

2003

John Miller and Joan Miller v. United States of America : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

JOHN MILLER and JOAN MILLER

Plaintiffs/Appellees

v.

UNITED STATES OF AMERICA,

Defendant/Appellant.

)
)
)
) Utah Supreme Court
)
) Case No. 20030054-SC
)
)
) United States District
)
) Court Case No. 1:02-CV-37-TC
)
)
)

OPENING BRIEF OF PLAINTIFFS/APPELLEES

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

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UTAH SUPREME COURT

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CLERK OF THE COURT

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JURISDICTION

This Court has “original jurisdiction over the question of state law” certified by the United States District Court for the District of Utah. Utah Code Ann. § 78-2-2(1)(2001).

STATEMENT OF ISSUES

Judge Tena Campbell of the United States District Court for the District of Utah certified the following question of law:

Whether a federal government employee, who ordinarily would be immune from suit in cases of strict liability, may be liable under Utah’s Dramshop Act if the Plaintiffs establish negligence.

(Appellant’s Addendum at tab 2.)

The Millers submit that the question certified requires this Court to answer the following two questions of Utah law:

1. Whether the common law of Utah recognizes a right of action by a third party against a seller of alcoholic beverages, who is not subject to the provisions of Utah’s Dramshop Act, when the third party has suffered injury at the hands of an intoxicated person and where the seller negligently continued to serve the intoxicated person in violation of Utah’s statutory prohibition.
2. Whether, provided there is a such a third-party common law cause of action against negligent sellers of alcoholic beverages, who are not subject to the

provisions of Utah's Dramshop Act, Utah's Dramshop Act preempt such causes of action.

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

UTAH CONST., Art. I, § 11.

All laws of a general nature shall have uniform operation.

UTAH CONST., Art. I, § 24.

A copy of this statute was attached at addendum tab 1 of Appellant's Opening Brief

Utah Code Ann. § 32A-14-101 (1999 Repl.)

SUMMARY OF THE ARGUMENT

The U.S. is attempting to avoid responsibility for its negligent and wrongful acts by exploiting what it perceives as a loophole in interaction between the law of Utah and the law of the United States. Utah common law currently recognizes a third-party action against negligent vendor's of alcohol, although there is some dispute concerning the exact nature of this common law right. This Court should resolve any conflict in favor of the laws and policies of Utah.

At common law an negligence action accrues against another, when one suffers an injury, which is proximately caused by the breach of a duty by another. The U.S. had a duty not to serve alcohol to an already intoxicated man, which existed because one could foresee the likelihood of injury and because serving an intoxicated person is against the law. The U.S. Government breached this duty and the Millers were injured as a result. The question of legal or proximate cause amounts to whether the result was foreseeable and whether it was a substantial factor in causing the harm. The Millers injuries were substantially caused by the U.S. Government's failure to stop serving an intoxicated man alcohol. The Millers' claims all elements of claims for common law negligence, and this Court should recognize the Millers' common law claims.

This Court has stated that Utah's Dram Shop Act preempts the common law of negligence insofar as it imposes liability for acts the Act reaches; however the common law is not preempted as to the U.S. Government because the Act does

not reach the acts of the government in buying and selling alcohol. This is because the Act imposes strict liability and federal law prohibits applying strict liability to the U.S. Government. Further, the Act does not preempt the common law as it applies to the U.S. Government, because the legislature did not intent to apply the Act to the U.S. Government. Finally, the Act does not preempt the common law as the U.S. Government, because such an interpretation of the Act would be unconstitutional under the Utah Constitution.

Application of the common law to third-party tort claims, for acts not reached by the Act, is consistent with the previous rulings of this court, the intent of the legislature in enacting the Act, the public policy of the State of Utah, the jurisprudence of several sister states, the well established policy of the courts of Utah and the open courts provision of the Utah Constitution. Accordingly, this Court should answer the certified question in the affirmative and hold that a federal government employee, who ordinarily would be immune from suit in cases of strict liability, may be liable under the principles of common law, under Utah's Dramshop Act, if the plaintiffs establish negligence.

ARGUMENT AND CITATION TO AUTHORITY

The U.S. Government is attempting to avoid responsibility for its negligent and wrongful acts, arguing that the U.S. Government is immune from liability for the wrongful and negligent acts and omissions of its employee by operation of the Federal Tort Claims Act in relation to the strict liability imposed by Utah's Dramshop Act, Utah Code Ann. 32A-14-101 (1999 Repl.).

