

2003

# John Miller, Joan Miller v. United States of America : Reply Brief

Utah Supreme Court

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**IN THE UTAH SUPREME COURT**

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JOHN MILLER AND JOAN MILLER, :

Plaintiffs/Appellees, :

v. : No. 20030054-SC

UNITED STATES OF AMERICA, :

Defendant/Appellant. :

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**REPLY BRIEF OF APPELLANT UNITED STATES OF AMERICA**

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ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, NORTHERN DIVISION  
HONORABLE TENA CAMPBELL

---

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## ARGUMENT

### **I. Plaintiff has no common-law negligence claim against the United States because Utah's Dramshop Act preempts common-law claims.**

As discussed in the United States' Opening Brief, Plaintiffs' Complaint appears to allege causes of action based on both Utah's Dramshop Act and common-law negligence. Plaintiffs now acknowledge that they cannot proceed under the Dramshop Act because the Federal Tort Claims Act ("FTCA") does not waive the United States' sovereign immunity with respect to the Dramshop Act's strict-liability provisions. See Plaintiffs' Opening Brief at 17-19. In lieu of that claim, Plaintiffs contend that they can proceed on a common-law negligence theory. In order to do so, however, Plaintiffs would have to base their negligence claim on facts that fall squarely within the terms of the Dramshop Act. Plaintiffs cannot do so because Utah's Dramshop Act preempts such a claim.

Prior to the enactment of the Dramshop Act, this Court consistently followed the common-rule that a person or entity that served alcohol to an intoxicated person had no liability to a third party who was injured by the intoxicated person. Adkins v. Uncle Bart's, Inc., 1 P.3d 528, 532 (Utah), cert. denied, 531 U.S. 1011 (2000); but cf. Rees v. Albertson's, Inc., 587 P.2d 130, 133 (Utah 1978) (recognizing a cause of action against a vendor of alcohol who sold the alcohol negligently and in violation of a statute to an underage purchaser).

In 1981, the Utah legislature enacted the Dramshop Act, creating a comprehensive system of liability on the part of purveyors of alcohol. That statute, together with subsequent amendments, provides a detailed procedural and substantive framework for claims against alcohol purveyors. Among other things, the Dramshop Act

- (1) designates the circumstances under which commercial alcohol providers may be held liable,
- (2) designates the more limited circumstances under which private alcohol providers may be held liable,
- (3) provides for vicarious liability of employers,
- (4) provides for the survival of a claim in the case of the death of a claimant,
- (5) establishes limits of damages recoverable,
- (6) establishes a two-year statute of limitations,
- (7) preserves claims with no damage limitation against the intoxicated person who causes injury or death, and
- (8) prohibits employers from retaliating against employees who use their independent judgment in refusing to sell alcohol to persons described in the statute.

Utah Code Ann. §§ 32A-14a-101, et seq. (2001 Repl.).



In the 22 years since the enactment of the Dramshop Act, this Court has declined to expand the liability of alcohol purveyors by recognizing common-law claims outside the scope of the Act. See, e.g., Adkins, 1 P.3d at 533 (holding that a party injured by an intoxicated person cannot base a cause of action against a dramshop either on common-law negligence or on a violation of the Utah Liquor Control Act). Moreover, even if this Court would be inclined to recognize a common-law claim in the absence of governing legislation, the Dramshop Act preempts the development of common-law liability on the part of alcohol providers. Gilger v. Hernandez, 997 P.2d 305 (Utah 2000). The Dramshop Act preempts such a claim even where the Act excludes that claim from its coverage. Id. at 307-10.

In Gilger, the plaintiffs sought to recover for injuries they suffered when they were stabbed by an intoxicated minor who had been served beer at the defendant's private residence. The plaintiffs did not assert a claim under the Dramshop Act because the version then in effect excluded claims against social hosts who served beer to minors.<sup>1</sup> Instead, the plaintiffs claimed that the

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<sup>1</sup>The Dramshop Act has subsequently been amended to include liability for social hosts who provide beer to minors. Utah Code Ann. §§ 32A-1-105(2), 32A-14a-102(2)(2001 Repl.).

defendant was negligent per se because she had violated Utah criminal law by providing alcohol to a minor. Id. at 306.

