

2009

Kevan Francis v. The State of Utah : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Francis v. Utah*, No. 20090256.00 (Utah Supreme Court, 2009).
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IN THE UTAH SUPREME COURT

KEVAN FRANCIS, et al.,	:	
	:	BRIEF OF
Plaintiffs-Appellants,	:	PLAINTIFFS-APPELLANTS
	:	
vs.	:	
	:	No. 20090256
THE STATE OF UTAH, et al.,	:	
	:	Oral argument requested
Defendants-Appellees.	:	

Appeal from the Judgment of the Fourth Judicial District Court,
Utah County
The Honorable Gary D. Stott, District Court Judge, Presiding
District Court Case No. 080401029

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FILED
UTAH APPELLATE COURTS
AUG 06 2009

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THE PARTIES

Pursuant to Rule 24(a)(1) of the Utah Rules of Appellate Procedure, the following parties were named as plaintiffs and as defendants before the District Court:

Plaintiffs: Kevan Francis and Rebecca Ives, individually and as the natural parents of Samuel Ives, deceased.

Defendants: The State of Utah and the Utah Division of Wildlife Resources.

TABLE OF CONTENTS

STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW.....	1
APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
Nature of the Case	3
The Course of Proceedings and Disposition In The Trial Court.....	6
Statement of Facts	6
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. Section 301(5)(c) Does Not Apply To Any Part Of The Complaint Because The Temporary Closing Of Of A Campsite is Not Failure to “Revoke an Authorization”	12
II Section 301 (5)(c) Of The Act Does Not Have Any Application To The Failure To Warn Theory Of Liability	20
II Section 301 (5)(c) Does Not Apply, Even If Closing The Campsite Would Have Involved A Revocation Of An “Authorization” Because It Was The Federal Government, Not The State, That Had The Power To Close The Campsite.	23
CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>Benjamin v. AMICA Mut. Ins. Co.</i> , 140 P.3d 1210 (Utah 2006).....	21
<i>Bucker v. Kennard</i> , 99 P.3d 842, 851 (Utah 2004)	13
<i>Francis v. U.S.</i> , 2009 WL 236691 (D. Utah 2009, Kimball, J) 6	
<i>Gillman v. Dept. of Financial Institutions of the State of Utah</i> , 782 P.2d 506 (1989)	18
<i>Healthcare Services Group, Inc. v. Utah Dept. of Health</i> , 40 P.3d 591, 593 (Utah 2002)	12
<i>Houghton v. Department of Health</i> , 57 P.3d 1067, 1069 (Utah 2002)	1, 2
<i>Hoyer v. State</i> , 2009 UT 38, 2009 WL 1706511 (Utah 2009)	12, 13
<i>Johnson v. Utah Dept. of Transp.</i> 133 P.3d 402, 406 (Utah 2006).....	18, 19
<i>Moss v. Pete Suazo Utah Athletic Commission</i> , 175 P.3d 1042 (2007).....	13, 19
<i>Nelson v. Salt Lake City</i> , 919 P.2d 568 (1996)	13, 19
<i>Stahl v. Utah Transit Authority</i> , 618 P.2d 480 (Utah 1980).....	16
<i>Taylor v. Ogden City School District</i> , 927 P.2d 159 (1996)	22, 23
<i>Wheeler v. McPherson</i> , 40 P.3d 632, 645 (Utah 2002).....	1, 2, 3

Statutes

Utah Code Ann. §63(G)-7-301.....	passim
Utah Code § 40-10-6(4)	15
Utah Code § 19-5-108	15

Utah Code § 4-3-8	15
Utah Code § 59-14-201	15
Utah Code § 58-67-301	15
Utah Code § 31A-5-212	15
Utah Code § 31A - 11-106	15
Utah Code § 32A-1-804	16
Utah Code § 32A-1-805	16
Utah Code § 19-6-108	16
Utah Code § 41-6a-1620	16
Utah Code § 19-5-104 (g)	16
Utah Code § 31A-5-103	16
Utah Code § 40-10-22	17
Utah Code § 58-1-401	17
Utah Code § 31A-4-103	17
Utah Code § 19-6-108(12)	17

Rules

Rule 3, Utah Rules of Appellate Procedure	1, 2, 3
-------------------------------------------------	---------

STATEMENT OF JURISDICTION

On January 30, 2009, the trial court issued a Ruling granting defendants' Motion for Judgment on the Pleadings. (Addendum at 1-10; hereinafter "Add. ___") On February 23, 2009, the trial court entered a Judgment that dismissed the action with prejudice. (R.000098-99) Plaintiffs filed a timely Notice of Appeal from the Judgment on March 13, 2009. (R.000101-103) This Court has jurisdiction pursuant to Rule 3 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the trial court erred in granting defendants' Motion for Judgment on the Pleadings based on a determination that the failure to close a campsite, until a bear that had attacked campers at that campsite was destroyed, constituted a failure to "revoke authorization" to use the campsite, and therefore the State of Utah was immune under the Utah Governmental Immunity Act, even though there was no authorization required to use the campsite.

The case was disposed of on a Motion for Judgment on the Pleadings, which is reviewed under a correctness standard, with no deference to the trial court's decision. *Houghton v. Department of Health*, 57 P.3d 1067, 1069 (Utah 2002). In addition, the case was dismissed based on the Utah Governmental Immunity Act, which is a ruling that the court lacks subject matter jurisdiction. Such dismissals raise matters of law that are also reviewed with no deference to the trial court's decision. *Wheeler v. McPherson*, 40 P.3d 632, 645 (Utah 2002). Plaintiffs filed a timely Notice of Appeal (R.000101-103), which preserved this error for appeal. *Rule 3, Utah Rules of Appellate Procedure*.

II. Whether the trial court erred in granting defendants' Motion for Judgment on the Pleadings pursuant to the Utah Governmental Immunity Act with respect to Plaintiffs' allegation that the State is liable because of a failure to warn that a dangerous bear had entered the campsite, for which there would be no immunity under the Act, because the Complaint alleged, in the alternative, that the State is liable because it failed to cause the campsite to be closed until the bear was destroyed, which the trial court ruled was immune from suit under the Act.

The case was disposed of on a Motion for Judgment on the Pleadings, which is reviewed under a correctness standard, with no deference to the trial court's decision. *Houghton v. Department of Health*, 57 P.3d 1067, 1069 (Utah 2002). In addition, the case was dismissed based on the Utah Governmental Immunity Act, which is a ruling that the court lacks subject matter jurisdiction. Such dismissals raise matters of law that are also reviewed with no deference to the trial court's decision. *Wheeler v. McPherson*, 40 P.3d 632, 645 (Utah 2002). Plaintiffs filed a timely Notice of Appeal (Rec. 000101-103), which preserved this error for appeal. *Rule 3, Utah Rules of Appellate Procedure*.