Under Utah law a vendor who negligently and wrongfully provides alcohol to another may be liable to a third-party for injuries suffered as a result of the vendor's negligent and wrongful provision of alcohol. See Rees v. Albertson's, Inc., 587 P.2d 130 (Utah 1978); Utah Code Ann. §32A-14-101 (1999 Repl.). This Court has explicitly recognized that a cause of action accrues to "a third person against a vendor of alcohol who sells the same negligently and in violation of a statute to an underage purchaser, who becomes intoxicated and causes injury to the third person." MacKay v. 7-Eleven Sales Corp., 2000 UT 15, ¶9, 995 P.2d 1233. See also Rees v. Albertson's, Inc.; Yost v. State, 640 P.2d 1044 (Utah 1981). Conversely, this Court has stated that "there is no common law basis to support a third-party negligence claim against" vendors of alcohol. Adkins v. Uncle Bart's, Inc., 2000 UT 14, ¶20, 1 P.3d 528, 533, cert. denied, 531 U.S. 1011 (2000). This Court should resolve this seeming conflict in a manner that promotes the public policy and law of the State of Utah¹ and recognize that a vendor who

¹ See Utah Code Ann. §68-3-2 (1953).

negligently and wrongfully serves alcohol to an intoxicated person, who the vendor knew or should have known was intoxicated, may be liable to a third person for injuries suffered as a result of the vendor's negligent and wrongful acts.

I. COMMON LAW LIABILITY TO A THIRD-PARTY FOR NEGLIGENT PROVISION OF ALCOHOL TO ANOTHER

As a general rule, “at common law, one who suffers injury to his person or property because of the negligence of another has a right of action in tort.” Payne v. Myers, 743 P.2d 186, 188 (Utah 1987)(citation omitted). “Under traditional tort analysis, the plaintiff must establish the existence of a duty, the breach of which proximately causes injury to the plaintiff.” Id. See Restatement (Second) of Torts §281 (1965). Thus, under the traditional principles of common law, a right of action in tort accrues to the Millers against the U.S. Government, if 1) the U.S. Government employee had a duty to discontinue serving alcohol to Mr. Valle, when the U.S. Government employee knew or should have known Mr. Valle was intoxicated and 2) the U.S. Government employee's continued service of alcohol to an already inebriated Mr. Valle proximately caused the Millers' injuries. Further, “questions relating to negligence and proximate cause are generally for the trier of fact . . . to determine.” Rees, at 133. “When there is a doubt about the existence of proximate cause and negligence, it should be resolved by allowing the case to go to trial.” MacKay, at ¶12, 1236 (citing Rees).

A. The U.S. Government Had A Duty To Stop Serving Alcohol To Mr. Valle After He Became Intoxicated.

Under common law principles, a duty exists if the Court determines that “as a matter of law, the tort-feasor could have anticipated the harm to the plaintiff.” Loveland v. Orem City Corp., 746 P.2d 763, 778 (Utah (Durham, J. dissenting))(citing Rest. 2d Torts § 281 comment c (1965)). In addition, a duty may be created by legislative enactment, which modifies the common law. See Jackson v. Mateus, 2003 UT 18 ¶21, 70 P.3d 78, 83 (“It is a well-recognized principle that the common law may be modified by statute or ordinance.”). In this case the U.S. Government had a duty to stop serving Mr. Valle after he became intoxicated, both because the harm to the Millers was a foreseeable result of serving alcohol to an intoxicated person and because, under Utah law, a duty exists to not serve alcohol to intoxicated persons in bars and clubs.

1. A duty to discontinue serving alcohol to already intoxicated patrons existed because the resulting harm was foreseeable.

In determining whether or not a duty exists, “Utah follows the foreseeability rule set forth in the Restatement (Second) of Torts and followed by a majority of states.” Tallman v. City of Hurricane, 1999 UT 55, ¶7, 985 P.2d 892, 894. In order for a duty to exist under this formulation of reasonable foreseeability, it must “be reasonably foreseeable, not that the particular accident

would occur, but only that there is a likelihood of an occurrence of the same general nature.” Rees, at 133.² See also

Here, the likelihood that the intoxicated patron of the U.S. Government’s on-base N.C.O. Club would be involved in an automobile accident after he left the base was reasonably foreseeable. Accordingly, the U.S. Government had a duty, under common law principles to stop serving Mr. Valle after he became intoxicated.

2. A duty to discontinue serving already intoxicated patrons existed under Utah law.

It is well-recognized “that the common law may be modified by statute or ordinance.” Jackson v. Mateus, 2003 UT 18 ¶21, 70 P.3d 78, 83. Laws, ordinances and regulations provide a model of expected behavior, and may be adopted as the standard of care, provided that “the purpose of the statute was to protect a class of persons of which” the injured party is a member from the type of harm which resulted. Rollins v. Peterson, 813 P.2d 1156 (Utah 1991) (applying Restatement (Second) of Torts § 286, § 288 (1965)). Although, violation of the standard of care established by statute or regulation does not raise to the level of negligence per se until the standard is formally adopted by the court, “violation of

² Recently, the Connecticut Supreme Court addressed the issue of foreseeability in relation a third-party action for negligent and reckless infliction of emotional distress: “It seems self-evident that the serving of alcoholic beverages to an obviously intoxicated person by one who knows or reasonably should know that such intoxicated person intends to operate a motor vehicle creates a reasonably foreseeable risk of injury to those on the roadways.” Craig v. Driscoll, 813 A.2d 1001, 1020 (Conn. 2002)

a standard of safety set by statute or ordinance is prima facie evidence of negligence.” Id., fn 4.

