

1989

George "Nick" Kirk v. The State of Utah and its subdivision, The Department of Corrections: Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

89-0276

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE "NICK" KIRK,

Plaintiff-Appellant,

vs.

THE STATE OF UTAH and its
subdivision, THE DEPARTMENT OF
CORRECTIONS,

Defendant-Respondent.

89-0276 CA

Case No. 870488

Category No. 14b

BRIEF OF RESPONDENT

Appeal from a Summary Judgment of the Fourth Judicial
District Court In and For Utah County
The Honorable Boyd L. Park, Judge

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FILED

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Clerk, Supreme Court of Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE "NICK" KIRK,

Plaintiff-Appellant,

vs.

Case No. 870488

THE STATE OF UTAH and its
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Defendant-Respondent.

BRIEF OF RESPONDENT

Appeal from a Summary Judgment of the Fourth Judicial
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PARTIES

The parties to this litigation are:

Appellant: George "Nick" Kirk, plaintiff below.

Defendant: The State of Utah and its subdivision, the
Department of Corrections, defendant below.

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STATEMENT OF JURISDICTION

This is an appeal from the Order of the Fourth Judicial District Court for Utah County, the Honorable Boyd L. Park, granting the State's Motion to Dismiss pursuant to the "incarceration exception" of Section 63-30-10(1)(j) of the Utah Governmental Immunity Act (hereafter "UGIA"). This Court has jurisdiction over plaintiff's appeal pursuant to Section 78-2-2(3)(i) of the Utah Code and Rule 4(a) of the Rules of the Utah Supreme Court.

STATEMENT OF THE CASE

Since this is appeal of an Order granting the State's Motion to Dismiss, the allegations of appellant's Verified Complaint are not disputed. Most of the facts set forth by appellant (hereafter "Kirk") in his Brief are immaterial to the legal issues before this Court on appeal. The undisputed material facts are as follows:

1. At the time respondent State of Utah (hereafter "State") transported Ronnie Lee Gardner (hereafter "Gardner") to the Metropolitan Hall of Justice at Salt Lake City he "was . . . incarcerated at the Utah State Prison." Plaintiff's Verified Complaint at ¶ 9, a copy of which is attached hereto as Appendix I.

2. Gardner was in the company of two Utah State Prison guards during transport. See Brief of Appellant, Statement of Facts, at ¶ 3.

3. After entering the Metropolitan Hall of Justice accompanied by the two armed guards, Gardner was passed a handgun by an accomplice, and thereafter shot Kirk. Plaintiff's Verified Complaint, supra, at ¶ 7.

SUMMARY OF ARGUMENT

By Kirk's own allegation, when the State transported Gardner from the prison to the courthouse he was "incarcerated." Kirk also alleges that the State was negligent in the manner in which it transported Gardner. Thus, by Kirk's own allegations, his injury arose out of Gardner's incarceration and the UGIA expressly and unambiguously preserves the State's immunity from suit for injury which "arises out of the incarceration of any person in any state prison . . . or other place of legal confinement." Utah Code Ann. § 63-30-10(1)(j) (1953, as amended).

The State did not waive application of this immunity provision by purchasing insurance coverage. Immunity granted by the UGIA remains unless expressly waived, and no provision of the UGIA waives immunity upon purchase of insurance coverage.

ARGUMENT

POINT I

KIRK'S CLAIMS ARE BARRED BY THE INCARCERATION EXCEPTION OF THE UTAH GOVERNMENTAL IMMUNITY ACT.

The UGIA codifies the common law principal that a governmental entity is immune from suit except where it consents to be sued and establishes a three-step test for determining whether immunity exists:

(1) The first step is to determine whether the activity out of which injury arises is "a governmental function." Utah Code Ann. § 63-30-3. If so, immunity exists. Kirk does not contend, nor can it reasonably be argued that the transport of Gardner from the prison to the courthouse is not a uniquely governmental function. See Epting v. State, 546 P.2d 242, 244 (Utah 1976) and Sheffield v. Turner, 21 Utah 2d 314, 445 P.2d 367, 368 (1968).

(2) Step two is to determine whether immunity is waived by the Act for the particular governmental function in question. While Kirk's Complaint makes no specific reference to a waiver of immunity provision, it is presumed that he relies on Section 63-30-10(1), which waives immunity for "injury proximately caused by a negligent act or omission of an employee committed within the scope of his employment." Utah Code Ann. § 63-30-10(1).

It will be presumed for the purposes of this portion of the argument only that the waiver of Section 63-30-10(1) applies. The State argues elsewhere, however, that there is no duty running from it to Kirk and, therefore, as a matter of law there can be no negligence. See "ARGUMENT," POINT III, infra.

(3) The third step is to determine whether the waiver of immunity is subject to any exception. Section 63-30-10(1) lists several distinct exceptions to the general waiver of immunity for employee negligence. These exceptions are listed in the alternative rather than conjunctive, and thus only one need apply to void the waiver. The waiver and the exception applicable here are as follows:

(1) Immunity from suit of all government 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:

. . . .