III. Whether the trial court erred in granting defendants' Motion for Judgment on the Pleadings pursuant to the Utah Governmental Immunity Act by applying the failure to revoke authorization exception when it was the Federal government, not the State of Utah, that had the authority to close the campsite.

The case was disposed of on a Motion for Judgment on the Pleadings, which is reviewed under a correctness standard, with no deference to the trial court's decision. *Houghton v. Department of Health*, 57 P.3d 1067, 1069 (Utah 2002). In addition, the

case was dismissed based on the Utah Governmental Immunity Act, which is a ruling that the court lacks subject matter jurisdiction. Such dismissals raise matters of law that are also reviewed with no deference to the trial court's decision. *Wheeler v. McPherson*, 40 P.3d 632, 645 (Utah 2002). Plaintiffs filed a timely Notice of Appeal (R.000101-103), which preserved this error for appeal. *Rule 3, Utah Rules of Appellate Procedure*.

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

The trial court's dismissal was based on the following section of the Utah Governmental Immunity Act, Utah Code § 63G-7-301(5)(c):

(5) Immunity from suit of each governmental entity is not waived under Subsections (3) and (4) if the injury arises out of, in connection with, or results from:

....

(c) the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization;

In the case law, the above-quoted provision is usually referred to by its pre-2004 number, Utah Code § 63-30-10(3). It will be referred to in this Brief by its current number, "Section 301(5)(c)."

STATEMENT OF THE CASE

Nature Of The Case

This case arises out of a tragic bear attack that killed a young boy camping with his family in the American Fork Canyon area. The same bear had attacked, but not harmed, campers early in the morning on the same day, at the very same campsite. The bear was declared a Level III nuisance bear, and a State of Utah regulation requires that

such a bear be destroyed, and that campers and any other items that might attract a bear be kept away from the site of the attack until the bear is destroyed.

State officials attempted to track and kill the bear beginning within hours of the first attack, but were unable to find the bear that day. Tragically, despite failing to find the bear, the State officials never attempted to keep campers away from the campsite in question, or even warn those attempting to use the campsite. As a result, the decedent's family camped at the very same spot of the attack, the very same day, without any knowledge that an attack had taken place that morning. The bear returned, attacked once again, and this time the result was fatal. Plaintiffs have sued the State of Utah alleging that the failure to either warn Plaintiffs or cause the campsite to be closed until the bear was destroyed was negligent and the cause of the child's death.

The issue before this Court is whether this conduct is provided immunity under the Utah Governmental Immunity Act (the "Act"). While the Act waives governmental immunity for negligence claims, the trial court ruled that the following exception to the waiver of immunity applies, Utah Code Ann. § 63G-7-301(5)(c) (hereinafter "Section 301(5)(c)"):

(5) Immunity from suit of each governmental entity is not waived under Subsections (3) and (4) if the injury arises out of, in connection with, or results from:

(c) the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization;

The trial court ruled that keeping campers from using the campsite in question would have constituted a "revocation" of the "authorization" to use that campsite. Based

on this, the trial court ruled that defendants were immune from suit. Plaintiffs contend that this is error for three reasons:

First, closing the campsite would not have constituted the revocation of an “authorization.” Plaintiffs needed no permission or authorization to use the campsite in question. Under the plain language of the Act, the exception applies only if there is a grant of authorization that the State then fails to revoke, but here there was no such authorization to revoke.

Second, the Complaint alleges two alternative theories of negligence, a failure to warn Plaintiffs of the danger, and a failure cause the campsite to be closed while the bear was being destroyed. Even if Act granted immunity for the theory based on the failure to close the campsite, there would be no immunity for the claim based on the failure to warn. Warning campers of the presence of a dangerous animal does not involve a “revocation of authority.” At a minimum, therefore, Plaintiffs should have been permitted proceed on the theory that the State is liable for its failure to warn.

Third, the Federal government, not the State, had the power to close the campsite. Although the area in question was jointly managed by the State and Federal governments, the campsite was on Federal land, and the applicable regulation required the State to request that the Federal government close the campsite. Assuming that closing a campsite constitutes revoking an “authorization,” Section 301(5)(c) would still not apply because the Act applies to a failure by the State to revoke authorization, not a failure by the Federal government to revoke authorization.

The Course Of Proceedings And Disposition In The Trial Court

Plaintiffs filed a two-count Complaint. Count I alleges negligence against the State of Utah and Count II alleges negligence, based on the same facts, against the Utah Division of Wildlife Resources. (R.000001-7) Defendants shall jointly be referred to as the “State.” After filing an Answer (R.000022-31), the State filed a Motion for Judgment on the Pleadings, arguing that the Utah Governmental Immunity Statute (the “Act”) precluded any lawsuit based on these events. (R.000038-45) The Court granted that Motion on January 30, 2009. (Add.1-10)

Although not directly related to this case, the Court should be aware that Plaintiffs filed a similar lawsuit against the Federal government, because Federal and State agents had joint responsibility for administering this area. The Federal government moved to dismiss based on the immunity provisions of the Federal Tort Claims Act. By Memorandum Decision and Order dated January 30, 2009, the United States District Court denied that motion, ruling that the claims against the Federal government were not covered by any exceptions to the Federal Tort Claims Act. *Francis v. U.S.*, 2009 WL 236691 (D.Utah 2009, Kimball, J).¹

Statement Of Facts

On the night of June 16-17, 2007, a group camped at an unimproved campsite approximately one mile above the Timpanooke Recreation Area in the American Fork Canyon. At approximately 5:30 a.m. on the morning of June 17, a bear came into the campsite, raided the coolers, and ripped open one of the tents.

¹ A copy of Judge Kimball’s decision is attached at Add. 11-30.

The campers were able to chase off the bear without anyone being injured. The campers immediately notified defendant Utah Division of Wildlife Services directly and through other agencies. (R.000006)

After receiving this report, the State decided that the bear was a Level III nuisance. (R.000006) A State regulation requires that such a bear be destroyed. (Add. 12) The State regulation further provides that any campsite where the bear was active should be kept free of any “attractants” until the bear is destroyed:

Division employees should request that land management agencies close or restrict the use of campgrounds where nuisance black bears are active until the source of the problem (attractant) has been removed and/or the offending bear has been removed. (Add. 7-8)

Campers, who bring food, are “attractants,” and therefore this regulation requires that all campers be removed until the bear has been destroyed.