Title 32A of the Utah Code, Utah’s Alcoholic Beverage Control Act, was enacted under the State’s police powers to further public “health, peace, safety and morals.” Utah Code Ann. § 32A-1-103 (1999 Repl.) (Title 32A enacted to protect “health, peace, safety, welfare, and morals” of Utah citizens.). It includes provisions for both civil liability³ and criminal liability⁴, for providing alcoholic beverages to persons who appear to be intoxicated.⁵ The U.S. Government employee of the Air Force NCO Club violated this standard of care and conduct by continuing to serve Mr. Valle after he was obviously intoxicated. Accordingly, the US Government’s violation of the strictures of the Act is evidence of that it breached its duties to the Millers.

Further, following this reasoning, this Court should adopt the standards of Utah’s Alcoholic Beverage Control Act as duty owed by providers of alcohol in this State, consistent with § 286 of the Restatement (Second) of Torts, thereby establishing a violation of the provisions of the Act as negligence per se. It is

³ Utah Code Ann. § 32A-14-101 (1999 Repl.).

⁴ “A person may not sell, offer to sell, or otherwise furnish or supply any alcoholic beverage or product to any person who is apparently under the influence of intoxicating alcoholic beverages or products or drugs or to a person whom the person furnishing the alcoholic beverage knew or should have known from the circumstances was under the influence of intoxicating alcoholic beverages or products or drugs.” Utah Code Ann. § 32A-12-204 (1999 Repl.).

⁵ “Any person who violates this title or the commission rules adopted under this title is guilty of a class B misdemeanor, unless otherwise provided in this title.” Utah Code Ann. § 32A-12-104 (1999 Repl.).

obvious that furnishing alcohol to an intoxicated person – a person deemed by law to lack the judgment to drink responsibly – poses a threat to public safety, and the Act unquestionably reflects a legislative concern for the dangers attendant to (or inherent in) the sale of alcohol. Utah’s Alcoholic Beverage control Act exists to protect Mr. and Mrs. Miller –members of the public—from the type of injuries that they sustained, in the manner that they sustained them, to wit, an auto accident caused by an intoxicated driver who had been negligently and wrongfully provided alcohol after he was visibly and obviously intoxicated.

The U.S. Government has a duty in common sense, under the common law principle of reasonable foreseeability and pursuant to Utah statutory law not to serve customers in its bar and clubs after those customers become intoxicated.

B. The U.S. Government’s Negligent Serving Of Alcohol To An Obviously Intoxicated Patron Was The Proximate Cause Of The Millers’ Injuries.

In the common law, a negligent or wrongful act is the proximate cause when it is the act that “necessarily sets in operation the factors that accomplish the injury.” Harline v. Barker, 912 P.2d 433, 439 (Utah 1996). “To establish proximate cause” a plaintiff must prove that the conduct complained of “was a substantial causative factor leading to his injury.” McCorvey v. Utah State Dept. of Transp., 868 P.2d 41, 45 (Utah 1993). As a general rule, “proximate cause is and issue for the jury to decide.” Id. Only when reasonable minds can draw only one inference from the evidence presented does proximate cause become a

question of law to be determined by the Court. See Rees, 587 P.2d at 133; Harline, at 439.

1. Traditional rule

Traditionally, at common law, third-party claims against one who negligently furnishes liquor for damages caused by the person intoxicated by the liquor were barred. Yost, 1047, fn 2. The reasons advanced for this prohibition were that the drinking of the alcohol was a subsequent intervening cause, which was the proximate cause of the injury, and that “the later injury to another was thought to be an unforeseeable result of providing the liquor.” Ono v. Applegate, 612 P.2d 533, 537 (Haw. 1980). These common law rationales are dated, based in an age of horses and carriages and not the fast-paced age we live in where an “imbiber going upon the public highways” is “capable of producing mass death and destruction.” Meade v. Freeman, 462 P.2d 54 (1969).

It is axiomatic that automobile accidents are the foreseeable result of intoxicated driving. With the risks raising to the level of common knowledge, the assumption that the ingestion of the alcohol is a sufficient intervening force to obviate all liability of the one providing the alcohol is counter to accepted common law principles in which a “tortious act by a third party does not act as an intervening force if such acts are within the scope of the risk created.” Craig v. Driscoll, 813 A.2d 1001, 1017 (Conn. 2002). Indeed, this Court has recognized

that by improperly providing alcohol to another one may proximately cause injury to a third-person. See Rees, at 133; Yost, at 1047; MacKay, at ¶12, 1246.

The hazards and the awareness of the age have made archaic the old common law rule of third-party liability.