(j) arises out of the incarceration of any person in any state prison, county or city jail or other place of legal confinement. . . .

Utah Code Ann. § 63-30-10(1)(j).

A. Kirk's Assailant Was Incarcerated At All Times Pertinent to this Action

Plaintiff's Verified Complaint and the Statement of Facts in his Brief on appeal make it clear that Gardner was an inmate at the Utah State Prison, being held on a charge of first

degree murder for an incident which had occurred some months before. It is undisputed that at the time of the shooting in question, Gardner had been transported from the prison to the courthouse to be formally arraigned on the murder charge. Under the facts of this case it cannot reasonably be argued that Gardner was not still "incarcerated" when he reached the courthouse.

In Madsen v. State, 583 P.2d 92 (Utah 1978), the Utah Supreme Court held that an injury caused by an inmate who was "under the control of prison officials" was barred by the incarceration exception of Section 63-30-10(1)(j). The Court defined incarceration as being "in prison" or "under the control of the State." Id. at 93. Even Justice Maughan's dissent in Epting v. State, supra, upon which appellant relies in his Brief, states that the statutory provision in question would apply whether the inmate was "incarcerated . . . in the prison, or under the direct control of the state." 546 P.2d at 246 (emphasis added).

It is clear that Gardner, who was chained, handcuffed, and in leg irons, and who was accompanied by two uniformed prison guards carrying service revolvers, remained "under the control of the state." See, e.g., Emery v. State, 26 Utah 2d 1, 483 P.2d 1296, 1297 (Utah 1971) (where the Court interpreted the words "other place of legal confinement" to include any place

"where one cannot be released without some kind of permission"). Indeed, Kirk's Verified Complaint acknowledges that Gardner was incarcerated "at the time" the prison guards transported him to the Metropolitan Hall of Justice. Gardner was still under the control of those guards when the escape ensued and was still "incarcerated" when the State's alleged negligence occurred.

B. Kirk's Injury Arose Out of Gardner's Incarceration

Kirk also argues that, even assuming Gardner's "incarceration," Kirk's injury did not "arise out of" the incarceration. The case authority cited by Kirk in his Brief, however, makes it clear that the term "arises out of" as found in Section 63-30-10(1)(j), is interpreted broadly, and encompass the facts of this case.

In his Memorandum filed below in opposition to respondent's Motion to Dismiss, appellant quoted from Justice Maughan's opinion in National Farmer's Union Prop. & Cas. Co. v. Western Cas. & Surety Co., 577 P.2d 961 (Utah 1978). The quote is helpful here: "The term 'arising out of' is ordinarily understood to mean originating from, incident to, or connected with the item in question." Id. at 963 (emphasis added). The Utah Supreme Court also applied this definition to the incarceration exception in Madsen v. State, supra.

In Madsen, the wife and daughter of a Utah State Prison inmate who had died following surgery in the prison hospital

filed a wrongful death action against the prison and selected prison employees. The Court recognized that the inmate while not incarcerated in the prison, was confined to the hospital at the prison and concluded that the inmate's death "arose out of" incarceration and that "since this injury occurred while Madsen was under the control of prison officials, the governmental entities, vis., the State of Utah and the Board of Corrections, are both immune from liability." Id. (emphasis added). Madsen reaffirms the Court's earlier rule announced in Emery v. State, supra, and Epting v. State, supra, that a prisoner's status and the state's control over the prisoner, rather than the prisoner's physical location, are the critical factors respecting application of the incarceration exception.

In the present case, the inmate Ronnie Lee Gardner was chained and shackled, under the control of two uniformed prison guards armed with service revolvers, being transported to a District Court arraignment, when he tried to escape, injuring appellant in the process. In Epting v. State, supra, the assailant was an inmate on prison "work release," working a job outside the prison during the day. He walked away from the job and shortly thereafter murdered the claimants' mother. The inmate in Epting was not shackled or chained and was not accompanied by armed prison guards, but rather was on a privileged work release program outside the prison undertaking gainful

employment. Nevertheless, the Court in Epting concluded that there were just two logical alternatives for consideration under these circumstances: either (a) the prisoner had totally escaped the control of the prison and was thus acting on his own; or (b) the prisoner was under the control of the prison authorities so that his conduct arose out of his incarceration. Epting, 546 P.2d at 244. Under the first alternative, the prison could not be responsible for the prisoner's actions; under the second alternative, the prison would be immune from suit under the incarceration exception of the statute. Id. The same must hold true here.

The rationale of Epting also is persuasive in reputing Kirk's argument that "there was no causal connection of the incarceration of Gardner and the shooting of the plaintiff." Brief of Appellant at 6-7. If there is no causal connection between the State's incarceration of Ronnie Lee Gardner and his shooting of Kirk there can be no causal connection between the State's alleged negligence and Kirk's injuries, and therefore appellant's claims must fail.

Kirk cannot reasonably argue that no causal connection exists between the State's incarceration of Gardner and his injuries, while arguing that a causal connection does exist between the State's negligence and his injuries. Indeed, it is the State's failure to insure incarceration in fact upon which Kirk bases his negligence claim.