The defendant argued that the Dramshop Act preempted the plaintiffs' common-law claim. The plaintiffs responded that the Dramshop Act did not preempt their common-law claim because the Act did not impose liability for the acts alleged in their complaint, and the Act did not explicitly bar general negligence liability. Id. at 307-8.

This Court held that the comprehensive nature of the Dramshop Act's civil-liability provisions evidenced a legislative intent to preempt common-law negligence claims against alcohol providers. "The Act evidences an overall scheme of regulation of liability for liquor providers. Its very comprehensiveness suggests a purpose and intent to preempt inconsistent common law." Id. at 309. The Court held that the plaintiffs' claim was preempted despite the fact that the Dramshop Act then in effect exempted the defendant from liability. "Even if this court were to find that there was common law liability for social hosts who serve beer to minors, such liability would be preempted by the Dramshop Act." Id. at 308.

This Court has subsequently reaffirmed its determination that comprehensive legislation preempts the development of overlapping common-law

claims, even where the plaintiff will be left without a remedy. In Gottling v. P.R. Incorporated, 61 P.3d 989 (Utah 2002), the plaintiff asserted a common-law wrongful-termination claim, alleging that she was terminated from her employment because of her refusal to engage in a sexual relationship with the company's owner. The plaintiff did not seek recovery under the Utah Anti-Discrimination Act ("UADA") because the company employed fewer than 15 employees and thus was excluded from the UADA's coverage. Instead, the plaintiff asserted a common-law tort claim based on an alleged public policy against sexual discrimination. Id. at 991.

This Court rejected the plaintiff's claim on the ground that the UADA preempted common-law employment-discrimination claims. The Court relied in part on the fact that the UADA contains explicit language stating that it is the sole basis for employment-discrimination claims under Utah law. Id. at 992. The Court also said, however, that the UADA would preempt common-law claims even in the absence of such language. The Court reasoned that it must defer to the legislature's policy decisions. "Simply put, we must not craft a remedy where the legislature intends no remedy to exist. To do otherwise trespasses upon the legislative domain and threatens the fragile balance of power upon which our system of government rests." Id. at 998. The Court held that the plaintiff's

common-law claim was preempted even though the plaintiff had no recourse under the UADA. “[N]ew statutory schemes, in certain circumstances, may preclude formerly available common law causes of action, despite leaving some individuals without a remedy.” Id. at 997 (citing Gilger, 997 P.2d at 309-10).

The present case presents an even more compelling case for preemption because Plaintiffs’ allegations fall squarely within the liability provisions of the Dramshop Act. Plaintiffs allege that alcohol was served to Mr. Valle when he was apparently under the influence of alcohol; that the service of the alcohol to Mr. Valle caused his intoxication; and that the collision that caused Plaintiffs’ injuries resulted from Mr. Valle’s intoxication. Complaint at 3-4, ¶¶ 8-10 (U.S. District Court record, document 1). These allegations would state a cause of action against a private person or entity. See Utah Code Ann. § 32A-14-101(1)(b) (1999 Repl.). Unfortunately for Plaintiffs, their claim is against the United States, which has not waived its immunity from Plaintiffs’ strict-liability claim under the Dramshop Act. Thus, the deficiency in Plaintiffs’ claim is not the result of a gap in the Dramshop Act’s coverage, but rather the result of the FTCA’s preservation of the United States’ sovereign immunity against “strict liability of any sort.” Laird v. Nelms, 406 U.S. 797, 803 (1972).