2. Evolution of The Traditional Rule

The general rule that a common law negligence action could not be brought by a third-party against the person who provided alcohol to another began in the middle of the last century. In 1959, New Jersey Supreme Court held that a third party injured by an intoxicated person could bring a negligence action against the commercial vendor who sold the inebriate the alcohol. Rappaport v. Nichols, 156 A.2d 1 (N.J. 1959). Since Rappaport, most courts have abandoned the old common law rule as being "antiquated and illogical." Brigance v. Velvet Dove Restaurant, Inc., 725 P.2d 300, 302 (Okl. 1986).⁶ Additionally, many states that already had enacted the dramshop acts, including Utah, have recognized a new common law right of action against commercial vendors and have permitted

⁶ See Nazareno v. Urie, 638 P.2d 671 (Alaska 1981); Ontiveros v. Borak, 557 P.2d 200 (Ariz. 1983); Ono v. Applegate, 612 P.2d 533 (Haw. 1980); Michnik-Zilberman v. Gordon's Liquor, Inc., 453 N.E.2d 430 (Mass. 1983); Campbell v. Carpenter, 566 P.2d 893 (Or. 1977); Jardine v. Upper Derby Lodge No. 1973, Inc., 198 A.2d 550 (Pa. 1964); Sorensen v. Jarvis, 350 N.W.2d 108 (Wis. 1984); Pfiefer v. Copperstone Restaurant and Lounge, 693 P.2d 644 (Or. App. 1985); Vesely v. Sager, 486 P.2d 151 (Calif. 1971); Deeds v. U.S., 306 F.Supp. 348 (D. Mont. 1969).

plaintiffs to recover in negligence, even where their claim would be barred by the Dramshop Act provisions.⁷

Two decision, made over twenty years apart by court on far sides of this country epitomize the thoughtful evolution of the common law of third-party liability mandated by changing circumstances, Ono v. Applegate, 612 P.2d 533, decided in 1980 by the Supreme Court of Hawaii, and Craig v. Driscoll, 813 A.2d 1003, decided in 2002 by the Supreme Court of Connecticut.

In Ono, the plaintiff was woman who was injured when the automobile driven by a man who had been intoxicated before going to a tavern, where he continued to drink, crossed the middle of the road and struck the auto in which she was a passenger head-on, killing two of the occupants and seriously the plaintiff. The defendant tavern's motion to dismiss was denied, and the defendant appealed the apportionment of fault. At issue on appeal was the question, "whether a person who in injured by an inebriated automobile driver may recover, in the absence of dram shop legislation, from the tavern that provided alcohol to the driver in violation of [Hawaii's] liquor control law." Id. at 537.

⁷ See Mullis v. Monroe, 505 S.E.2d 131 (N.C. 1998); Largo Corp. v. Crespin, 727 P.2d 1098 (Colo. 1986); Connolly v. Conlon, 371 N.W.2d 832 (Iowa 1985); Thaut v. Finley, 213 N.W.2d 820 (Mich. 1973); Trail v. Christian, 213 N.W.2d 618 (Minn. 1973); Berkeley v. Park, 262 N.Y.S.2d 290 (1965); Hutchens v. Hankins, 303 S.E.2d 584 (N.C. 1983); Mason v. Roberts, 294 N.E.2d 884 (Ohio 1973); Tomlinson v. Love's Country Stores, Inc., 854 P.2d 910 (Okla. 1993); Brigance v. Velvet Dove Restaurant, Inc., 725 P.2d 300, 302-03 (Okla. 1986).

The court examined the reasoning of Vesely v. Sager, 486 P.2d 151 (Calif. 1971), wherein the California Supreme Court stated “that the consumption of liquor, the resulting intoxication, and the injury-producing conduct were foreseeable intervening causes which would not relieve the tavern of liability. Id. (citing Vesely at 159). Noting with approval the reasoning in Vesely and the clear trend in “[o]ther jurisdictions, that in the absence or inapplicability of dram shop legislation” had allowed recovery against taverns “for injuries received by a third person as a result of a customer’s intoxication,” the Ono court was persuaded that “a person injured by an inebriated tavern customer” should be permitted recovery at common law, provided the plaintiff proves negligence. Id. at 538.

In defining the common law duty of the tavern, the court, employing the standard set for in the Restatement (Second) of Torts, determined that the liquor control act imposed a duty on the tavern “not to serve a person under the influence of alcohol.” Id. at 539. On the issue of proximate cause, the court held that “in light of the universal use of automobiles and the increasing frequency of accidents involving drunk drivers,” a tavern owner should reasonably foresee “the consequences of serving liquor;” thus, “the consumption, resulting inebriation and injurious conduct are therefore foreseeable intervening acts which will not relieve the tavern of liability. “ Id. at 538-39.

Similar Ono, the issue in this case is whether to allow common law recovery for negligently providing liquor to an intoxicated person, in violation of

Utah's Alcoholic Beverage Control Act, in the absence of Dramshop liability. As in Ono, the U.S. Government N.C.O. Club had a duty to not serve intoxicated patrons. Under the reasoning Ono, the U.S. Government should reasonable foresee that persons who become intoxicated at the N.C.O. Club are likely to be involved auto accidents, like the one that seriously injured the Millers and that it is the breach of the duty is a proximate cause of resulting automobile accidents.