But for Gardner's incarceration, there would have been no need for the State to transport him to the Metropolitan Hall of Justice. But for Gardner's incarceration there would have been no prison guards, no chains, no shackles. But for Gardner's incarceration, there would have been no attempt to escape. But for Gardner's incarceration, appellant would have no justifiable reason to sue the State of Utah and its Department of Corrections.

POINT II

THE STATE OF UTAH DID NOT WAIVE IMMUNITY BY PURCHASING LIABILITY INSURANCE.

A. Waivers of Immunity Must Be Expressly Stated in the UGIA.

The UGIA is a codification of the common law principle of sovereign immunity. The Utah Supreme Court has stated succinctly that "the Act expressly provides for the continuance of sovereign immunity." Holt v. Utah State Road Comm'n, 30 Utah 2d 4, 511 P.2d at 1287. Accordingly, the UGIA states that where a governmental entity is engaged in a "governmental function," the entity is immune from suit for any injury resulting therefrom, "except as may be otherwise provided in" the Act. Utah Code Ann. § 63-30-3.

This language indicates legislative "intention that the act be strictly applied to preserve sovereign immunity; and to

waive it only as clearly expressed therein." Holt, 511 P.2d at 1288 (footnote omitted). Thus, a governmental entity is immune "unless immunity is expressly waived in one of the succeeding sections of the . . . Act." Madsen v. Borthick, 658 P.2d 627, 631 (Utah 1983) (emphasis added).

Where a statute's meaning is plain from the words and language chosen by the Legislature, the courts must "assume that each term in the statute was used advisedly . . . and that each should be interpreted and applied according to its usually accepted meaning." West Jordan v. Morrison, 656 P.2d 445, 446 (Utah 1982). This is precisely what the Utah Supreme Court has done in the past with respect to the "except as may be otherwise provided" language of Section 63-30-3. Where no express waiver of immunity is found, no waiver can be implied.

B. The UGIA Contains No Express Waiver of Immunity for Purchase of Insurance.

Kirk's Brief does not cite any section of the UGIA where immunity is expressly waived by a governmental entity upon purchase of insurance. No such provision exists. Rather, he argues that the provision of the UGIA allowing a governmental entity to purchase insurance, to join with other entities to create a "reserve fund," or to create a fund of its own "to protect [it] from any or all risks created by this chapter," see Utah Code Ann. §§ 63-30-26 and 28, implies such a waiver.

However, the "risks created by this chapter" come only from the express waivers of immunity found in the Act. If immunity is not waived, there is no "risk" to be insured against. Thus, to argue that obtaining insurance expands or defines the risk simply does not follow.

Moreover, public policy requires that governmental entities be entitled to rely on the unambiguous language of the UGIA in planning for potential liability risks. Were plaintiff's argument adopted here, governmental entities would lose all immunity simply by attempting to secure adequate protection from injuries arising out of activities for which immunity has expressly been waived.

POINT III

RESPONDENT OWED NO DUTY TO APPELLANT.

By direct argument in his Memorandum opposing the Motion to Dismiss below, and by indirect argument in his Brief to this Court, appellant seeks to have Obray v. Malmberg, 26 Utah 2d 17, 484 P.2d 160 (1971), overruled. See Brief of Appellant at 8-10; Memorandum in Opposition at 19. The Obray decision adopts the "public duty" rule for Utah. That rule requires that plaintiff must show the breach of a duty owed to plaintiff as an individual, and not merely the breach of an obligation owed to the general public. See also 18 McQuillan, The Law of Municipal Corporations, § 53.046 at 165 (3rd Ed. 1971).

The rule also requires that plaintiff must show that he had a special relationship with defendants which would impose a duty greater than the general duty owed by the defendants to the public at large. See Humann v. Wilson, 696 F.2d 783, 784 (10th Cir. 1983). Obray has not been overruled or modified by any Utah Supreme Court decision. To the contrary, the public duty rule of Obray was reaffirmed in 1984 by the Utah Supreme Court in Christenson v. Hayward, 694 P.2d 612 (Utah 1984).

This general duty owed to the public at large may become a special duty owed to an individual, only where the governmental entity deals or acts directly with the injured party on an individual basis. See 18 McQuillan, supra, and cases cited therein. Such were the facts in Little v. Utah State Div. of Family Serv., 667 P.2d 49 (Utah 1983), cited by plaintiff in his Brief. There, the Division of Family Services placed a child in a foster home, assumed a specific duty to provide proper care for that child, and then breached that specific duty, causing injury to the child. 667 P.2d at 51-52. That is not the case here. No such direct contact took place between Kirk and the State; no special relationship was created; no specific duty towards appellant was assumed.

