as to Forsyth's defense of governmental immunity. Forsyth filed a separate motion for summary judgment.

C. DISPOSITION IN LOWER COURT

The motions were heard together by the trial court, the Honorable Michael R. Murphy presiding. Forsyth's motion for summary judgment was granted and plaintiffs' motion for partial summary judgment was denied.

STATEMENT OF FACTS

1. At the time of the accident which forms the basis of this action, Forsyth was employed full time by the Utah National Guard as a mechanic at Camp Williams, Utah. He also

held a part-time evening job as a bartender at the Camp Williams NCO Club, a self sustaining instrumentality of the State of Utah. (Record, at p. 77.) (The Record will hereafter be referred to as "R., at p. \_\_\_\_.")

2. On the evening of July 21, 1984, Forsyth in his employment as bartender served intoxicating liquor to defendant Aerts in the Camp Williams NCO Club. (R., at pp. 18 & 77.)

3. Some time after Aerts left the Camp Williams NCO Club on July 21, 1984, the vehicle he was operating struck and killed plaintiffs' decedent. Aerts was found to have a blood alcohol content of .19. (R., at pp. 15, 16, & 77.)

#### SUMMARY OF ARGUMENTS

1. In 1981, the Utah legislature enacted the Dram Shop Act creating a previously nonexistent cause of action against one furnishing liquor in favor of those injured by the intoxication of the person who was provided liquor. Section 32-11-2 of the Dram Shop Act excludes the state and its employees from that newly imposed liability where the liability arises out of the activities of the state and its employees in regulating, controlling, authorizing, or otherwise being involved in the sale of intoxicating liquor. Since the liability plaintiffs attempt to impose on Forsyth arises out of his activities while involved

in the sale of intoxicating liquor, Forsyth is not subject to liability and plaintiffs may not bring their action against him.

2. The activities of the Utah National Guard constitute a "governmental function". While immunity from suit for the negligent acts of state employees has been waived, such immunity has specifically been reserved for injuries arising out of the activities of the Utah National Guard. Since Forsyth's activities were activities of the Utah National Guard, he is immune from suit.

#### ARGUMENT

##### POINT I

##### PURSUANT TO §32-11-2, FORSYTH IS NOT SUBJECT TO DRAM SHOP LIABILITY

In the third cause of action, plaintiffs' complaint alleges that Forsyth is liable for the death of Jacquelyn Brinkerhoff pursuant to the provisions of Utah's Dram Shop Act then in effect, Utah Code Ann. §32-11-1 et seq. The trial court ruled that pursuant to §32-11-2, Forsyth was not subject to suit. The trial court's ruling was correct and should be affirmed.

The cause of action which plaintiffs allege against Forsyth was unknown at common law. Prior to the enactment of Utah's Dram Shop Act there was no cause of action against one

furnishing liquor in favor of those injured by the intoxication of the person who was provided liquor. See, Yost v. State, 640 P.2d 1044 (Utah 1981) and 45 Am Jur 2d. Intoxicating Liquors, §§553 and 554.

By enactment of the Dram Shop Act in 1981, the Utah legislature created a previously nonexistent cause of action. The first section of the Dram Shop Act, §32-11-1, contains the substantive provisions which statutorily created the new cause of action for dram shop liability. That section provides that any person "who gives, sells, or otherwise provides intoxicating liquor to another", under certain circumstances, and thereby causes the intoxication of the other person is liable in injuries to any third person resulting from the intoxication.

While §32-11-1 contains the substantive provisions creating the new cause of action, §32-11-2 contains a provision exempting the state, its agencies, employees, or political subdivisions from the newly created liability imposed by §32-11-1. Section 32-11-2 states as follows:

No provision of this act shall create any civil liability on the part of the state, its agencies, employees, or political subdivisions, arising out of their activities in regulating, controlling, authorizing, or otherwise being involved in, the sale or other distribution of intoxicating liquor.

(Emphasis added)

The language of §32-11-2 excluding the state and its

employees from dram shop liability is broad. Section 32-11-2 plainly states that no provision of the Dram Shop Act shall create any civil liability on the part of state employees arising out of their activities in regulating, controlling, authorizing or otherwise being involved in the sale of intoxicating liquor. That language is broad and covers all activities where a state employee, acting in his or her capacity as state employee, is involved in the sale of intoxicating liquor.