In Craig v. Driscoll, the Connecticut court dealt with the issue of whether, notwithstanding Connecticut's Dram Shop Act, the common law recognizes negligent infliction of emotional distress claims against a purveyor of alcoholic beverages made by the mother and brother of a pedestrian who was run down by the intoxicated patron of the purveyor's establishment. 813 A.2d at 1006. The Craig court undertook a thorough analysis of preemption by the Dram Shop Act, the common law, the effect of the Act upon the common law and strength of the reasoning behind extant proximate cause jurisprudence. Id. Making way for the common law cause of action outside the Act's consideration, the court expressly rejected the "fiction that the behavior of anyone who is under the influence of alcohol is automatically, as a matter of law, an intentional intervening act that relieves the liability of a vendor of alcohol even though the vendor's negligence is otherwise established." Id. at 1022.

Similarly, this Court should further embrace the notion that, whether or not the person under the influence is a minor, the behavior of an intoxicated person is

not of necessity an intervening cause of injury to a third person, when a purveyor of alcohol continues to serve alcohol to the intoxicated person

The U.S. negligently and wrongfully continued to serve alcohol to an obviously and visibly intoxicated Arthur Valle. The intoxicated Mr. Valle then left the Club and drove his vehicle onto the roads of Utah where he collided with the Millers' vehicle, severely and permanently injuring the Millers. This accident was the foreseeable result of the intoxication enabled and caused by the negligent over-serving by the U.S. Under traditional common law principles, the U.S. is liable to the Millers', insofar as the Millers' injuries were caused by its negligent acts or omissions. The Millers' claim of negligence against the U.S. and the facts of this case satisfy all elements of claims for common law negligence and negligent infliction of emotional distress, and this Court should recognize the Millers' common law claims.

II. THE COMMON LAW LIABILITY OF THE U.S. GOVERNMENT IS NOT PREEMPTED BY UTAH'S DRAMSHOP ACT.

In Gilger v. Hernandez, this Court explored the extent of preemption of the common law by Utah's Dramshop Act. 2000 UT 23, 997 P.2d 305. The Court explained the relationship between common law liability and limited Dramshop liability as a trade-off, whereby

[T]he legislature assured those who were subjected to dramshop liability that they would not be subject to common law negligence liability and that this statutory liability would be limited, something that exposure to common law negligence liability would not have provided.

Id., at ¶13, 310. The Court concluded, “that the common law of negligence is preempted *insofar as it may impose liability for acts that the Dramshop Act reaches.*” Id. (emphasis added). This holding gives rise to the logical inference that common law liability is not preempted for acts that are not reached by Utah’s Dramshop Act, where no trade-off between limited liability and common law liability took place.

The Utah’s Dramshop Act does reach the acts U.S. Government or its employees in procuring and selling alcoholic beverages. The U.S. Government is not liable under the Utah’s Dramshop Act through the operation of the Federal Tort Claims Act, and there was no trade-off between the protections of the Act and the common law. Moreover, the Utah legislature did not intend for Utah’s Alcoholic Beverage Control Act, including Dramshop, to apply to the U.S. Government. Accordingly, Utah’s Dramshop Act does not preempt the common law liability of the U.S. Government.

A. Under the Federal Tort Claims Act, Utah’s Dramshop Act Does Not Reach Acts Of U.S. Government Employees.

Under the doctrine of federal preemption and through the operation of the Federal Tort Claims Act, Utah’s Dramshop Act does not reach the acts of the U.S. Government U.S. Government. If the United States’ assertion is correct, Utah’s Dramshop Act creates a regime of strict but limited liability for those who violate its provisions; however, the through the operation of federal preemption and the Federal Tort Claims Act, the provision and liability of the Act do not reach the

acts of U.S. Government employee. Accordingly, the common law of negligence, as to the U.S. Government, is not preempted by the Dramshop Act⁸.

1. Strict Liability of Utah's Dramshop Act

This Court has held that Utah's Dramshop Act imposes a form of strict liability. Reeves v. Gentile, 813 P.2d 111, 117 (Utah 1991). Notwithstanding the allocation of comparative fault, under Utah Code Ann. § 78-27-37(2), the Act still "prescribes a form of strict liability." Red Flame, Inc. v. Martinez, 2000 UT at ¶11. See also Adkins v. Uncle Bart's. Accordingly, Utah's Dramshop Act is a strict liability statute,

2. Liability of the U.S. Government Under the FTCA

The Federal Tort Claims Act waives the governmental immunity of the U.S. Government for claims for money damages "for injury or loss of property, or personal injury or death" when that injury or loss of property is "caused by the negligent or wrongful act or omission of any employees of the Government" acting in the scope and course of employment, "if a private person, would be liable to the claimant" under "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The United States Supreme Court has determined that the FTCA's broad waiver of immunity does "not authorize the imposition of strict

⁸ Of course, if there was no common law liability for serving liquor to a clearly intoxicated individual, there would be nothing for the Dramshop Act to preempt. Such is a clear recognition by the *Mackay* Court that there is common law negligence for selling liquor to someone that is clearly intoxicated. See *Mackay v. 7-Eleven Sales Corp.*, 995 P.2d 1233 (Utah 2000)(recognizing cause of action for negligent sale of alcoholic beverages to a minor in violation of prescribed law).

liability of any sort upon the Government.” Laird v. Nelms, 406 U.S. 797, 804, 92 S.Ct. 1899, 1902 (1972) (restating rule announced in Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956 (1953)).