Even where the state may assume voluntarily to perform certain acts or functions, either by statute, regulation, or otherwise, no liability or actionable duty is created absent a

special relationship with the claimant. See Davidson v. City of Westminster, 32 Cal. 3d 197, 649 P.2d 894, 899, 185 Cal. Rptr. 252 (1982) (the common theme running through cases in which a special relationship, and thus an actionable duty, has been found is the voluntary assumption by the public entity or official of a specific duty toward the injured party); Dinsky v. Town of Framingham, 386 Mass. 810, 438 N.E.2d 51, 56 (1982) (application of majority rule that in absence of special duty to plaintiff, different from duty owed to public at large, no cause of action can be maintained against a government entity). Thus, Obray is still good law in Utah. No duty exists and therefore appellant has no cause of action, precluding the necessity of applying Section 63-30-10(1)(j).

With regard to appellant's argument that a duty "should" exist, this Court has not adopted Section 319 of the Restatement (Second) of Torts, as appellant freely admits in his Brief. See Brief of Appellant at 9. This is not an appropriate case for this Court to consider doing so. Even if the Restatement section cited were adopted here and a duty created thereby upon which appellant could maintain an action, the specific immunity provision of Section 63-30-10(1)(j), which by its very language presumes that a duty exists, bars plaintiff's claim. Accordingly, this Court should not adopt Section 319 of the Restatement where its adoption would be precedent setting but have no legal effect.

POINT IV

KIRK'S "MODERN TREND" ARGUMENT SHOULD BE
MADE TO THE LEGISLATURE, NOT THIS COURT.

This Court has held consistently that the courts of this state are to give force and effect to statutory terms which are deemed to have been used advisedly by the Legislature. West Jordan v. Morrison, 656 P.2d at 446. See also Gord v. Salt Lake City, 20 Utah 2d 138, 434 P.2d 449, 451 (1967). "It is not the duty of this Court to assess the wisdom of the statutory scheme." Gord, 434 P.2d at 451. Here, appellant argues that this Court should adopt a "modern trend" which is contrary to the clear statutory scheme set forth in the incarceration exception of Section 63-30-10(1)(j). See Brief of Appellant at 8-10.

This Court must assume that the Legislature intended to accomplish just what the incarceration exception does--extend immunity to governmental entities in cases like the one at bar. This Court may not alter or skew application of clear statutory language simply because it disagrees with the wisdom, effectiveness, reasonableness or orderliness of the statute. See Gord, 434 P.2d at 451. The Court "has a duty to let [the statute] operate as the legislature has provided," id., regardless of "trends" in other states or jurisdictions.

It should be noted that the "trend" states whose decisions appellant has cited in his Brief are jurisdictions which have

abrogated, abolished, altered, or never had a governmental immunity statutory framework similar to Utah's. The legal theories, doctrine or statutory bases for these decisions, then, are strikingly different than that before this Court here. See, for example, Spanel v. Mounds View Sch. Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962) and Tyler v. State, 618 P.2d 1042, 1045 (Wyo. 1980). Decisions of courts from other jurisdictions which are based on statutes different from those of Utah, are not controlling law in Utah. See State v. Atherton, 69 Utah 53, 252 P. 280 (1926).

Even the Utah cases cited by appellant in support of his "modern trend" argument are not applicable here. Neither Doe v. Arguelles, 716 P.2d 279 (Utah 1985) nor Little v. Utah State Div. of Fam. Serv., supra, deal with the incarceration exception of Section 63-30-10(1)(j). Both dealt with the discretionary function exception of Section 63-30-10(1)(a), which is not at issue here. Furthermore, neither discussed or adopted any "trend."

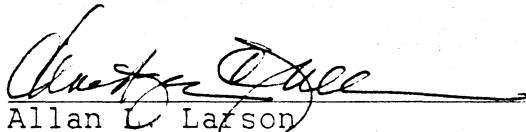
Neither can Standiford v. Salt Lake City, 605 P.2d 1230 (Utah 1980) be read to support a "trend" away from immunity for governmental functions. Standiford deals exclusively with the creation of a workable standard to determine whether a governmental entity's activities are an "exercise of governmental function."

CONCLUSION

For the reasons set forth above, this Court should affirm the lower court's judgment of dismissal with prejudice and on the merits of appellant's Verified Complaint, and respondent State of Utah respectfully requests that this Court do so.

DATED this 11th day of April, 1988.

SNOW, CHRISTENSEN & MARTINEAU

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SCMCCF158

APPENDIX I

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

GEORGE "NICK" KIRK,)

Plaintiff,)

vs.)

THE STATE OF UTAH and its)
subdivision, THE DEPARTMENT
OF CORRECTIONS,)

Defendants.)

V E R I F I E D
C O M P L A I N T

Civil No. C 87-00117

Judge James H. Pearson

Plaintiff complains and alleges:

1. That he is a resident and citizen of the
State of Utah and was at all times mentioned herein.

2. That this action is brought pursuant to the
Utah Governmental Immunity Act, 63-30-1, et. seq., Utah Code
Annotated, 1953 as amended.

3. That the plaintiff has properly and timely
filed his notice of claim with the State of Utah as provided
by 63-30-11, UCA, 1953 as amended, a copy of which is attached
hereto, made a part hereof and marked as Exhibit "A," to
which claim the defendants have failed, refused, and neglected
to respond.

