

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 Appellant

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

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IN THE SUPREME COURT

STATE OF UTAH

MORRIS BRINKERHOFF, et al.,	:	
individuals and heirs of the	:	
Estate of Decedent	:	APPELLANT'S BRIEF
JACQUELYN BRINKERHOFF,	:	
	:	
Plaintiffs/Appellants,	:	
	:	
vs.	:	
	:	
WALTER K. CHRISTENSEN,	:	Case No. 870364
CONRAD CHRISTENSEN,	:	
ALEXANDER J. AERTS and	:	
ALLEN FORSYTH,	:	
	:	
Defendants/Respondents	:	

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Clerk, Supreme Court

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	:	
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STATEMENT OF ISSUE PRESENTED ON APPEAL

The issue in this case is whether the operation of the Camp Williams Army National Guard NCO Club Bar was intended to be immune from liability for causes of action arising under the Utah Dram Shop Act at U.C.A. 32-11-1 by either U.C.A. 32-11-2 or U.C.A. 63-30-10(1)(i).

STATUTES TO BE REVIEWED

The Judicial interpretation of the Legislative intent of the following statutes is determinative of this case.

U.C.A. 32-11

Section 1:

(1) any person who gives, sells or otherwise provides intoxicating liquor to another contrary to section 16-6-13.1(3)(d), section 32-1-36.5(1)(1), section 32-7-14 or section 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 third 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 persons estate.

Section 2:

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

U.C.A. 63-30

Subsection 10(1):

Immunity from suit of all governmental entities is waived for injuries proximately caused by a negligent act or omission by an employee committed within the scope of his employment except if the injury:

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

STATEMENT OF THE CASE

This case is a wrongful death action brought by the survivors of Jacquelyn Brinkerhoff. Jacquelyn Brinkerhoff was killed by a hit and run driver. The driver was Alexander Aerts who had a blood alcohol content of .19 percent. Jacquelyn Brinkerhoff was killed within six minutes after Defendant Alexander Aerts left the Camp Williams Army National Guard NCO Club. Alexander Aerts was the guest of Conrad Christensen, who, at that time, was a member of the Camp Williams Army National Guard NCO Club. Alexander Aerts hit Jacquelyn Brinkerhoff from behind while she was bicycle riding safely out of the lane of traffic. She did not contribute to her demise. Jacquelyn Brinkerhoff's bicycle locked onto the front bumper of the vehicle Aerts was driving and he pushed it for another five (5)

miles before it fell off and one mile later was stopped by the police for the hit and run. Jacquelyn Brinkerhoff left behind six small children ranging in ages from six months to nine years. Alexander Aerts and the owner of the vehicle, which was Conrad Christensen's father, having already settled out, the only remaining Defendant is Allen Forsyth, a National Guard mechanic who moonlights as a bar tender at the Camp Williams Army National Guard NCO Club.

Summary Judgment was granted against Plaintiffs by Judge Murphy of the Third District Court who ruled that the exemption from liability in section 2 of the Dram Shop Act shielded Allen Forsyth and the State of Utah from liability. Further, Judge Murphy ruled, "the basis for ruling is the immunity granted in U.C.A. section 63-30-10(1)(i) and 32-1-2". The statutory history concerning the latter section is not justification for limiting immunity to the "wholesale" sale of liquor. As Plaintiff indicated, the statements of Senator Jeffs were made in the "frenzy" of the last day of legislative business. This appeal ensued, and the matter appears to be a case of first impression.

SUMMARY OF ARGUMENT

The governmental immunity section of the Dram Shop Act and the immunity for the National Guard were not intended to cover this situation of the National Guard's operation of the Camp Williams Army National Guard NCO Club.

ARGUMENTS

U.C.A. SECTION 32-11-2 WAS NOT INTENDED TO EXTEND IMMUNITY TO THE PRESENT SITUATION.

When Courts apply statutory law, they are bound to consider

legislative intent so as to make the legislation meaningful and avoid absurd results.

American Coal Co. vs. Sundstrom 689 P.2d 1,3 (Utah 1984); Murray City vs. Hall 663 P.2d 1314, 1317 (Utah 1983); Andrus vs. Allred 404 P.2d 972, 974 (Utah 1965); State vs. Jones 735 P.2d 399 at 402 (Utah App. 1987); State vs. Day 638 P.2d 546 (Wash. 1981); Holy Trinity Church vs. United States, 143 U.S. 457, 12 S.Ct. 511, 36 L. ed. 226; Markham vs. Cabell, 326 U.S. 404 at 409, 66 S.Ct. 193 at 195; Utah International, Inc. vs. Department of Interior 643 F. Supp. 810 at 821 (D. Utah 1986); Millet vs. Clark Clinic Corp. 609 P.2d 934, 936.