The legislature could have narrowed the scope of §32-11-2 but chose not to do so. For example, one year earlier in Standiford v. Salt Lake City Corp., 605 P.2d 1230 (Utah 1980) this Court construed the term "governmental function", as used in the Governmental Immunity Act, to relate only to those governmental activities of such a unique nature that they can only be performed by a governmental agency or are essential to the core of governmental activity. Ibid at 1236 and 1237. The legislature could have restricted the scope of §32-11-2's exclusion from dram shop liability by indicating that the state, its agencies, employees or political subdivisions were excluded from dram shop liability only when they were exercising a governmental function. However, the legislature did not so restrict the scope of §32-11-2. Instead it adopted broad language which manifests an intention to exempt from dram shop

liability all state employees who, in their capacity as state employees, are in any way involved in the sale of intoxicating liquor. This Court must assume that each term of the statute was used advisedly and must give each term an interpretation and application in accordance with their usually accepted meaning. E.g., Board of Granite School District v. Salt Lake County, 659 P.2d 1030 (Utah 1983) and Grant v. Utah State Land Board, 485 P.2d 1035 (Utah 1971). The language of §32-11-2 is clear; it exempts state employees involved in the sale of intoxicating liquor from the newly created civil liability imposed by the Dram Shop Act.

The activities of Forsyth as a state employee fall squarely within the provisions of §32-11-2. Forsyth, a state employee, was involved, in his capacity as a state employee, in the sale of intoxicating liquor. Under those circumstances, §32-11-2 mandates that no provision of the Dram Shop Act shall create any civil liability on the part of Forsyth. The plain language of §32-11-2 allows for no other conclusion.

Plaintiffs argue that the comments made by Senator Jeffs indicate a legislative intention that the exclusion from dram shop liability apply to the state and its employees only in their capacity "as liquor wholesalers". (Brief of appellants, p. 6.) Plaintiffs' argument is without merit for two reasons.

First, even if Senator Jeffs' comments can be construed to indicate that he believed the exclusion protected the state and its employees only in their capacity as liquor wholesalers, those comments are not a conclusive expression of legislative intent. The intent of the legislature should be determined primarily from the legislation itself. See, United States Brewers Association, Inc. v. Director of the New Mexico Department of Alcoholic Beverage Control, 668 P.2d 1093 (N.M. 1983). What may have been the intent of an individual legislator may not have been the intent of the legislative body who enacted the statute (See, Johnson v. Continental West, Inc., 663 P.2d 483 (Wash. 1983)), and the views expressed by an individual legislator do not necessarily express the intent of the entire legislative body. See, Bouquet v. Bouquet, 546 P.2d 1371 (Cal. 1976). Moreover, the statements of one legislator--particularly when those statements were made on the last day of the legislative session "when the Legislature was in a frenzy to get done with its business" (Brief of Appellants, p. 6)--should not be considered a reliable expression of the intent of the entire legislative body. See, Carmona v. Division of Industrial Safety, 530 P.2d 161 (Cal. 1975).

Secondly, and in any event, the interpretation advanced by Forsyth and adopted by the trial court is not inconsistent



with the comments made by Senator Jeffs. Neither Senator Jeffs' comments nor the statute itself restrict the exclusion from dram shop liability to only liability arising from activities of the state or its employees in the wholesale liquor business. Had the Legislature intended so to restrict the exclusions, it would have been a simple matter to include some language indicating that the exclusion pertained only to activities relating to the wholesale distribution of liquor. The absence of such restrictive language and the inclusion of broad language indicating that the state and its employees are excluded from dram shop liability when they are "otherwise involved in the sale of intoxicating liquor" indicate an intention not to restrict the exclusion from dram shop liability as plaintiffs suggest.

Plaintiffs argue further that if Forsyth's argument is accepted, absurd results will occur. They argue that if the provisions of §32-11-2 are applied literally, then merely as an incident of employment by the state, state employees would be entitled to immunity from dram shop liability, even with regard to activities outside the scope of state employment. Forsyth agrees that such an interpretation would be absurd. No such contortion of the language of §32-11-2 is required, however, to achieve a rational result and to give the language of that section reasonable effect according to its plain terms.

The more reasonable interpretation of §32-11-2 is that it did not intend to provide state employees exclusion from dram shop liability in any context simply because they are state employees. Rather, the language of §32-11-2 indicates that the exclusion applies only as to those activities undertaken in the course and scope of employment as a state employee. Section 32-11-2 states that no provision of the Dram Shop Act shall create civil liability on the part of state employees "arising out of their activities in regulating, controlling, authorizing, or otherwise being involved in, the sale . . . of intoxicating liquor."