4. That the plaintiff has, with this complaint, filed an undertaking as required by 63-30-19, UCA, 1953 as amended, in the amount of \$300.00.

5. That the acts complained of herein occurred while the defendants' officers, agents and employees were acting within the scope of their employment performing ministerial acts and functions in a negligent or grossly negligent manner evidencing a deliberate indifference to the rights of the plaintiff, said ministerial acts consisting of the transportation of one RONNIE LEE GARDNER to a court hearing in Salt Lake City, Utah, as is more fully set forth hereafter.

6. That on or about the 2nd day of April 1985, the plaintiff, by and through its officers, agents and employees, acting within the scope of their employment and pursuant to the mandates and requirements of Utah law and Utah constitution, arranged for, planned and did transport one RONNIE LEE GARDNER from the Utah State Prison at Draper, Utah, to the Metropolitan Hall of Justice in Salt Lake City, Utah, so that the said RONNIE LEE GARDNER could attend a court hearing at which he was required to be in attendance.

7. That due to the negligent or grossly negligent manner or manner exhibiting a deliberate indifference to the safety of the public, and in particular the plaintiff, and

the manner by which the said RONNIE LEE GARDNER was restrained, transported, and guarded, the said RONNIE LEE GARDNER attempted to escape from the Metropolitan Hall of Justice at Salt Lake City, Utah, and in so doing, due to the negligent conduct of the defendants' officers, agents and employees, acquired a deadly firearm and did shoot, among others, the plaintiff causing him temporary and permanent injuries, pain, suffering, permanent disfigurement, loss of work, income and other and further damages, both mental and physical.

8. That the plaintiff incurred medical and doctor's expenses and charges in an amount as yet not fully ascertained and which are still being incurred for which the plaintiff is entitled to be reimbursed in such amount as may be proven at the time of trial.

9. That at the time that the ~~plaintiff~~^{defendant} by and through its officers, agents and employees transported the said RONNIE LEE GARDNER to the Metropolitan Hall of Justice at Salt Lake City, Utah, the said RONNIE LEE GARDNER was facing a capital murder charge arising out of an incident which occurred during an earlier escape, and, further, was incarcerated at the Utah State Prison for various homicide, assault and other felony convictions, including escape. That the said RONNIE LEE GARDNER had made other successful escapes from the defendant and had made threats prior to the 2nd day of April 1985, that he would again escape. That the

officers, agents and employees of the defendant, knew, or should have known of the dangerous propensities of the said RONNIE LEE GARDNER but that they negligently, or grossly negligently, or with a deliberate indifference transported the said RONNIE LEE GARDNER and guarded him in such a manner that he attempted to escape from the Metropolitan Hall of Justice.

10. That the officers, agents and employees of the defendant did negligently or grossly negligently or with deliberate indifference train, instruct, counsel and direct other agents and employees in the methods and manner of restraint, transportation and guarding of persons being transported and that as a direct and proximate cause thereof the said RONNIE LEE GARDNER did attempt an escape as aforesaid. That the acts of the defendants were ministerial acts and as such are not subject to any claim of sovereign immunity.

11. That as a direct and proximate cause of the conduct of the defendants, acting through their officers, agents and employees the plaintiff suffered the injuries and losses set forth above.

WHEREFORE, plaintiff prays judgment as follows:

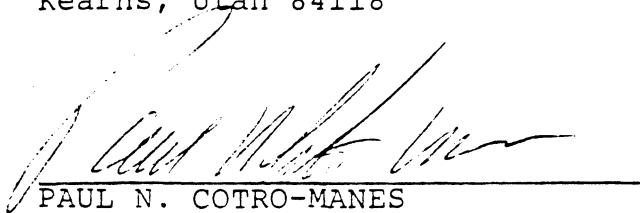
(1) That the Court award to the plaintiff herein, special damages in the sum of \$25,000 or such other and further sum as may be proven at the time of trial in this matter;

(2) That the Court award to the plaintiff herein, general damages in the sum of \$400,000 or such other and further sum as may be proven at the time of trial in this matter;

(3) For such other and further relief as the Court deems just in the premises, pre-judgment interest at the legal rate set by the laws of the State of Utah, costs and interest after judgment.


George "Nick" Kirk

Plaintiff's address:
5111 South 4460 West
Kearns, Utah 84118


PAUL N. COTRO-MANES
Attorney for Plaintiff
Suite 280, 311 South State Street
Salt Lake City, Utah 84111-2377

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

GEORGE "NICK" KIRK, being first duly sworn, deposes and says that he is the plaintiff in the foregoing action, that he has read the foregoing complaint and knows and understands the contents thereof; that the same is true

of his own knowledge, except as to matters therein stated
on information and belief, and as to such matters he believes
them to be true.

George Nick Kirk

Subscribed and sworn to before me this 12th day of
January 1987.