Pursuant to this regulation, State agents went to the campsite on the afternoon of June 17, with dogs, and attempted to locate and euthanize the offending bear. (R.000005) At about 4:00 p.m. the State agents terminated the search without locating the bear, deciding to continue the search the next morning. (R.000005) Although the bear was still at large, the State placed no notice on the campsite in question, nor made any effort to warn campers or keep them away from the campsite. The State also failed to request that the Federal government close the campsite. (R.000005)

The State has admitted the following:

a State employee left an unimproved area thought to be (the site of the attack) at approximately 5:00 p.m. and the employee did not post notices

about the bear or attempt to warn unknown users of the unimproved area. The State affirmatively states that the employee left the unimproved area unoccupied and clean of any attractants. (R.000029)

In the last sentence of the quoted paragraph, the State appears to be suggesting that since the campsite was free of campers at 5:00 p.m., no steps needed to be taken to insure that campers did not enter this area after 5:00 p.m. The trial court rejected any such suggestion, noting that “the State did not follow (its) internal regulation.” (Add. 8)

Shortly after the State terminated its search, Rebecca Ives, Tim Mulvey, Jack Mulvey (“Plaintiffs”) and Samuel Ives entered the very same campsite. Plaintiffs were not required to seek permission to use the campsite in question, which was an unimproved campsite.² They had no knowledge of the events that had taken place that morning. At about 9:00 p.m. they went to bed. (R.000005) Sometime before midnight, the bear returned, slit open the tent, and carried off Samuel Ives, who was mortally wounded. On the following day, the bear was located and destroyed. (R.000004)

The Complaint alleges negligence against both the State of Utah (Count I) and the State of Utah Division of Wildlife Services (Count II) based on the following:

² The Complaint contains no allegation of any permission or authorization being required to use the campsite in question, which, by the State’s admission, is “unimproved.” (R.000001-7) Thus, a fair inference to draw (and all inferences favorable to Plaintiffs must be drawn) is that no permission or authorization was required to use this campsite.

- a. The State agents left the campground without placing any notices about the Level III nuisance bear, or attempting to notify potential users of the campground of the imminent danger presented by the Level III bear.
- b. The Utah Division of Wildlife agents failed to request that the Federal Agents close the campground and thereby remove any attractants until the bear could be destroyed.
- c. The Utah Division of Wildlife agents failed to remove any attractants, or assure that campers with food (attractants) were kept from coming into the campground. (R.000004))

There is one factual error in the trial court's discussion of the facts that is significant. The trial court stated that "Plaintiffs would not have camped had *the State* revoked authorization" for them to camp. (Add. 9; emphasis added) The land in question, however, is owned by the Federal government, and the Federal government was the entity that could have closed the campsite. That is why the State's regulation provides that the State should request that "land management agencies" – which refers to the Federal government – should close the campsite. (Add. 7) That is also why the Complaint alleges that the State should have warned Plaintiffs, and should have requested that Federal agents close the campground. (R.000004) Indeed, the State has itself taken the position that it could only request the closure of the campsite. (R.000074)

SUMMARY OF ARGUMENT

The Utah Governmental Immunity Act (the "Act") waives immunity from suit for claims based on negligence. Utah Code Ann. § 63(G)-7-301(4). However, the Act has exceptions to that waiver, and the sole basis for the dismissal of Plaintiffs' Complaint was the application of the following exception:

(5) Immunity from suit of each governmental entity is not waived under Subsections (3) and (4) if the injury arises out of, in connection with, or results from:

(c) the issuance, denial, suspension, or revocation of, or by the *failure* or refusal *to* issue, deny, suspend, or *revoke*, any permit, license, certificate, approval, order, or similar *authorization*....
(Section 63G-7-301(5)(c); emphasis added)

The terms “failure” “to” “revoke” “authorization” are highlighted because it was that language in the Act that the trial court deemed applicable. The trial court ruled that the wrong alleged by Plaintiffs was that the authorities should have closed the campsite in question. Although no permit or permission of any kind had been required to camp at the campsite in question, the State argued, and the trial court agreed, that closing the campsite would have constituted a “revocation” of “authorization,” and therefore the State was immune from suit. Plaintiffs will show that this ruling is incorrect as a matter of law for three reasons:

First, Section 301(5)(c) does not apply to temporarily closing a campground until a dangerous animal is destroyed. The Act creates an exemption for claims based on the issuance or failure to revoke permits or licenses or other similar authorizations. This exemption arises in situations where the State has to determine whether someone qualifies to undertake a regulated activity, such as operating business or driving a car. There is no permit or authorization or set of qualifications required to use the campsite in question, and this claim, therefore, does not involve harm caused by a failure to revoke a permit or authorization. This claim arises out of the State’s failure to follow its own regulation for dealing with a Level III nuisance bear.

Second, Plaintiffs alleged an alternative theory of negligence, only one of which is potentially covered by Section 301(5)(c). The Complaint alleges that the State failed to place a warning at the campground (R.000004, ¶ 28(a)), and, in the alternative, that it failed to either keep campers from using the campsite, or cause the Federal government to close the campsite. (R.000004, ¶ 28(b)) The failure to warn basis for liability involves no “revocation” of “authorization” because it does not involve precluding anyone from using the campsite. The trial court, however, held because one of the alleged acts of negligence – the failure to close the campsite – was subject to an exemption from liability, the State was immune from any claim relating to this incident. This is not a correct interpretation of the Act.

Third, if one assumes that the claim arises out of a failure to revoke an authorization, it was the Federal government that had to power to close the campsite, not the State. The Act, however, should only apply to the State’s failure to revoke an authorization. The trial court’s dismissal incorrectly found the State immune based a perceived Federal failure to revoke an authorization. This is a particularly troubling ruling given that the United States District Court has ruled that the Federal government is not immune for its conduct. (Add. 11-30) Under the trial court’s ruling, the State is immune for a failure of action by the Federal government, but the Federal government is not immune for that very same conduct.

ARGUMENT

Introduction

The case below was disposed of on a Motion for Judgment on the Pleadings. Accordingly, the Court must “accept the factual allegations in the complaint as true ... and consider such allegations ‘and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff.’” *Healthcare Services Group, Inc. v. Utah Dept. of Health*, 40 P.3d 591, 593 (Utah 2002).

I. Section 301(5)(c) Does Not Apply To Any Part Of The Complaint Because The Temporary Closing Of A Campsite Is Not A Failure To Revoke An “Authorization.”

Under the Act, “a governmental entity is immune from liability if it can show the following: (1) the activity giving rise to liability served a government function; (2) governmental immunity is not waived for the activity; or (3) if immunity is waived, then the activity falls within an exception to the waiver.” *Hoyer v. State*, 2009 UT 38, 2009 WL 1706511 (Utah 2009). It is undisputed that the activity at issue served a governmental function, and it is also that the Act waives immunity for claims of negligence. Utah Code Ann. § 63(G)-7-301(4). The sole question in this appeal, therefore, is whether the exception to the Act’s waiver found in Section 301(5)(c) applies to the facts of this case.