Utah’s Dramshop Act prescribes a form of strict liability. The U.S. Government has denied any application of liability without fault. Thus, the Act does not reach the acts of the U.S. Government. Since, the Act does not reach the U.S. Government, no exchange of limited strict liability for the liability of the common law could have taken place. Accordingly and because the Act does not reach the acts of the U.S. Government and because there was no exchange of common law liability for limited strict liability, the Act does not preempt the common law as to the U.S. Government.

B. The Utah Legislature Did Not Intent Utah’s Dramshop Act To Preempt The Common Law As To The U.S. Government.

Utah’s Dramshop Act does not preempt common law liability of the actions of the U.S. Government. Utah has adopted the preemption model developed by the United States Supreme Court “for determining preemptive intent.” Gilger v. Hernandez, 2000 UT 23, ¶11, 997 P.2d 305, 308.

Under this model, the Court first looks to find “language in the statute that reveals explicit legislative to preempt common law. Id. If this explicit language does not appear, the court considers “whether the statute’s structure and purpose or nonspecific statutory language, nonetheless reveal a clear, but implicit preemptive intent.” Id. This preemptive intent may become apparent a) when the

statute “creates a scheme of statutory regulation so pervasive” that it is reasonable to infer, “that the legislature left no room for the common law to supplement it,” b) when the statutory law is “in irreconcilable conflict with the common law,” or c) when the common law stands “as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature.” Id. at 308-09 (citing Barnett Bank of marion County v. Nelson, 517 U.S. 25, 31, 116 S.Ct. 1103, 1104 (1996)(internal quotations and marks omitted).

Under this model analysis, it is clear that the Utah’s Dramshop Act does not preempt the common law as it may apply to the U.S. Government. The Act does not expressly preempt the common law of liability. Nor do the statute’s structure, purpose and language reveal an intent to preempt the common law as it may apply to the sale and distribution of alcohol by the U.S. Government. Instead, the legislature left room for the common law to supplement the Act; there is no conflict between the common law and the Act in this case; and here the common law offers a means to more fully fulfill the purposes of the Act.

1. Utah’s Dramshop Act Does Not Expressly Preempt The Common Law

Utah’s Dramshop Act does not expressly preempt the common law of liability for liquor distribution by the U.S. Government. See Utah Code Ann. 32A-14-101, et seq.; Id. at ¶ 12, 309. The Act does except the State, as well as its agencies, employees and political subdivisions from any civil liability “arising out of their activities in regulating, controlling, authorizing, or otherwise being

involved in the sale or other distribution of alcoholic beverages.” Utah Code Ann. § 32A-14-102 (1999 Repl.). See Brinkerhoff v. Forsyth, 779 P.2d 685 (1989)(holding that explicit language of Act precluded liability of employee of State-owned NCO Club under the Act). However, the Act is notably silent as to the liability of the U.S. Government. Thus, the question becomes whether the statute’s structure, purpose and language reveal an intent by the Legislature to preempt the common law of liability as to the U.S. Government.

2. The Structure And Language of Utah’s Dramshop Act Do Not Reveal An Intent To Apply Act To The U.S. Government

The structure and language of the Act do not reveal an intent to preempt the law of liability for the sale and distribution of alcohol by the U.S. Government. While “[t]he Act evidences an overall scheme of regulation of liability for liquor providers,”⁹ this scheme extends only to state-licensed providers of alcohol. In fact, the structure and language of Title 32A indicates that the U.S. Government is decidedly not considered or regulated by Utah’s Dramshop Act.

Title 32A applies to “alcoholic beverage control in this state except where local authorities are expressly granted regulatory control.” Utah Code Ann. § 32A-1-102(3) (1990 Amd.). However, “local authority” is defined as “the legislative body” of a county if unincorporated “or the governing body” of a city or town if incorporated. Utah Code Ann. § 32A-1-105(25)(1990 Amd.). Notably,

⁹ Gilger, at ¶12, 309.

even Title 32A's definition of "public building" does not include structures owned or leased by the U.S. Government¹⁰, despite the existence of federal military installations in Utah since before statehood and the relative comprehensiveness of the regulatory scheme, there is no mention of application to the U.S. Government.

Further, the plain language of the Dramshop Act indicates a legislative awareness and acceptance of remedies outside of the specific statutory remedies. Subsection (4) does not expressly limit the type of remedy but provides that "[a] person who suffers injury under Subsection (1) or (2) has a cause of action against the person who provided the alcohol." Utah Code Ann. § 32A-14-101(4) (1999 Repl.). While Subsection (8) provides that "[n]othing in this chapter precludes any cause of action or additional recovery against the person causing the injury. Id. Thus, while a cause of action does lie for persons, like the Millers, who are injured as the result of a person providing alcohol in violation of the Act, the cause of action is not of necessity at statutory cause of action, nor are other causes of action precluded or preempted by the Act.