Lauren A. Sherr
Notary Public, residing at
Salt Lake City, Utah

My Commission Expires:

6-25-88

CLAIM AGAINST THE STATE OF UTAH
and its
DEPARTMENT OF CORRECTIONS
its Warden, Officers
and Employees

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

GEORGE "NICK" KIRK being duly sworn deposes and
says:

1. That he is a resident and citizen of the State
of Utah and that he is over the age of 21 years and that this
Claim is filed pursuant to 63-30-1, et. seq., Utah Code Anno.,
1953 as amended.

2. That on the 2nd day of April 1985, your affiant
was employed by the Sheriff of Salt Lake County, State of
Utah, as a bailiff assigned to the Third Judicial District
Court, County of Salt Lake, New Courts Building, Metropolitan
Hall of Justice, Salt Lake City, Utah.

3. That on the 2nd day of April 1985, pursuant to
the provisions of the Utah Constitution and the statutory
laws of the State of Utah, requiring the attendance of an
accused at court hearings involving him, the State of Utah
by and through its Department of Corrections, its officers,
agents, and employees, transported one RONNIE LEE GARDNER to
the Metropolitan Hall of Justice, New Courts Building, Salt
Lake City, Utah, for a court hearing arising out of certain
alleged criminal conduct of the said Ronnie Lee Gardner.

4. That in so doing, the State of Utah by and through its officers, agents, and employees were acting in a ministerial capacity and subject to the provisions of the Utah Governmental Immunity Act waiving immunity in such situations.

5. That the State of Utah by and through its Department of Corrections, the Warden of the Utah State Prison and his officers, agents, and employees, all employed by the State of Utah, while they were then and there acting in their official capacity and within the scope of their authority and employment, negligently or willfully transported the said Ronnie Lee Gardner in such a manner and/or under such negligently or willfully applied restraints and/or the omission to apply the same and/or with such negligent disregard of watchfulness and caution normally associated with the movement of such a person, that the said Ronnie Lee Gardner obtained possession of a loaded firearm and did attempt to escape from the Metropolitan Hall of Justice and in so doing did grievously shoot and injure your affiant, George "Nick" Kirk, without provocation, who, as a direct and proximate cause of the negligent acts and omissions of the State of Utah, its officers, agents, and employees, suffered permanent disabling injury to his body, undergone pain, suffering, surgery, loss of employment, incurred medical and hospital expenses and has otherwise suffered with a resulting economic

loss of \$ 25,000.00 for medical and hospital bills and general damages in the sum of \$ 400,000.00 so far as they are known at this time.

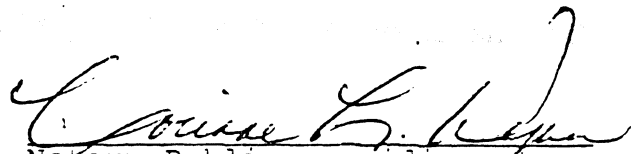
6. That at the time that the State of Utah by and through its officers, agents, and employees transported the said Ronnie Lee Gardner into the Metropolitan Hall of Justice, New Courts Building, it and they well knew that the said Ronnie Lee Gardner had on a previous occasion, a short time prior to the 2nd day of April 1985, escaped from the custody of the State of Utah, its Department of Corrections and the officers, agents, and employees thereof; and further had allegedly murdered a citizen of the State of Utah while on escape; further, the said Ronnie Lee Gardner had announced to the officers, agents, and employees of the State of Utah, previous to April 2, 1985, his intent to attempt future escapes. Even though the said State of Utah by and through its officers, agents, and employees knew of the dangerous propensities of the said Ronnie Lee Gardner, it and they took no precautionary measures, all ministerial in nature, to protect the public and in particular your affiant, George "Nick" Kirk, from the said Ronnie Lee Gardner.

7. That this affidavit and claim are filed pursuant to 63-30-11, Utah Code Annotated, 1953 as amended, and is timely under the provisions of 63-30-12, Utah Code Annotated, 1953 as amended.

8. All communications relative to this notice of claim should be served upon my attorney, Paul N. Cotro-Manes, Esq., Attorney at Law, Suite 280, 311 South State Street, Salt Lake City, Utah 84111-2377, telephone (801) 531-1300.

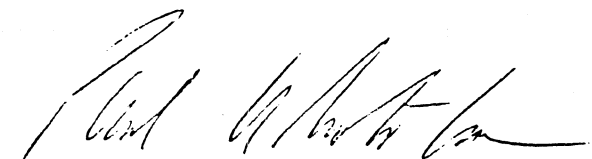

GEORGE "NICK" KIRK

Subscribed and sworn to before me this 30th day of January 1986.


Notary Public, residing at
Salt Lake County, Utah

My Commission Expires:

MY COMMISSION EXPIRES AUG. 21, 1988


PAUL N. COTRO-MANES
Attorney for Affiant
George "Nick" Kirk
Suite 280, 311 South State Street
Salt Lake City, Utah 84111-2377

APPENDIX II

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

GEORGE "Nick" KIRK,

Plaintiff,

-vs-

STATE OF UTAH, et al.

Defendants.