Plaintiffs suggest that this Court could overcome the United States' sovereign immunity in either of two ways. First, Plaintiffs suggest that the Court could create a system of negligence per se based on the criminal provisions of the Alcoholic Beverage Control Act ("ABCA"). See Plaintiffs' Opening Brief at 8-10. Plaintiffs' theory is undermined by a comparison of those provisions with the civil-liability provisions of the Dramshop Act. The ABCA imposes criminal penalties for providing alcohol to the following categories of persons: (1) any person under the age of 21 years; (2) any person "who is apparently under the influence of intoxicating alcoholic beverages" or who the provider "knew or should have known from the circumstances was under the influence of intoxicating alcoholic beverages"; and (3) any "known interdicted person." Utah Code Ann. §§ 32A-12-203, -204, -205 (2001 Repl.). These are precisely the same categories of persons listed in the Dramshop Act's provisions imposing liability on commercial providers of alcoholic beverages. See Utah Code Ann. § 32A-14a-102(1)(b)(ii) (2001 Repl.). Thus, Plaintiffs' suggestion would create a body of tort liability directly in conflict with the Dramshop Act. The fact that the Utah legislature included the same categories of persons in both the criminal and civil liability sections of the ABCA demonstrates its intent that injured parties should

not be allowed to rely on the criminal provisions to make an end run around the comprehensive liability provisions of the Dramshop Act.

Plaintiffs' second suggestion is that this Court could fashion a unique cause of action applicable only to the United States. See Plaintiffs' Opening Brief at 23-24. This theory, while creative, would be ineffectual. The fundamental principle governing the United States' tort liability under the FTCA bears repeating: The United States is liable only to the extent "a private individual under like circumstances" would be liable. 28 U.S.C. § 2674 (emphasis added). Plaintiffs' proposed common-law claim would fall outside the scope of the FTCA, however, because it would apply only to the United States and not to "a private individual under like circumstances." Thus, the ironic result of Plaintiffs' proposal for a common-law claim targeted only at the United States is that such a claim would not meet the express requirements of the FTCA.

In order to create a claim applicable to the United States, this Court would have to recognize a negligence claim applicable not just to the United States, but to all persons and entities. Injured parties would be able to pursue either a strict-liability claim under the Dramshop Act, or a negligence claim, or both. While the creation of a second layer of liability would give injured parties more options, it would simultaneously nullify the legislature's decisions regarding the appropriate

balance between victim compensation on the one hand, and protection of alcohol providers on the other. Commercial alcohol purveyors would be subject to a greater variety of claims, and the duration of their potential liability would be extended from two years to four years. More importantly, commercial purveyors would face a dramatic increase in their potential liability and insurance costs. At the same time, non-commercial alcohol providers - - who are liable under the Dramshop Act only for providing alcohol to minors - - would be at risk for a wider variety of potential claims, with unlimited damages.

These are just a few of the considerations facing the legislature when it enacts or amends dramshop legislation. The fact that the FTCA excludes strict-liability claims from its coverage is not a sufficient reason to upset the legislature's resolution of these issues. If public policy demands that the federal government bear liability under the Utah Dramshop Act, it is a matter for consideration by Congress in its evaluation of the FTCA's waiver of sovereign immunity, or by the Utah legislature in its evaluation of the appropriate type of proof to be required under the Dramshop Act.

[R]espect for the legislative prerogative in lawmaking requires that the judiciary not interfere with enactments of the Legislature where disagreement is founded only on policy considerations and the legislative scheme employs reasonable means to effectuate a legitimate objective. In matters not affecting fundamental rights, the prerogative of

the legislative branch is broad and must by necessity be so if government is to be by the people through their elected representatives and not by judges.

Gottling, 61 P.3d at 998 (citing Baker v. Matheson, 607 P.2d 233, 237 (Utah 1979)).

In Gilger, this Court correctly concluded that the Utah legislature intended to occupy the field of dramshop liability when it enacted comprehensive legislation governing the civil liability of alcohol purveyors. There is no rationale or precedent for this Court to create a system of common-law liability that would directly conflict with the statutory system of liability already authorized under Utah's Dramshop Act. Plaintiffs' request that this Court do so should be rejected.