Construed liberally so as to effect the purpose of the Dramshop Act and to further justice, the language and structure of Utah's Dramshop does not preempt common law causes action, which impose liability upon the U.S. Government.

¹⁰ Utah Code Ann. § 32A-1-105(38)(1990 Amd.) defines a public building as "any building or permanent structure owned or leased by the state, a county, or local government entity that is used for public education, transacting public business, or regularly conducting government activities."

Supplementation By The Common Law

The permissive language in Subsections (4) and (8), combined with the lack of any reference to the U.S. Government, which procures and distributes alcohol in Utah, in both the Act and Title 32A as a whole, is evidence of legislative intent to allow the common law to supplement statutory provisions of the Act. This Court has already recognized that there is room to supplement the statutory remedies provided by Utah's Dramshop Act for the negligent and improper provision of alcohol with the common law. See Yost v. State; MacKay v. 7-Eleven Sale Corp. Further, one must assume that the Legislature was aware that the operation of the FTCA as interpreted by federal courts would preclude the strict statutory liability imposed by the Act, when it did not include the actions of the U.S. Government within the provisions of Title 32A. Thus, leaving the common law to supplement the statutory provisions of the Act.

Conflict Between The Act And The Common Law

In this case there is no conflict between the common law and Utah's Dramshop Act, insofar as the common law imposes liability on the U.S. Government for the harm caused to the Millers by the negligence of its Federal Employee, in continuing to serve Mr. Valle past the point where that Employee knew or should have known Mr. Valle was intoxicated, when the Act (and the Title that contains it) does not reach the acts of a U.S. Government bartender on a military base within the State. Indeed, "[i]t would be incongruous if in circumstances where the state has cast its net wider than in a traditional negligence

action, a Government employee is automatically excused from liability even if his negligence can be proved." Smith v. Pena, 621 F.2d 873, 880 (7th Cir. 1980).

**The Common Law Is A Vehicle Vehicle For Furtherance
Of The Legislative Aims of the Act**

Finally, in this case, the common law does not stand as a barrier to effectuating the purposes and objectives of the legislature in enacting Utah's Dramshop Act. The three basis purposes of dramshop legislation are punishment, regulation and compensation. See Red Flame, Inc. v. Martinez, 2000 UT 22, ¶16, 996 P.2d 540, 544 (Durham, J., dissenting); Gilger, 2000 UT 23, ¶29, 997 P.2d 305, 314 (Durham, J., dissenting). Applying the common law to the instant case furthers all three of theses objectives, in a manner that the Act, by itself cannot.

Application of the common law to this case provides for punishment for the U.S. Government's wrongful and negligent acts, in the form of financial obligations to parties injured by those act. This financial disincentive for bad acts acts as a regulatory force on care the U.S. Government exercises in serving alcohol in the State. Finally, the application of the common law to the acts of the U.S. Government provides compensation to persons injured as a result of its negligent acts.

C. Constitutional Issues in Preemption Under The Open Courts Provision of the Utah Constitution.`

Further support for the assertion that the common law is not preempted by Utah's Dramshop Act is found in an application of the strictures of the Open Courts provision of Utah's Constitution, which provides:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Article I, Section 11, Utah Const.

To determine if a statute unconstitutionally limits one's right to remedy by due course of law for injury to one's "person, property, or reputation" under Article I, section 11, we must apply the the two-part test first set forth in Berry v. Beech Aircraft Corp., 717 P.2d 670, 683 (Utah 1985). Horton v. Goldminer's Daughter, 785 P.2d 1087 (Utah 1987), When reviewing statutes for constitutionality, a statute is presumed constitutional, and the Court will "resolve any reasonable doubts in favor of constitutionality." Society of Separations, Inc. v. Whitehead, 870 P.2d 916, 920 (Utah 1993).

Under the Berry analysis, the Court must first determine "if the law provides an injured person an effective and reasonable alternative remedy by due course of law for vindication of his constitutional interest." Horton, at 1094. The benefit provided by the substitute remedy "must be substantially equal in value or

other benefit to the remedy abrogated . . . although the form of the substitute remedy may be different.” Id. If the law provides this substantially equal substitute remedy, then the requirements of Section 11 are satisfied. Id. If, however, “no substitute or alternative remedy provided,” this abrogation is only justified “if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.” Id.

Here, if as the United States claims that the Millers are entitled to no remedy under the Utah Dramshop Act, through preemption and operation of the FTCA, then the Act, as applied,¹¹ is unconstitutional under the Article I, Section 11. First, under the this theory, the Millers would be totally deprived of all remedies, both statutory and common law, as the application of the interpretation forwarded by the United States afford no effective and reasonable alternative remedy. Second, no social or economic evil is eliminated. Indeed, the clear social or economic evils to be eliminated was recognized by the Utah Legislature and addressed with the enactment of Utah’s Dramshop Act, and the interpretation of Utah law forwarded by the United State perpetuates rather than eliminates those evils. Accordingly, this interpretation and application of Utah law would be unconstitutional.