:

:

:

:

Civil No. CV-87873

RULING

BOYD L. PARK, JUDGE

This matter came regularly before the court for hearing on Thursday, August 13, 1987, on Defendant's Motion to Dismiss based upon sovereign immunity pursuant to 63-30-1 et seq. Paul N. Cotro-Manes esq. represented Plaintiff. Christopher C. Fuller esq. represented Defendants. The Court, having heard oral arguments of counsel in the premises, having read the Motion to Dismiss, the Memoranda in Support of the Motion, and the Memoranda in Opposition to the Motion, makes the following Findings and Ruling:

FINDINGS

1. On April 2, 1985, during an escape attempt at the Salt Lake Metropolitan Hall of Justice, prison inmate Ronnie Lee Gardner shot bailiff George "Nick" Kirk, plaintiff herein. in the stomach.

2. On January 12, 1987, Plaintiff filed this negligence action against the State of Utah and the Utah State Department of Corrections.
3. On February 9, 1987, defendants filed a motion to dismiss this action based on the Utah Governmental Immunity Act, 63-30-1 et seq.
4. Section 63-30-3 of the Utah Governmental Immunity Act, which expressly provides for the continuance of sovereign immunity for any injury resulting from the exercise of a governmental function "except as otherwise provided in this chapter," indicates an intention that the act be strictly applied to preserve sovereign immunity. *Holt v. Utah State Road Commission*, 30 Utah 2d 4, 511 P.2d 1286 (Utah 1973).
5. Section 63-30-2(4) of the Utah Sovereign Immunity Act defines "Governmental function" as:

any act or failure to act, operation, function, or undertaking of a governmental entity whether or not the act or failure to act, operation, function, or undertaking is characterized as a governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential or not essential to a government or government function, or could be performed by private enterprise.
6. By delivering inmate Ronnie Lee Gardner to the court, the defendant's employees were clearly engaged in a governmental function within the meaning of 63-30-2(4) and the fact that

that such activity could be performed by private enterprise does not alter that result.

7. Section 63-30-10(1) expressly waives governmental immunity from suit for injury proximately caused by a negligent act or omission of an employee committed within the scope of his authority except for certain enumerated exceptions.
8. One exception expressly retains governmental immunity if the injury "arises out of the incarceration of any person in any state prison . . ." Section 63-30-10(1)(j) U.C.A 1953, as amended; previously numbered as 63-30-10(10).
9. The plain meaning of that section reflects a legislative intent to retain sovereign immunity for any injuries occurring while the incarcerated person is in prison and under the control of the state. *Madsen v. State*, 583 P.2d 92, 93 (Utah 1978).
10. The fact that inmate Ronnie Lee Gardner was brought to the Salt Lake Metropolitan Hall of Justice for court proceedings does not change the fact that Gardner was an inmate incarcerated at the Utah State Prison who was under the control of the state.
11. The governmental entity is immune "unless immunity is expressly waived in one of the succeeding sections of

the . . . Act," Madsen v. Borthick, 658 P.2d 627, 631 (Utah 1983)(emphasis added), and a waiver of that immunity cannot be implied solely by the fact a state has chosen to purchase insurance coverage.

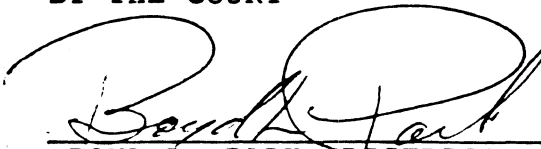
12. This court recognizes that sovereign immunity is a harsh doctrine which effectively deprives the plaintiff of his remedy for actual injuries suffered. The court further acknowledges that, while several states are currently restricting sovereign immunity, the State of Utah seems to be reinforcing sovereign immunity. However, this court is not the appropriate forum to change the policy of the Utah State Legislature nor the rulings of the Utah Supreme Court.

RULING

1. Defendant's are immune from this suit pursuant to Section 63-30-10(1)(j) of the Utah State Governmental Immunity Act.
2. Defendants' Motion to Dismiss this action is granted.

Dated this 4th day of November, 1987.

BY THE COURT


BOYD L. PARK, DISTRICT JUDGE

cc: Paul N. Cotro-Manes esq.
Christopher C. Fuller esq.
Brent A. Burnett, esq.

ALLAN L. LARSON
JODY K BURNETT
CHRISTOPHER C. FULLER
SNOW, CHRISTENSEN & MARTINEAU
Co-Counsel for Defendants
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

GEORGE "NICK" KIRK,

Plaintiff,

vs.

THE STATE OF UTAH and its
subdivision, THE DEPARTMENT
OF CORRECTIONS,

Defendants.