The trial court ruled that Section 301(5)(c) was applicable because the failure to close the campground in question was a failure to revoke an authorization. The fundamental problem with this ruling is that there was never any permit, permission or authorization granted to Plaintiffs to camp there. In order to trigger the application of the

Act's provision on the failure to revoke an authorization, the activity in question must involve the State issuing an authorization to conduct that activity in the first place. There is, however, nothing in the record suggesting that any authorization was needed to use the campsite in question. Furthermore, governmental immunity is an affirmative defense, and the State therefore had the burden of proving that authorization was granted to Plaintiffs that should have been revoked. *Buckner v. Kennard*, 99 P.3d 842, 851 (Utah 2004) ("Governmental immunity is an affirmative defense"); *Nelson v. Salt Lake City*, 919 P.2d 568, 574 (Utah 1996) ("Immunity is an affirmative defense which must be proved by the defendant).

The trial court, although never explicitly stating this, must have thought that to camp on any publicly-owned land involves some sort of implied permission from the government. This would require applying Section 301(5)(c) where there is no explicit license, permission or authorization involved. There is, however, nothing in the plain language of Section 301(5)(c) that extends its reach beyond explicit grants of permits, licenses or other similar authorizations, and the Court has previously rejected extending the Act beyond its plain language:

We decline to stray from the plain meaning of the text where the statute is unambiguous and there is no compelling reason to believe that the legislature has misspoken.

Moss v. Pete Suazo Utah Athletic Com'n., 175 P.3d 1042, 1046 (Utah 2007); *accord*, *Hoyer v. State*, 2009 UT 38, 2009 WL 1706511 (Utah 2009) ("we seek to given effect to the purpose and intent of the legislature.... To that end, we begin by examining the statute's plain language").

When read as a whole, the plain language of Section 301(5)(c) shows that it is concerned with regulated activities where the State has to determine whether someone qualifies to undertake a particular regulated activity. Section 301(5)(c) lists five specific kinds of actions that it applies to – “permits, licenses, certificates, approvals and orders” – plus a catchall category of “similar authorizations.” The trial court relied on the catchall category of “similar authorizations” because there was no “permit, license, certificate, order, or approval” involved. Since the term “authorization” is limited to those situations that are “similar” to the five specifically enumerated acts, “authorization” refers to situations that, while are not technically designated as permits, licenses, certificates, approvals or orders, are qualitatively the same kind conduct.

What, then, is included in the terms “permit, license, certificate, order or approval?” Although the State issues dozens of permits, licenses, certificates, approvals and orders, the common thread is that they all involve situations in which the State has to determine whether someone qualifies to undertake a regulated activity. There are some activities anyone is allowed to do, and there are other regulated activities that only qualified individuals can undertake. For example, anyone can hike in a state forest, but only those with a proper permit can remove timber. Anyone can bike or walk on a road, but only those with a driver’s license can drive a car on a road. Anyone can buy land, but only those with a permit can build a home on the land. Section 301(5)(c) grants the State immunity from decisions in which the State decides whether or not someone meets the qualifications for undertaking a regulated activity.

A few examples from each of the categories listed in Section 301(5)(c) will illustrate this point:

Permits

Coal Mines: Utah Code § 40-10-6(4) provides that no one can open a coal mine without receiving a permit, and the statute lists the criteria for approval of such a permit.

Discharge of waste products: A permit is required and the statute lists the factors to decide whether such a permit should be granted, Utah Code § 19-5-108.

Licenses

Dairy Operations: A license is needed to operate most business, included operations that make dairy products. Utah Code § 4-3-8.

Sale of Tobacco: A license is required. Utah Code § 59-14-201.

Practice of Medicine: The statute requires a license before anyone can practice medicine. Utah Code § 58-67-301.

Certificates

Insurance companies: A certificate of authority is needed before a company can sell insurance in Utah. Utah Code § 31A-5-212.

Motor Clubs: A certificate is needed to operate a motor club. Utah Code § 31A-11-106.

Approvals

Although the term “approval” might at first seem vague, it is in fact a specific term used in the Utah Code to provide for situations where prior State approval is needed to undertake a regulated activity, although a license or permit is not involved:

Building a waste disposal facility: To build any such facility one must first obtain “approval” from the State. Utah Code § 19-6-108.

Labeling on malt liquor beverages: All labeling and packing must receive “approval” before it can be used. Utah Code § 32A-1-804.

Motor vehicle lighting devices and safety equipment: These must first receive “approval” before they can be sold to the public. Utah Code § 41-6a-1620.

Orders

An “order” in the Utah Code refers to situations in which permission is needed, but the qualifications are more specific to the individual project than would be the case with a license or permit. For example:

Construction of a treatment plant for discharging waste products into water: An order granting permission is needed. Utah Code § 19-5-104(g).

Insurance company’s right to operate: In addition to the normal qualifications that must be met to get a certificate, the State has the right to issue orders to impose additional conditions in specific situations. Utah Code §31A-5-103.

* * *

What this survey shows is that “permit, license, certificate, approval, and order” have a specific meaning in Utah law. The use of these terms in the immunity under the Act should therefore be interpreted consistently with how those terms are used elsewhere in the Utah Code. *Stahl v. Utah Transit Authority*, 618 P.2d 480 (Utah 1980) (“It is also our duty to construe a statutory provision so as to make it harmonious with other statutes relevant to the subject matter”). Each term refers to a situation where the Legislature, by

statute, has given the State the right to determine whether someone qualifies to undertake a regulated activity. The statutes also almost always include the right to suspend or revoke the permit or license if necessary.³ The reason for providing immunity in such situation is that governmental official should not be second-guessed as to whether someone does or does not qualify for a permit or license.

The term “authorization,” therefore, must be interpreted to apply to situations that have the same characteristics. This means it applies only to situations where the legislature requires the State to determine whether someone qualifies to undertake a regulated activity, even though the State’s permission is not specifically designated as a permit, license, certificate, order or approval.

The facts in this case fall far outside the scope of this provision. There are no qualifications to use the campsite in question, and no permission or authorization of any kind was required. Neither the State nor the Federal Government ever make a determination as to whether someone qualifies to use this campsite. The temporary closure of the campsite in question, therefore, would not have involved a decision that anyone failed to meet the qualifications for using the campsite. Rather, the issue was simply keeping the public away from a known danger. This is not in any way similar to a licensing decision or a decision to issue a permit or certificate.

³ *E.g.*, Utah Code § 40-10-22 (procedure for revoking a coal mine permit); Utah Code § 58-1-401 (procedure for revoking a license to practice medicine); Utah Code § 31A-4-103 (procedure for revoking an insurance company’s certificate); Utah Code § 19-6-108(12) (procedure for revoking a waste disposal facility building approval).