¹¹ It is unnecessary for this Court to determine whether Utah's Dramshop Act is unconstitutional on its face. The Plaintiffs simply contend that it is unconstitutional *as applied* to this case's unique factual setting as a result of the application of the Federal Tort Claims Act.

Under the foregoing analysis, the interpretation of Utah law forwarded by the United States, wherein the Millers' common law remedies against the U.S. Government are preempted by Utah's Dramshop Act and Utah's Dramshop Act, as it applies to the U.S. Government, is preempted through operation of federal law, is unconstitutional under the Open Courts provision of the Utah Constitution. Accordingly, the common law as it applies to the U.S. Government is not preempted.

D. Equal Protection under the Utah Constitution.

The State of Utah's Constitution contains an Equal Protection Clause. Utah Const. Art. I, § 24. That constitutional provision is not interpreted the same as the Federal Constitution in every instance. Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884 (Utah 1988). Even when the rational basis test is utilized, the Utah Supreme Court has stated that "to pass state constitutional muster, a legislative measure must often meet a higher de facto standard of reasonableness than would be imposed by the federal courts." Id. at 889. On the other hand, when a fundamental liberty or suspect class¹² is involved, the Utah Supreme Court has implied that strict scrutiny would apply:

Although we have not expressly addressed the question under the state constitution, at least one judge has indicated that a strict scrutiny test would be appropriate under article I, section 24.

See Allen v. Trueman, 110 P.2d 355, 365 (1941)(Wolfe, J., concurring).

¹² The Plaintiffs do not contend that a suspect class is involved.

In determining whether strict scrutiny should apply, the following discussion by the Utah Supreme Court is enlightening as it pertains to fundamental liberty under Utah law:

The protection of such basic personal interests from the power of temporary majorities to infringe them is a primary function of a constitution. Certainly, the right to the protection of the law for one's person, property, and reputation is a right that is as essential to the happiness of an individual as is liberty. While democracy is the mainspring of our republican form of government, the founders of this state and this nation knew that certain basic rights could be rooted in law more effectively than can be accomplished by relying on the sometimes fickle goodwill of the popular organs of government for their protection.

Horton, 785 P.2d at 1091.

Horton involved a Utah statute that prevented a plaintiff from seeking redress for personal injuries (the statute was declared unconstitutional under Article I, section 11). The Millers respectfully ask this Court to consider the right to redress wrongs in a civil action to be a fundamental right, equivalent to a citizen's liberty in the eyes of the Utah Constitution. Strict scrutiny should be applied to determine if the United States application of Utah's Dramshop Act is constitutional.

Certainly, there would have been a less restrictive alternative available to the legislature: such as stating in the Dramshop Act that if strict liability does not apply to a defendant, negligence will. Thus, the State of Utah's policy of

compensating victims of intoxicated individual's acts would be equally applied to everyone.

While the strict scrutiny test is more rigorous than the rational basis test, the Utah Dramshop Act, (if interpreted as argued by the US Government), does not pass the rational basis test. There is no rational basis for passing an act that disallowed recovery because the plaintiff was injured as a result of alcohol being served on an Air Force base when recovery would be allowed had the alcohol been served at a tavern a mile away off base. When applied under the government's analysis, the act is clearly unconstitutional. Thus, no preemption is possible, and Society of Separations, Inc., 870 P.2d at 920, requires that this Court resolve this issue in a manner consistent with the Utah Constitution.

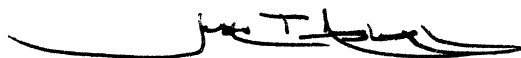
CONCLUSION

This Court should answer the certified question in the affirmative and hold that a federal government employee, who ordinarily would be immune from suit in cases of strict liability, may be liable under the principles of common law, under Utah's Dramshop Act, if the plaintiffs establish negligence.

Application of the common law to third-party tort claims, for acts not reached by the Act, is consistent with the interests of justice, the previous rulings of this court, the intent of the Utah Legislature in enacting the Act, the public policy of the State of Utah, the jurisprudence of several sister states, the well established policy of the courts of Utah and the open courts provision of the Utah

Constitution. Accordingly, this Court should find that the common law of Utah recognizes a right of action by a third party against a seller of alcoholic beverages, who is not subject to the provisions of Utah's Dramshop Act, when the third party has suffered injury at the hands of an intoxicated person and where the seller negligently continued to serve the intoxicated person in violation of Utah's statutory prohibition. This Court should further hold that Utah's Dramshop Act does not preempt such causes of action.

SPENCE, MORIARITY & SHOCKEY, LLC

A handwritten signature in black ink, appearing to read "Justin T. Ashworth", written over a horizontal line.

JUSTIN T. ASHWORTH
Attorneys for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing **OPENING BRIEF OF
THE PLAINTIFFS/APPELLEES** were hand-delivered this 7th day of July
2003 to the following:

PAUL M. WARNER
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A handwritten signature in black ink, appearing to be "JE", is written over a horizontal line.