Forsyth, in his capacity as a state employee, was "involved in the sale . . . of intoxicating liquor". Accordingly, under the plain language of §32-11-2, he is not subject to dram shop liability. The trial court's ruling granting Forsyth's motion for summary judgment should be affirmed.

POINT II  
PURSUANT TO §63-30-10(1)(i),  
FORSYTH IS IMMUNE FROM SUIT

Forsyth's motion for summary judgment in the lower court was also based on the provisions of §63-30-10(1)(i) which preserves immunity from suit for injuries arising out of the activities of the Utah National Guard. The trial court agreed

that §63-30-10(1)(i) preserved immunity to Forsyth in this case and granted Forsyth's motion for summary judgment. The lower court's ruling was correct and should be affirmed.

Section 63-30-10 is part of Utah's Governmental Immunity Act. Utah Code Ann. §63-30-1 et seq. The Act generally retains immunity from suit for governmental entities except where immunity is specifically waived by statute. See, Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975). The Act retains immunity from suit for injuries resulting from the exercise of a "governmental function". In that regard §63-30-3 provides as follows:

Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function. . . .

In the case of Standiford v. Salt Lake Corp., 605 P.2d 1230 (Utah 1980), this Court established the standard for what constitutes a "governmental function" in the exercise of which a governmental entity is immune from suit. In Standiford the Court stated as follows:

[T]he test for determining governmental immunity is whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental activity.

Id. at pp. 1236 and 1237. The Court later held that this test does not refer to what government may do but what government alone must do. Johnson v. Salt Lake City Corp., 629 P.2d 432, 434 (Utah 1981).

There can be few clearer examples of activities of such a unique nature that they can only be performed by a governmental entity or which are essential to the core of governmental activity than the activities of the Utah National Guard. Government alone has the responsibility and authority of assembling, training, and equipping a national guard. The activities of the Utah National Guard plainly constitute a "governmental function".

As indicated above, the Governmental Immunity Act generally retains immunity except where specifically waived. One provision where such a specific waiver of immunity occurs is §63-30-10. This section waives immunity from suit for injuries caused by a negligent act or omission or an employee. However, that section does not waive immunity for injuries arising "out of the activities of the Utah National Guard". Utah Code Ann. §63-30-10(1)(i). Therefore, immunity from suit for injuries arising out of the activities of the Utah National Guard is preserved.

Plaintiffs argue that Forsyth's activities do not constitute "activities of the Utah National Guard". Plaintiffs

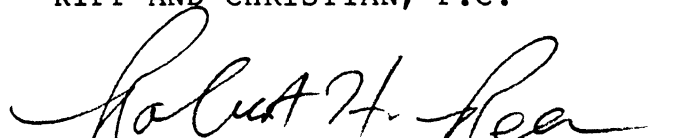
construe that language too narrowly. Forsyth was employed not by some private club but by the NCO Club located at Camp Williams, a facility operated by the Utah National Guard. The club was provided specifically for the benefit, enjoyment, and relaxation of members of the Utah National Guard. It is not just another private club but is part of the overall function and operation of the Utah National Guard. Forsyth's activities while employed as a bartender at the NCO Club constitute activities of the Utah National Guard. Pursuant to §63-30-3 and §63-30-10(1)(i) Forsyth is immune from suit for injuries arising from those activities.

#### CONCLUSION

For the foregoing reasons, defendant/respondent Allen Forsyth respectfully requests the Court to affirm the lower court's granting Forsyth's motion for summary judgment.

DATED this 22nd day of February, 1988.

KIPP AND CHRISTIAN, P.C.

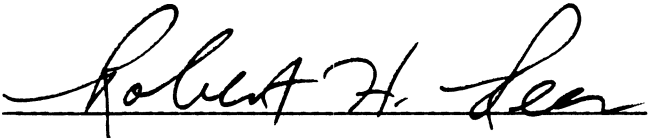
A handwritten signature in cursive script, appearing to read "Robert H. Rees", written over a horizontal line.

CARMAN E. KIPP  
ROBERT H. REES

MAILING CERTIFICATE

MAILED, postage prepaid, this 22nd day of February,  
1988, four true and correct copies of the foregoing Brief of  
Respondent, to the following:

D. Aron Stanton  
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255 East 400 South, Suite 101  
Salt Lake City, Utah 84111

A handwritten signature in cursive script, reading "Robert H. Lee", is written over a horizontal line.