Consider the results of broadening the concept of “authorization” to include situations in which governmental officials should be keeping the public away from a danger. What if the State were working on a road, but failed to cordon off an area where there was a dangerous hole? Under the trial court’s interpretation of Section 301(5)(c), that would constitute a failure to revoke the authorization to use that section of the road. Or what if the State discovered a bomb in a government-owned building, but failed to evacuate the area? That would, under the trial court’s view, constitute a failure to revoke the authorization to enter the government-owned building. The only sensible reading of Section 301(5)(c), therefore, is that it applies to situations where State approval is necessary to show that an individual is qualified to undertake a regulated activity. Any other interpretation of § 301(5)(c) would create an exception to the waiver of immunity that would threaten to swallow the rule, a reading of the Act the Court has rejected. *Johnson v. Utah Dept. of Transp.* 133 P.3d 402, 406 (Utah 2006) (“To do otherwise would allow the exception to swallow the rule”).

While there are no cases directly on this issue, the two Utah Supreme Court cases on Section 301(5)(c) are consistent with this reading of the statute. In *Gillman v. Dept. of Financial Institutions of the State of Utah*, 782 P.2d 506 (1989), the trustee of a bankrupt thrift sued the state for failing to properly regulate the company. The Court held that the State was immune because the essence of the claim was a failure to revoke the thrift’s license, which is a decision that requires the State to decide whether a company qualifies to participate in a regulated activity.

Similarly, in *Moss v. Pete Suazo Utah Athletic Commission*, 175 P.3d 1042 (2007), the plaintiff was the heir of a professional boxer who died during a boxing match. Plaintiff claimed that the State should not have issued a license to the boxer. To receive a license to box, there is a statute with specific qualifications, and the claim was that the decedent did not meet those qualifications. This claim, therefore, fell squarely within the scope of Section 301(5)(c).

Placing Section 301(5)(c) in the broader context of the Act is also helpful. One theme running through many provisions is the distinction between discretionary policy making decisions, which are generally immune, and operational decisions, which are not. For example, in *Nelson v. Salt Lake City*, 919 P.2d 568 (1996), the plaintiff was injured in a river and alleged that the state negligently maintained a fence between the park and the river. The court ruled that the State was not immune because, having made the discretionary decision to erect a fence, which might be immune from suit under the Act, the State was under a duty to maintain it, which was “an operational decision” not protected by the Act. *See also, Johnson v. Utah Dept. of Transp.*, 133 P.3d 402 (Utah 2006) (decision to use orange barrels instead of a concrete barrier to keep motorists away from a construction zone not a policy decision protected by the Act).

Here, the State enacted a regulation that required it to secure the closure of a campsite until a Level III bear has been destroyed. As the trial court noted, “the State did not follow this internal regulation....” (Add. 8) Having made the choice to adopt this regulation, this lawsuit challenges not a policy decision, but the operational conduct of

the State in failing to implement its own regulation. Section 301(5)(c), therefore, has no application to the facts of this case.⁴

**II. Section 301(5)(c) Of The Act Does Not Have Any
Application To The Failure To Warn Theory Of Liability.**

One of Plaintiffs' theories of liability is that State was negligent because it left the campground "without placing any notices about the Level III nuisance Bear, or attempting to notify potential users of the campground of the imminent danger presented by the Level III bear." (R.000004) This failure to warn allegation is alone sufficient to support a negligence claim. Plaintiffs would never have used the campsite in question had any kind of warning been provided. Section 301(5)(c) has no application to this allegation because there is nothing that could be deemed a failure to "revoke" an "authorization." The allegation does not involve closing a campsite, but claims only that the State should have warned potential campers about the danger.

The trial court ruled that this allegation was barred by Section 301(5)(c) because that provision applies "if the injury arises out of, in connection with, or results from" any of the enumerated exceptions. The trial court concluded that, even though a claim based on a failure to warn allegation would not be covered by the section, Plaintiffs' entire

⁴ The Federal Court reached a similar conclusion under the Federal Tort Claims Act:

In the instant case, the bear that had earlier attacked campers at that very Campsite presented a "specific hazard, distinct from the multitude of hazards that might exists in a wilderness," *Id.*, similar to the situation in *Duke*. It is difficult to conceive of what policy considerations could have been a play in failing to keep campers away from that Campsite while the bear was being tracked – or failing to at least warn campers about the situation. (Add. 29)

claim arose out of the alleged failure to revoke the authorization to use the campsite.

This conclusion is not a correct application of the Act.

Although contained in one Count, the Complaint alleges alternative factual bases for liability: Plaintiffs allege that the State should be liable for the failure to warn, or in the alternative, for the failure to cause the campsite to be closed. Either act was independently sufficient to prevent Plaintiffs' injury. The claim based on the State's failure to warn, therefore, "arise out of" or "result from" a failure to revoke an authorization. The fact that the State committed two negligent acts, one of which is potentially subject to immunity, should not affect an independent and alternative theory of liability that is not subject to immunity.

Utah law specifically permits alternative pleading, even if one theory contradicts the other. For example, in *Benjamin v. AMICA Mut. Ins. Co.*, 140 P.3d 1210 (Utah 2006), the plaintiff pled a cause of action for both negligent and intentional infliction of emotional distress. The Court, citing Utah R. Civ. P. 8(a), held that even though the crux of a claim for negligent infliction of emotion distress was unintentional action, plaintiff could plead both that and a claim that the conduct was intentional. *Id.* at 1214. Here, Plaintiffs have pled alternative theories, one that the State was negligent for failing to secure the closure of the campground, and the other for failing to warn potential campers.

It is useful, in this regard, to consider that Plaintiffs could have pled a complaint based solely on the failure to warn. There could be no argument, in that case, that the claim arose out of a failure to revoke an authorization. Why, then, should the outcome change because Plaintiffs included an alternative factual basis for liability?

The trial court relied on the Utah Supreme Court’s decision in *Taylor v. Ogden City School District*, 927 P.2d 159 (1996), which held that “arising out of” as used in the Act must be broadly interpreted and requires “only that there be some causal relationship between the injury and the risk” that is the subject of the statute.⁵ Nothing in this holding, however, precludes pleading *alternative* factual grounds for liability for the same injury, where one theory is covered by the immunity statute, and one theory is not.

In *Taylor*, a child got into a fight at school and was injured when he was pushed through as a result of the fight. The plaintiffs alleged that the state negligently used unsafe glass, which caused the injury. The Act provides immunity for claims that “arise out of” an assault, and there was no question but that the plaintiff was the victim of the assault. Even though the negligent installation of glass standing alone might not be subject to an immunity provision, the court held that the claim “arose out of” a situation that was subject to statutory immunity – an assault. There were no alternative theories of liability involved. The complaint could not have been pleaded without mentioning the assault, because everything came about because of that. *Taylor*, therefore, stands for the proposition that if an injury arises out of an event that is subject to immunity – an assault – you cannot create a viable claim by slicing out one aspect of the situation – the installation of dangerous glass – that is not subject to immunity.