To determine legislative intent, the Court can consider the historical setting of the statute, the circumstances surrounding its promulgation and the purpose of the statute. Saffels vs. Bennet 630 P.2d 505, 510 (Wyo. 1981); Dependants of Fred Crawford vs. Financial Plaza 643 P.2d 48, 53 (Ha. 1982); Parker vs. Rampton 497 P.2d 848, 850 (Utah 1972); State vs. 1 Porsche 2 Door I.D.#911211026, Title #PP 10026F, etc. 526 P.2d 917 (Utah 1974).

If U.C.A Section 32-11-2 were to be applied according to its precise literalness then absurd results could ensue. The unqualified exemption for State employees would create exemption from Dram Shop liability as an employee benefit of employment by the State. A social host could avoid Dram Shop Liability solely on the basis of his employment by the State while his private industry neighbor would be found liable for the exact same activity. This result would be totally absurd, but it would follow from a precise reading of the statute. Further, the statute de-

prives the citizen's of Utah from the social responsibility the State as such has a duty to it's citizens. It is apparent from the face of U.C.A. Section 32-11-2 that the exemption is intended to be for the benefit of the State in fulfilling its duties in regulating the use of alcoholic beverages in the State. The State of Utah heavily regulates the distribution and sale of alcohol. Every ounce of intoxicating liquor sold in the State must at some time pass through State hands. Under the statute the exemption to the State of Utah and its employees applies to their "activities in regulating, controlling, authorizing or otherwise being involved in the sale or distribution of alcoholic beverages." In view of the State's most obvious connection to alcohol, the three important words in the statute are regulating, controlling and authorizing. The "or otherwise being involved in the sale" language is an apparent addition to cover any situation where the State, as a regulator of alcoholic beverages, may slip out of the exact definition of regulation, control or authorization. Had the legislature intended total exemption from liability, they could have put a period after political subdivisions. The excess wording is a clue to what they had in mind.

The Dram Shop Act was introduced in the State Senate in 1981 as Senate Bill 293. The enactment of the Dram Shop Act is part of the current trend toward protecting victims rights. In cases where someone suffers injury as a result of a person being intoxicated, the Dram Shop Act increases the number of Defendants that such a Plaintiff has a cause of action against; Utah State Senate 44th Legislative Session, Day 57, Disk 273, March 9, 1981. The

Act also encourages social responsibility on the part of persons who serve or sell alcohol. The Bill was passed by the Senate and referred to the House. While being considered by the House, the immunity for the State was amended out of the Bill; Utah House of Representatives 44th Legislative Session, Day 60, Disks 3 and 4, March 12, 1981. When the Bill, as amended, was returned to the Senate, Senator Jeffs, the sponsor, said the following about the amendment.

"The amendment to the Bill amended out the exemption for the State of Utah. There has been concern expressed by the Attorney General's office to me that if we exempt out, if we leave out the exemption for the State of Utah, since the State is in the wholesale liquor business, we run the risk of creating some large numbers of law suits no matter who sells the liquor, and they have asked me to request that we not accept the amendment by the House and that we recede from it." (Utah State Senate 44th Legislative Session, Day 60, Disk 309, March 12, 1981.)

The Amendment was refused by the Senate, the House relented and the Bill passed on the representation that the intent of U.C.A. section 32-11-2 was to protect the State while engaged in the wholesale liquor business. This all happened on the last day of the session when the legislature was in a frenzy to get done with its business. If the wording were to have been changed to reflect the intent to protect the State and it's employees only as liquor wholesalers, the bill would not have made it and another year would go by without the added remedies for victim's of drunk drivers.

The Dram Shop Act was intended to create a cause of action in the exact situation we have in this case. Plaintiff's dece-

dent was killed by an extremely intoxicated person who had been served liquor after he was already intoxicated. The activities of Defendant Allen Forsyth had nothing to do whatever with the role of the State in the wholesale liquor business. The immunity contained in U.C.A. section 32-11-2 is an exemption intended for that specific government purpose and was not intended as a license for government employees to act without social conscience.

ARGUMENT II

U.C.A. Section 63-30-10 (1)(i) WAS NOT INTENDED TO EXTEND IMMUNITY TO THE PRESENT SITUATION.