ORDER AND JUDGMENT

Civil No. CV-87873
(Formerly Third District
Court Civil No. C-87-00198)

Defendant's Motion to Dismiss, based upon sovereign immunity pursuant to Section 63-30-1, et seq., Utah Code Annotated, 1953 as amended, came on for oral argument before the above-referenced Court on Thursday, August 13, 1987, with Paul N. Cotro-Manes representing plaintiff, and Christopher C. Fuller of Snow, Christensen & Martineau representing defendants. The Court, having heard oral arguments of counsel, having read the Motion to Dismiss, the memoranda in support of the Motion, and the memoranda in opposition to the Motion, the Court having issued a Ruling on the Motion on November 4, 1987, being fully advised in the premises, the Court finds and concludes as follows:

1. On April 2, 1985, during an escape attempt at the Salt Lake Metropolitan Hall of Justice, prison inmate Ronnie Lee Gardner shot bailiff George "Nick" Kirk, plaintiff herein, in the stomach.

2. On January 12, 1987, plaintiff filed this negligence action against the State of Utah and the Utah State Department of Corrections.

3. On February 9, 1987, defendants filed a motion to dismiss this action based on the Utah Governmental Immunity Act, 63-30-1, et seq.

4. Section 63-30-3 of the Utah Governmental Immunity Act, which expressly provides for the continuance of sovereign immunity for any injury resulting from the exercise of a governmental function "except as otherwise provided in this chapter," indicates an intention that the act be strictly applied to preserve sovereign immunity. Holt v. Utah State Road Commission, 30 Utah 2d 4, 511 P.2d 1286 (Utah 1973).

5. Section 63-30-2(4) of the Utah Sovereign Immunity Act defines "Governmental function" as:

any act or failure to act, operation, function, or undertaking of a governmental entity whether or not the act or failure to act, operation, function, or undertaking is characterized as a governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential or not essential to a government or government function, or could be performed by private enterprise.

6. By delivering inmate Ronnie Lee Gardner to the court, the defendant's employees were clearly engaged in a governmental function within the meaning of 63-30-2(4) and the fact that such activity

could be performed by private enterprise does not alter that result.

7. Section 63-30-10(1) expressly waives governmental immunity from suit or injury proximately caused by a negligent act or omission of an employee committed within the scope of his authority except for certain enumerated exceptions.

8. One exception expressly retains governmental immunity if the injury "arises out of the incarceration of any person in any state prison . . ." Section 63-30-10(1)(j) U.C.A. 1953, as amended; previously numbered as 63-30-10(10).

9. The plain meaning of that section reflects a legislative intent to retain sovereign immunity for any injuries occurring while the incarcerated person is in prison and under the control of the state. Madsen v. State, 583 P.2d 92, 93 (Utah 1978).

10. The fact that inmate Ronnie Lee Gardner was brought to the Salt Lake Metropolitan Hall of Justice for court proceedings does not change the fact that Gardner was an inmate incarcerated at the Utah State Prison who was under the control of the state.

11. The governmental entity is immune "unless immunity is expressly waived in one of the succeeding sections of the . . . Act," Madsen v. Borthick, 658 P.2d 627, 631 (Utah 1983) (emphasis added), and a waiver of that immunity cannot be implied solely by the fact a state has chosen to purchase insurance coverage.

12. This court recognizes that sovereign immunity is a harsh doctrine which effectively deprives the plaintiff of his remedy for actual injuries suffered. The court further acknowledges that, while several states are currently restricting sovereign immunity,

the State of Utah seems to be reinforcing sovereign immunity. However, this court is not the appropriate forum to change the policy of the Utah State Legislature nor the rulings of the Utah Supreme Court.

WHEREFORE, based upon the above-listed findings, the Court concludes and rules that defendants are immune from this suit pursuant to Section 63-30-10(1)(j) of the Utah Governmental Immunity Act, and accordingly, defendants' Motion to Dismiss should be granted.

ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED that, based upon the above-listed findings and conclusions, defendants are immune from suit in this action and plaintiff's Complaint is barred pursuant to Section 63-30-10(1)(j) of the Utah Governmental Immunity Act, and plaintiff's Complaint should be, and hereby is, dismissed with prejudice and on the merits, no cause of action. Each party to bear its own costs herein.

DATED this _____ day of November, 1987.

BY THE COURT:

Boyd L. Park, Fourth Judicial
District Court Judge

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

MARIE B. VAN WENSVEEN, being duly sworn, says:

That she is employed in the law offices of Snow, Christensen & Martineau, attorneys for Defendants

herein; that she served the attached Order and Judgment

(Case Number CV-87873, Utah County)

upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Paul N. Cotro-Manes
Attorney for Plaintiff
Suite 280, 311 South State Street
Salt Lake City, Utah 84111

and causing the same to be mailed first class, postage prepaid, on the 10th day of November, 1987.

SUBSCRIBED AND SWORN to before me this 10th day of

November, 1987.

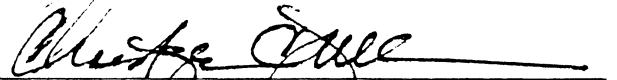
S/
Notary Public
Residing in the State of Utah

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief of Respondent by mailing four copies to Paul N. Cotro-Manes, Esq., Attorney for Appellant, at 311 South State Street, Suite 280, Salt Lake City, Utah 84111, this 11th day of April, 1988.

SNOW, CHRISTENSEN & MARTINEAU

By



Christopher C. Fuller
Attorneys for Respondent.