Here, in contrast, the failure to give notice did not “arise out of” the potentially immune event, the failure to close. The failure to warn is a complete and independent

⁵ The holding in *Taylor* was recently reaffirmed in *Hoyer v. Utah*, 2009 UT 38, 2009 WL 1706511 (Utah 2009)

factual basis for liability. The complaint could have been pled without mentioning the alleged failure to cause the closure of the campsite. Under this alternative theory, Plaintiffs' injury arose out of the failure to give notice, and nothing else. The fact that there was a separate act of negligence – the failure to cause the campsite to be closed – is not analogous to *Taylor*.

Under the rules allowing alternative pleading, therefore, Plaintiffs should, at a minimum, be permitted to proceed on the failure to warn claim. A claim based on that theory of causation did not arise out of or result from any failure to revoke an authorization to use the campsite and thus is not subject to Section 301(5)(c).

**III. Section 301(5)(c) Does Not Apply, Even If Closing
The Campsite Would Have Involved A
Revocation Of An “Authorization,” Because
It Was The Federal Government, Not The State,
That Had The Power to Close the Campsite.**

The Federal government, not Utah, had the power to close the campsite. Under the State's black bear regulation, a Level III bear required the State to request that land management agencies close the campground. (Add. 7-8). The applicable land management agency in this case was the Federal government, because the land was Federal land. (R.000044) That is why the Complaint does not allege a failure to close the campsite, but rather a failure by the State to request that Federal agents do so.

(R.000004) Although the trial court thought Plaintiffs alleged that the State negligently failed to close the campsite (Add. 4), this is not in fact what is alleged.

The fact that the State's alleged negligence was a failure to get the Federal government to close the campsite raises a novel question under the Act. If one assumes

that this case arises solely out of a failure to revoke an authorization, it would be the Federal government that failed to revoke the authorization. The negligence by the State is the failure to request that the Federal government take certain action. The State itself was not in a position to revoke an authorization (assuming closing the campground involved revoking an authorization).

The question, then, is whether Section 301(5)(c) applies to such a situation. Section 301(5)(c) states that immunity is not waived if the claim arises out of the “issuance, denial, suspension, or revocation of, of by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization.” The statute does not specify whether it refers to *Utah’s* issuance of, or failure to revoke, an authorization, or whether it includes *any* entity’s (including the Federal government) issuance of, or failure to revoke, an authorization. The section would only be applicable to this case if the Act applies to claims that arise out of the federal government’s issuance of or failure to revoke an authorization. This, however, is not a sensible reading of the statute.

Although we have not found a case dealing with this specific issue, this provision of the Act is logically concerned only with precluding lawsuits challenging a certain type of action by the State of Utah. The provision on issuing “authorizations” comes from a laundry list of activities for which the State is immune from lawsuits, including anything arising out of the failure to make an inspection (§ 301(5)(d)), the institution of judicial or administrative proceedings (§ 301(5)(e)), and the collection of taxes (§ 301(5)(h)).

It doesn't make sense for the State of Utah to have immunity for cases arising out of Colorado's failure to collect taxes, or the Canadian government's failure to inspect. Under the interpretation suggested by the State, the statute would create immunity for all kinds of actions by persons and entities unrelated to the State. The more sensible reading of the statute is that it lists certain kinds of activities by the State of Utah that should be immune from suit. Thus, the State should be immune from suit for claims arising out of Utah's failure to revoke an "authorization," not the failure of any entity, anywhere in the world, to revoke an "authorization."

This case provides perhaps the best illustration of the problem inherent in applying Section 301(5)(c) to a failure by the Federal government to revoke an authorization. The Federal Court has ruled that the Federal Government is not immune for that conduct (Add.11-30), and it surely makes no sense for Utah to be immune based on a Federal failure to act, when the Federal government itself is not immune for that failure to act.

CONCLUSION

For the reason stated in this Brief, Plaintiffs-Appellants respectfully request that the Court reverse the trial court's ruling granting defendants' Motion for Judgment on the Pleadings and remand this case for further proceedings.

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By: _____



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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, postage pre-paid,

this 6 day of August, 2009, to the following:

Reed Stringham
Assistant Utah Attorney General
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P.O. Box 140856
Salt Lake City, Utah 84114-0856



ADDENDUM

ADDENDUM

Trial Court Ruling Dated January 29, 2009 Addendum 1-10

Federal Court Memorandum Decision and Order
dated January 30, 2009 Addendum 11-30

Utah Governmental Immunity Act Addendum 31-33

Umun Page 1

**IN THE FOURTH JUDICIAL DISTRICT COURT,
UTAH COUNTY, STATE OF UTAH**

KEVAN FRANCIS, et al., Plaintiffs, vs. THE STATE OF UTAH, et al., Defendants	RULING Date: January 29, 2009 Case No.: 080401029 Judge: Gary D. Stott
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This matter comes before the Court on a Motion for Judgment on the Pleadings (“Motion”) filed by Defendants State of Utah, the Utah Division of Wildlife Resources, and John Does 1-X (“State”).

Kevan Francis and other relatives of the late Samuel Ives (“Plaintiffs”) filed a Complaint against the State on March 28, 2008, alleging negligence causing the wrongful death of the deceased, an 11-year-old boy killed by a black bear in American Fork Canyon on June 17, 2008. In its Amended Answer of April 24, 2008, the State asserted immunity from suit, pursuant to Utah Code Annotated section 63G-7-301. The State also filed this Motion on June 23, 2008. Plaintiffs responded (with the Court’s permission for an extension of time) on July 21, 2008, with an opposition memorandum. The State replied on August 11, 2008, then filed a Request for Oral Arguments on August 12, 2008. Counsel for both sides came to the Court on January 13, 2009, and

argued the Motion. Having heard the arguments and read the memoranda provided by both parties, the Court rules on the Motion as follows.

Rule 12(c) of the Utah Rules of Civil Procedure provides that any party may move for a judgment on the pleadings after the pleadings are closed and within such time as to not delay trial. *See* Utah R. Civ. P. 12(c). “A court may enter judgment on the pleadings when the moving party is entitled to judgment on the face of the pleadings themselves.” *See Mountain America Credit Union v. McClellan*, 854 P.2d 590, 591 (Ut. Ct. App. 1993). A judgment on the pleadings, which effectively amounts to a dismissal, is proper “only if, as a matter of law, the nonmoving party . . . could not prevail on the facts alleged.” *Id.* Further, a court should “accept the factual allegations in the complaint as true, and consider them, and all reasonable inferences to be drawn from them, in the light most favorable to the non-moving party.” *Krouse v. Bower*, 2001 UT 28, ¶ 2.