Section 63-30-10 (1)(i) of the Utah Code does not set up the Utah National Guard as an entity entirely outside the Civil Law of the State as Defendant would imply. The Utah National Guard exists for certain purposes, and the immunity granted to the Guard only applies to activities inherent to those certain purposes. The most obvious purposes of the National Guard are their role as a part of the National Defense and their availability to assist in times of disaster. By no stretch of the imagination does the immunized role of the National Guard extend to operation of a bar. Defendant Forsyth's usual work for the Guard is as a mechanic. His work as a bartender is supplementary and outside his usual duties. This further illustrates the separation of the NCO Club from legitimate Guard activities.

To clothe the National Guard in immunity for whatever activities the Guard may engage in would be an utter absurdity. To avoid this absurdity and to make the statute meaningful, a restrictive reading of U.C.A. 63-30-10 (1)(i) is necessary. Most

of the cases cited in Argument I are applicable here.

ARGUMENT III
A TEST FOR GOVERNMENTAL IMMUNITY

To allow total government immunity in this situation is contrary to the guide lines laid down in Standiford vs. Salt Lake City Corporations, 605 P.2d 1230 (Utah 1980). The Court, in the Standiford case did away with the old analogy of governmental immunity versus a proprietary function because of the conflicting results case law has established. The Court rejected the rigid dichotomy of the past because an activity is not proprietary it does not necessarily follow that the activity was governmental. The respondent would have this Court believe that this Court did not replace any type of analogy for determining governmental immunity.

In fact, this Court provided a new test for governmental immunity. In the Standiford case the Court held:

"Tests for determing governmental immunity is whether activity under consideration is of such unique nature that it can only be performed by governmental agency or that it is essential to the core of governmental activity."

The Michigan Court has defined the term "government function" as those activities invoking the essence of government- the "task of governing" - and those activities of such "peculiar" nature such that [they] can only be done by government." 273 N.W. 2d at 416.

Our Court went on to say they were less bound than the Michigan Supreme Court in redefining "governmental function". Unlike the Michigan Immunity Act, the Utah governmental Immunity

Act does not expressly approve past governmental tort liability, nor does it even mention, let alone define, "proprietary function."

Michigan is not alone in abandoning the "inherently unsound" proprietary governmental "quagmire."

In the Standiford case, the Utah Governmental Immunity Act, Section 63-30-1 etc: which became effective July 1, 1966 defines neither "governmental function" nor "proprietary function." Indeed, the Act does not use the term "proprietary function"; it simply retains tort immunity for some governmental entities, subject to broad statutory exceptions, for injuries resulting from a "governmental function." Section 63-30-3, as amended by the 1978 Legislature, reads as follows:

"Except as may be otherwise provided in this act, 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.

It has been stated in scholarly analysis that the legislature designed the statutory scheme to allow the Court flexibility and adaptability in fashioning consistent and rational limits to governmental immunity. To that end, the legislature intended the Courts to have the power to restrict the scopes of governmental immunity."
[Emphasis added.]

When the 1965 Legislature enacted the Utah Governmental Immunity Act, it broadened the liability of governmental entities....moreover, Legislature authorized public entities to secure liability insurance covering the entity and it's employees, Section 63-30-28 etc. The insurance authorization is relevant as to whether a governmental immunity should be subjected to

liability on tort claims because one historical fear of limiting immunity has been the unexpected and unplanned for expense to the public entity. When the availability of insurance protection, coupled with the statutory provisions for ceiling on liability, governmental entities may confidentially and accurately budget for their potential tour of liability. The State of Utah is self-insured until a certain dollar amount is reached, then a private insurer kicks in to cover the balance up to the statutory amount allowed by law.

The Camp Williams Army National Guard NCO Club is an entertainment facility provided by the State of Utah to it's Army National Guard members and their guests who are not members of the Army National Guard.

The Air Force National Guard NCO Club is not unlike the Camp Williams Army National Guard NCO Club. They both are owned and operated by the State of Utah as an entertainment facility for their National Guard members and their guests. The only difference is the Air Force National Guard NCO Club is located on private property and is required to have a State Liquor License for dispensing alcoholic beverages, where the Camp Williams Army National Guard NCO Club is not required to have a State Liquor License because it is located on State property. Therefore, the Air Force National Guard NCO Club is regulated by the State Liquor Agency and the Camp Williams Army National Guard NCO Club is not.