Plaintiffs accurately point out that courts in a number of other jurisdictions have recognized a common-law cause of action against dramshops. See Plaintiffs' Opening Brief at 12-15. The case law cited by Plaintiffs does not support their argument, however. Most of the cases arose in states without dramshop statutes. In the absence of dramshop legislation, of course, the issue of preemption does not arise. Moreover, those courts frequently relied on criminal statutes, like those in Utah's Alcoholic Beverage Control Act, which prohibit the distribution of alcohol to minors, inebriated individuals, or other classifications of persons. See, e.g., Ono v. Applegate, 612 P.2d 533 (Haw. 1980); Hutchens v. Hankins, 303 S.E.2d 584 (N.C. App. 1983). As discussed above, the Utah legislature has already



incorporated those classifications of persons into the civil-liability provisions of the Dramshop Act. Thus, the circumstances that persuaded the courts in states without dramshop legislation to fill the liability vacuum do not exist in Utah.

Even where courts have recognized common-law dramshop claims in jurisdictions with dramshop statutes, the courts have generally recognized common-law claims only where expressly authorized by statute or where necessary to fill substantial gaps in the statutory coverage. See, e.g., Largo Corp. v. Crespin, 727 P.2d 1098, 1105 (Colo. 1986) (recognizing a common-law cause of action where Colorado's dramshop statute governed only "extremely limited circumstances," i.e., the service of alcohol to "habitual drunkards" about whom a written notice had been issued); Thaut v. Finley, 209 N.W.2d 695 (Mich. App.), rev'd, 213 N.W.2d 820, 821-2 (Mich. App. 1973) (recognizing a common-law cause of action against a social host where the Michigan dramshop statute contained no provision for liability of social hosts); Trail v. Christian, 213 N.W.2d 618, 621-25 (Minn. 1973) (recognizing a common-law cause of action for the sale of "3.2 beer" where Minnesota's dramshop statute excluded any liability for the sale of 3.2 beer, and noting that the dramshop statute preempted common-law claims as to alcoholic beverages defined therein); Mullis v. Monroe Oil Co., Inc., 505 S.E.2d 131, 134-5 (N.C. 1998) (recognizing a common-law claim for the

negligent sale of alcohol to a minor, where North Carolina’s dramshop statute expressly preserved common-law claims); Mason v. Roberts, 294 N.E.2d 884, 887-8 (Ohio 1973) (recognizing a common-law cause of action where the Ohio dramshop statute applied only to the sale of alcohol to persons “blacklisted” on an order issued by the Department of Liquor Control).

Plaintiffs rely primarily on Craig v. Driscoll, 813 A.2d 1003 (Conn. 2002), where a three-to-two majority of the Connecticut Supreme Court recognized a broad common-law dramshop liability in the face of equally broad dramshop legislation. The United States submits that the Craig decision improperly blurs the division between the legislative and judicial roles.

In Craig, the Connecticut Supreme Court held that a common-law claim for negligent infliction of emotional distress was not preempted by Connecticut’s dramshop statute. Unlike Utah’s Dramshop Act, the Connecticut statute did not require any proof of a causal link between the providing of alcohol to an intoxicated person and the intoxication that caused the subsequent injury. The Connecticut statute provided for a damage limitation of \$20,000. The Connecticut Supreme Court held that “recognition of a common-law negligence action neither conflicts with the act nor thwarts its underlying purpose. . . . The act provides a means of recovery for plaintiffs who are unable to prove causation and culpability,

subject to a statutory limitation on damages.” 813 A.2d at 1014. The court decided that because of the modest damage limit in the Connecticut statute, it was appropriate to supplement the legislation.