The State’s Motion is based on governmental immunity. “Immunity is an affirmative defense which must be proved by the defendant.” *Nelson ex rel. Stuckman v. Salt Lake City*, 919 P.2d 568, 574 (Utah 1996). A governmental immunity analysis is typically preceded by a liability/negligence analysis. *See Ledfors v. Emery County Sch. Dist.*, 849 P.2d 1162, 1163-1164 (Utah 1993); *see also Rollins v. Petersen*, 813 P.2d 1156, 1162 (Utah 1991). However, the State admitted negligence for the purposes of its Motion, so this Court does not need to analyze duty and breach. *See Lyon v. Burton*, 2000 UT 19, ¶ 12. Therefore, the Court analyzes whether or not the State is entitled to governmental immunity.

A governmental immunity analysis requires three steps: “(1) whether the activity undertaken

is a governmental function; (2) whether governmental immunity was waived for the particular activity; and (3) whether there is an exception to that waiver.” *Blackner v. State*, 2002 UT 44, ¶ 10.

First, a governmental function is broadly defined as any “activity, undertaking, or operation of a governmental entity.” U.C.A. § 63G-7-102(4)(a). It also “includes a governmental entity’s failure to act.” *Id.* § 63G-7-102(4)(c). Operating a camp site, as well as the corresponding duties concerning responses to nuisance bears, fall under the ambit of governmental function. At the time of argument, neither party contended that the State was not performing a government function.

Second, immunity is generally waived for negligent conduct committed within the scope of the government worker’s employment. *See id.* § 63G-7-301(4). For the purposes of its Motion, the State conceded negligence.

Third, governmental immunity is not waived if there is a statutory exception to immunity. Here, the State alleges that a specific provision of U.C.A. § 63G-7-301(5) applies, which reads:

Immunity from suit of each governmental entity is not waived under Subsections (3) and (4) **if the injury arises out of, in connection with, or results from:** . . . (c) the issuance, denial, suspension, or revocation of, or by **the failure** or refusal to issue, deny, suspend, or **revoke, any permit**, license, certificate, **approval**, order **or similar authorization** . . .

Id. § 63G-7-301(5)(c) (emphasis added).

The State argues that the injury, Samuel Ives’s death, arose out of or in connection with the State’s failure to revoke the permit or authorization to camp in the danger area. That is, had the State revoked its permission to allow Plaintiffs’ to camp in the site, the bear attack would not have happened and the injury would not have occurred. Further, the statute is plain and unambiguous,

and an immunity waiver exception should not be qualified without “textual justification.” *Moss v. Pete Suazo Athletic Comm’n*, 2007 UT 99, ¶ 13. The State contends that the broad language of the statute allows immunity whenever the injury arises out of or in connection with the failure to revoke authorization, meaning that there only need be “some causal nexus” between the injury and the failure. *See Blackner*, 2002 UT at ¶ 15. The injury had at least some causal relation to the State’s failure to revoke its camping authorization to Plaintiffs. Thus, through this exception to the immunity waiver, Plaintiffs’ suit must be dismissed.

Plaintiffs argue that the Complaint alleges many acts of negligence other than simply failing to close or restrict the campground. Further, strict application of the waiver exception in this case would be inappropriate and frustrate the purposes of the immunity statute. Plaintiffs argue that such an expansive application here would cause the exception to swallow the rule, and this was certainly not what the Legislature intended. Specifically, section 63G-7-301(5)(c) refers to deliberative, regulatory acts in which immunity from lawsuits affords the government wide latitude to engage in policy-making decisions. For example, a boxer’s death following the Pete Suazo Utah Athletic Commission’s negligent decision to allow him to compete was held to result from an approval or similar authorization permitting the boxer to fight; thus, immunity applied. *See Moss*, 2007 UT 99 at ¶ 29. However, in emergent situations, such as when a dangerous bear is at large, the statute was not intended to immunize the government for its failure to remove attractants or warn the public. Plaintiffs argue that because the State’s own regulations require its employees to take certain steps upon discovery of a nuisance bear, then there is no discretion or deliberation involved. Rather, the

employees must follow the rules in handling dangerous bears to avoid harm to others. Plaintiffs argue that handling a nuisance bear is similar to re-installing a downed stop sign. It is mandatory and not discretionary, therefore a government cannot be immune for injuries resulting from its employees' failure to put the stop sign back in its place. *See, e.g., Richards v. Leavitt*, 716 P.2d 276, 279 (Utah 1985) (holding that "the maintenance and repair of traffic signs is a governmental function for which immunity from suit has been expressly waived and which is not within the discretionary function exception.") However, the decision whether to put a stop sign in a particular place is purely discretionary. Thus, the government is immune from suit if injuries arose from the government's failure to place a stop sign at a dangerous intersection. *See* U.C.A. § 63G-7-301(5)(a). Similarly, the State's decisions once it was on notice of a dangerous bear are not discretionary, but mandatory. Therefore, the State cannot rely on a statute that pertains to licensing and other types of decisions to be immune from suit.

Neither party fully argued the discretionary function exception, which allows the state to retain immunity if the injury arose out of the exercise or failure to exercise a discretionary function. *See* U.C.A. § 63G-7-301(5)(a). Presumably, this is because section 63G-7-301(5)(c) is more directly applicable to the case. For that matter, the fact that the first provision of the immunity exception statute, section 63G-7-301(5)(a), restores governmental immunity based on the performance or failure to perform any discretionary function means that the discretionary function issue is irrelevant to the other provisions in the same statute, as any of those statutory exemptions are independently sufficient for the State to have immunity. In other words, if the State proves that it has immunity

based on section 63G-7-301(5)(c), then it does not need to even delve into the question of whether the injury arose from the exercise of a discretionary function. In arguing against the application of Subsection 301(5)(c), Plaintiffs characterized it as relating only to deliberative functions, stating that in emergent situations the provision is inapplicable. However, Plaintiffs have pointed to no cases showing that regarding non-deliberative decisions or emergent situations, the immunity waiver exception found in Subsection 301(5)(c) does not apply. Thus, this Court is constrained to apply the exception as written, and as it has been interpreted by the Utah Supreme Court. This Court hesitates to “place a condition on the applicability of the exception without any textual justification.” *Moss*, 2007 UT 99 at ¶ 13.