Since the Dram Shop Act imposed a strict liability the question arises, is the Camp Williams Army National Guard NCO

Club immune to any liability because it is located on State property and not required to have a State Liquor License where the Air Force NCO Club is on private property and is required to have a State Liquor License not immune to liability? The analogy is clearly inconsistent with Respondent's argument of immunity. Those regulated by the Liquor Commission and private parties are subject to the Dram Shop Act.

In the State of Utah vs. Jones NO. 860199-CA; 55 Utah adv. rep. 60, the Court of Appeals ruled the Courts primary responsibility is construing Legislation is to give effect to the intent of the Legislature. And the Court looked at Christensen vs. Industrial Commission, 642 P.2d 755, 756 (Utah 1982). And the Court further stated, in addition,

One of the fundamental rules of Statutory construction is that the statute should be looked at as a whole and in light of the general purpose it was intended to serve and should be so interpreted and applied as to accomplish that objective. In order to give the statute the implementation which will fulfill it's purpose, reason and intention sometimes prevail over the technically applied literalness.

CONCLUSIONS

The Respondent would argue that because the Dram Shop Act unmistakably states that no provisions of the Dram Shop Act shall create any civil liability on the part of State employees arising out of their activity in regulating, controlling, authorizing or otherwise being involved in, the sale of intoxicating liquor, the State and Agents are immune. However, the Act itself if tested under the Standiford case does speak to governmental

functions. The Legislative history of the Dram Shop Act makes it clear that the governmental immunity protection was meant for package store owners. And the Legislature being aware of the Standiford case did not specifically narrow the scope of 32-11-2 by providing that exemption from Dram Shop liability applies where State employees are exercising a governmental function. Even though the term "governmental function" is a term of art, the new interpretation is more strict than the old governmental vs. proprietary function.

It is apparent from the face of U.C.A. Section 32-11-2 that the exemption is intended to be for the benefit of the State in fulfilling it's duties in regulating the use of alcoholic beverages in the State. The State of Utah heavily regulates the distribution and sale of alcohol. Every ounce of intoxicating liquor sold in the State must at sometime pass through State hands. Under the Statute, the exemption of the State of Utah and it's employees applies to their "activities in regulating, controlling, authorizing, or otherwise being involved in the sale or distribution of alcoholic beverages." In view of the States most obvious connection to alcohol, three important words in the Statute are regulating, controlling and authorizing. The "or otherwise being involved in the sale" language is an apparent addition to cover any situation or the State as a regulator of alcohol beverages may slip out of the exact definition of a regulation, control or authorization. Had the Legislature intended total exemption from liability they could have put a period after political subdivisions. The excess wording is a clue to what

they had in mind.

Neither State employment nor membership in the National Guard automatically absolves any person from acting without social responsibility. The Defendant, Alan Forsyth, should be liable to Plaintiffs for the injury they have suffered at the hands of Defendant Alan Forsyth serving intoxicating alcoholic beverages to Conrad Christensen and his guest at the Camp Williams Army National Guard NCO Club. The Utah National Guard exists for certain purposes, and the immunity granted to the Guard only applies to the activities inherent to those certain purposes. Most obvious purpose of the National Guard are the role as part of the National Defense and their availability to assist in times of disaster. By no stretch of the imagination does the immunized role of the National Guard extend to operations of a bar. Defendant Forsyth's usual work for the Guard is as a mechanic. His work as a bartender is supplementary and outside his usual duties. This further illustrates the separation of the Camp Williams Army National Guard NCO Club from legitimate Guard activities.

The function of the Camp Williams Army National Guard NCO Club can be performed by other than State of Utah government. Which is done daily by the establishment of private non-profit clubs. The running of the Army National Guard NCO Club is not essential to the core of governmental activity.

The most general test of governmental function relates to the nature of the activity. It must be something done or furnished with the general public good, that is, "of a public or

governmental character" such as the maintenance operations of public schools, hospitals, public charities, public parks, or recreational facilities.

Section 63-30-10(1)(i), Utah Code does not set up the Utah National Guard as an entity entirely outside the civil law of the State as Defendant/Respondent would imply. To clothe the State and it's political subdivisions i.e. the Utah National Guard in immunity for whatever activities is to nullify the social responsibilities the State has to the citizens of the State of Utah and it would be an utter absurdity to do otherwise.

The Lower Court's ruling should be reversed and remanded for a hearing to determine damages.

DATED this 23 day of December, 1987.

D. ARON STANTON & ASSOCIATES

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing APPELLANTS BRIEF was mailed, postage prepaid, U.S. Mail on this 23 day of December, 1987 to:

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