[The dramshop act] sets, in essence, a minimum recovery opportunity for persons injured as a result of the sale of liquor to an intoxicated person. By setting a *floor*, however, the legislature did not also intend to be setting a *ceiling* - - and we are free, therefore, to exercise our common-law authority to increase the recovery opportunity in circumstances where the state of mind of the bar owner warrants it. In this manner, the tort action would supplement, rather than conflict with, the [dramshop] act.

Id. (Italics in original.)

By characterizing the Connecticut dramshop statute’s \$20,000 damage limitation as a “minimum recovery” and a “floor,” the Connecticut Supreme Court seems to have considered the statute to be akin to a no-fault insurance policy for those who were injured by intoxicated persons but who could not prove negligence or causation. Thus, the Connecticut Supreme Court concluded that a broad tort cause of action would not conflict with the minimal remedial “floor” provided by Connecticut’s dramshop statute.

The United States submits that the dissent in Craig is the more well-reasoned opinion. The dissent relied primarily on the fact that the majority’s creation of a new negligence cause of action would upset the legislature’s policy

decisions with respect to the liability of dramshops, who prior to the adoption of dramshop legislation had no common-law liability. “[T]he majority eviscerates a scheme of recovery that the legislature crafted in reliance upon these very long-standing, but now abandoned, common-law precedents.” Id. at 1023. The dissent noted that the dramshop act was not an isolated statute, but rather a part of comprehensive legislation governing alcohol distribution and sale. “The pervasiveness of legislation in this area strongly suggests that the legislature, in enacting standards of liability for sellers of alcohol for damage caused by their intoxicated patrons, did not intend to leave for the courts the question of whether, and under what circumstances, liability beyond the statutory limits may be imposed on sellers for damage caused by their patrons.” Id. at 1025. The dissent also expressed concern that this upheaval in dramshop liability would have a significant effect on sellers of alcohol who had acted in reliance on the dramshop statute, such as by obtaining liability insurance consistent with the statute’s liability limits. Id. at 1026 n.6.

Utah’s Dramshop Act is more comprehensive than Connecticut’s, and thus even more deserving of judicial deference. When the Utah legislature enacted the Dramshop Act in 1981, it did so against the backdrop of the common-law rule exempting dramshops from liability. The legislature determined as a matter of

policy that alcohol providers should bear some responsibility for their actions.

The legislature did not, however, merely impose negligence liability on alcohol providers. It is apparent from the statute that the legislature determined that unlimited negligence liability would be too burdensome on both plaintiffs and defendants. Instead, the legislature imposed a form of strict liability that relieves plaintiffs of the burden of proving negligence and precisely defines the circumstances that will give rise to liability, thus easing the burden of proof required for plaintiffs to establish a claim.

On the other hand, the legislature concluded that alcohol providers should not be exposed to unlimited financial liability. The Dramshop Act includes limits on damages that can be levied against alcohol providers. The Act limits the liability of social hosts to cases where alcohol has been provided to a minor. In addition, the Act establishes a shorter two-year statute of limitations for claims brought under the Act.

The terms of the Dramshop Act evidence a balancing of considerations on behalf of both injured parties and alcohol providers. The issue is not whether this Court agrees with the legislature's policy decisions in crafting the Dramshop Act. See Gottling v. P.R. Incorporated, 61 P.3d at 997 (“This court cannot ignore or strike down an act because it is either wise or unwise. The wisdom or lack of

wisdom is for the legislature to determine.’” (citing Masich v. U.S. Smelting, Ref. & Mining Co., 191 P.2d 612, 625 (Utah 1948)). Rather, the issue is whether the legislature intended to occupy the field of dramshop liability and thus preempt the development of conflicting common-law claims. As discussed above, the comprehensive nature of the Act demonstrates the legislature’s intent to do so, and this Court correctly so held in Gilger. The Court should decline Plaintiffs’ invitation to reverse course and override the legislature’s policy decisions.

## **II. Utah’s Dramshop Act does not unconstitutionally limit Plaintiffs’ remedies.**

### **A. Open-Courts Provision**

Plaintiffs contend that the Dramshop Act violates the open-courts provision of the Utah Constitution (art. I, § 11), if the United States is not liable under either the Dramshop Act or the common law. See Plaintiffs’ Opening Brief at 25-27.

Contrary to Plaintiffs’ argument, it is not Utah's Dramshop Act that bars their claim but rather the United States' sovereign immunity, which is preserved under the FTCA. Thus, to the extent Plaintiffs contend that there is a conflict between the FTCA and the Utah Constitution, their argument must fail under the

Supremacy Clause of the United States Constitution (U.S. Const., art. VI, cl. 2).

Alabama-Coushatta Indian Tribe of Texas v. Mattox, 650 F. Supp. 282, 289 (W.D. Tex. 1986).

Moreover, Plaintiffs' argument would fail even if it were not barred by the Supremacy Clause. The FTCA's limited waiver of the United States' immunity opens the door to certain claims that injured citizens would not otherwise have. But the fact that Congress did not waive the federal government's immunity from all claims by injured persons does not mean that Plaintiffs have been "deprived" of anything. This Court has held that sovereign immunity does not violate the open-courts provision of the Utah Constitution. In Madsen v. Borthick, 658 P.2d 627 (Utah 1983), the plaintiffs sought damages for losses suffered as a result of the alleged failure by the state of Utah and its Commissioner of Financial Institutions to discharge their statutory functions with respect to the regulation of banks. The district court granted the state's motion to dismiss in part on the basis of Utah's Governmental Immunity Act.

On appeal, the plaintiffs claimed that the Governmental Immunity Act violated the open-courts provision of the Utah Constitution. This Court rejected that argument:

Sovereign immunity – the principle that the state cannot be sued in its own courts without its consent – was a well-settled principle of American common law at the time Utah became a state. . . . Article I, § 11 of the Utah Constitution, which prescribes that all courts shall be open and persons shall not be barred from using them to redress injuries, was not meant to create a new remedy or a new right of action. . . . Consequently, Article I, § 11 worked no change in the

principle of sovereign immunity, and sovereign immunity is not unconstitutional under that section.

658 P.2d at 629 (emphasis added; citations omitted); see also DeBry v. Noble, 889 P.2d 428 (Utah 1995) (holding that the open-courts provision is not violated by the Utah Governmental Immunity Act's preservation of sovereign immunity for negligent inspection of a building).

The same principle applies to Plaintiffs' argument in the present case. The United States' sovereign immunity bars Plaintiffs' claim, and the fact that Congress has not waived immunity does not deprive Plaintiffs of any claim. Thus, even if the Supremacy Clause did not bar Plaintiffs' argument, the FTCA's preservation of sovereign immunity would not violate the open-courts provision of the Utah Constitution.

**B. Equal Protection**

Again, Plaintiffs' argument addresses the wrong statute. Plaintiffs' claim under the Dramshop Act fails not because of any deficiency in the Act itself, but because Congress has not waived the United States' sovereign immunity as to strict-liability claims such as those brought under the Dramshop Act. If Plaintiffs believe the FTCA violates their equal-protection rights, their argument must proceed under the United States Constitution. The United States has briefed this issue in the proceedings before the United States District Court, where it will be



decided after conclusion of the proceedings before this Court. See Defendant's Reply Memorandum in Support of Motion to Dismiss (U.S. District Court record, document 19) at 10-12.

### **CONCLUSION**

For the reasons set forth above and in the United States' Opening Brief, the United States requests that this Court answer the issues certified by the United States District Court as set forth in the United States' Opening Brief at 12-13.

DATED this 28<sup>th</sup> day of August, 2003.

PAUL M. WARNER  
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**CERTIFICATE OF SERVICE**

I hereby certify that two copies of the foregoing **REPLY BRIEF OF APPELLANT UNITED STATES OF AMERICA** were mailed, postage prepaid, this 28<sup>th</sup> of August, 2003, to the following:

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