The Utah Supreme Court clarified the breadth of the causation requirement built into the waiver exception provision of the Utah Governmental Immunity Act in *Taylor ex rel Taylor v. Ogden School District*. 927 P.2d 159, 164 (Utah 1996). Taylor, a mother, sued on behalf of her son Zachary after he was pushed into an allegedly unsafe window at a state-owned school. *Id.* at 159-160. The broken glass damaged nerves and tendons in Zachary’s hand. *Id.* at 160. Taylor argued that Zachary’s injuries “arose out of” the defendant’s negligent failure to install safety plate glass in the school. *Id.* at 161. The defendant argued that the injuries “arose out of” an assault and battery, thus rendering the state immune under U.C.A. § 63-30-10(2). The Utah Supreme Court found the phrase “arising out of” to be “very broad, general and comprehensive.” *Id.* at 163. That is, there only need be “some causal relationship between the injury and the risk [provided for].” *Id.* The court continued:

Taylor maintains that the assault exception should not apply because Zachary's injuries have a greater link to the dangerous window in the restroom than to Trenton's assault. However, "arises out of" within the assault exception "is a phrase of much broader significance than 'caused by.'" *National Farmers Union [Property & Cas. Co. v. Western Cas. & Sur. Co.]*, 577 P.2d [961] at 963 [(Utah 1978)] (quoting *Hartford Accident & Indem. Co. v. Civil Serv. Employees Ins. Co.*, 33 Cal. App. 3d 26, 108 Cal. Rptr. 737, 741 (Ct. App. 1973)). Under the phrase's ordinary meaning, the assault need not be the sole cause of the injury to except the governmental entity from liability for the injury. *See id.* The language demands "only that there be some causal relationship between the injury and the risk" provided for. *Id.* (emphasis added) (quoting *Lawver*, 238 N.W.2d at 518). In this case, there is undoubtedly "some" causal relationship between Zachary's injury and Trenton's assault upon him.

Id.

Although *Taylor* discussed the "arose out of" phrase as it relates to assault, the phrase is found in the provision heading to all 21 immunity waiver exceptions found in section 63G-7-301(5). Thus, this Court interprets it in Section 301(5)(c) in the same manner as the Utah Supreme Court interpreted it in Section 301(5)(b). In the instant case, Plaintiffs have alleged other possible causes of injury, such as the negligent failure to notify potential campers or the negligent failure to remove attractants. Certainly, the injury derives from these causes just as much as it does from the government's failure to revoke camping authorization. But the immune situation need not be the sole cause of injury, nor is the government required to prove more than "some" causal link to the immune situation.

The State's policy on handling black bear incidents contains this rule of procedure:

Division employees should request that land management agencies close or restrict the use of campgrounds where nuisance black bears are active until the source of the problem (attractant) has been removed and/or the offending bear has been removed.

State of Utah Division of Wildlife Resources Administration, Handling Black Bear Incidents 7, No. W5WLD-3 (June 9, 2005).

Although Plaintiffs are correct that the State did not follow this internal regulation, the State's own negligence in disregarding necessary safeguards is irrelevant. Indeed, the *Moss* court found the Pete Suazo Utah Athletic Commission immune under section § 63-30-10(3)¹ despite its failure to follow at least five of its own safety rules. *See Moss*, 2007 UT 44 at ¶¶ 3-6. Further, the Utah Governmental Immunity Act "immunizes many governmental acts or omissions that impact life and safety." *Id.* at ¶ 13; *See, e.g.*, U.C.A. § 63G-7-301(5)(b) (assault and battery); *id.* § 63G-7-301(5)(g) (riots, mob violence, and civil disturbances); *id.* § 63G-7-301(5)(s) (emergency medical assistance, fire fighting, and regulating hazardous materials).

The Utah Supreme Court also noted in *Taylor* that sovereign immunity even applied where a plaintiff's injuries arose out of an assault by a non-government assailant. *See Taylor*, 927 P.2d at 164. The court stated that "[t]he Act and [the Utah Supreme Court's] prior decisions demand that the act be strictly applied to preserve sovereign immunity." *Id.* Hence, this Court strictly applies the Act.

This Court observes that sovereign immunity cases often seem unfair to plaintiffs who have suffered wrongs which could otherwise be righted against private parties. The Utah Supreme Court recognized this as well, in a case in which a school district was immunized from a suit arising out of the vicious beating of one of its students. *See Ledfors v. Emery County Sch. Dist.*, 849 P.2d 1162,

¹ This statute is identical to U.C.A. § 63G-7-301(5)(c) (2008).

1162-63 (Utah 1993). The Supreme Court concluded its decision with this paragraph:

In reaching this decision, we are sympathetic to Richie's plight. It is unfortunate that any parent who is required by state law to send his or her child to school lacks a civil remedy against negligent school personnel who fail to assure the child's safety at school. Nevertheless, the legislature has spoken with clarity on the question of immunity, and we are constrained by the plain language of the Act and our prior case law on this point. However, as we stated in *O'Neal v. Division of Family Services*, "Certainly, the legislature is not so constrained as we." 821 P.2d 1139, 1145 (Utah 1991). It is entirely within the legislature's power to permit all plaintiffs to whom the government owes a duty of care based on a special relationship to bring suit for injuries arising out of a breach of that duty. Or the legislature could tailor the waiver of immunity more narrowly; the state could permit suit by or on behalf of public school children injured as a result of such a breach of duty. Its power to craft waivers of immunity is far superior to ours.

Id. at 1167.

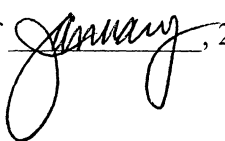
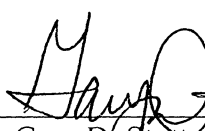
As in *Ledfors*, this Court sympathizes with Plaintiffs' heartbreaking situation. But, it is not within the authority of this Court to craft exceptions to exceptions on which the Legislature has spoken plainly and the Utah Supreme Court has interpreted broadly. True, the Legislature probably did not foresee that section 63G-7-301(5)(c) would one day be applied in a bizarre case involving a tragic bear attack. Nevertheless, this Court is "constrained by the plain language of the Act." And the relevant provision of the Act simply states that if the injury complained of arises out of or is connected with a failure to revoke a permit, approval or similar authorization, then the State is immune.

The State failed to revoke authorization for Plaintiffs to camp at their chosen site. Samuel Ives was killed by the bear at that camp site where, this Court assumes, Plaintiffs would not have camped had the State revoked authorization. Thus, the State is immune from any action based on

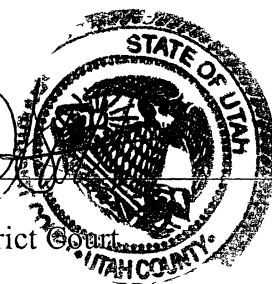
the injuries.

Therefore, the State's Motion for Judgment on the Pleadings is granted. Counsel for the Defendants shall prepare the appropriate order and submit it for this Court's signature.

Dated this 30 day of January, 2008.

Judge Gary D. Stott
Fourth Judicial District Court



A certificate of mailing is on the following page.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

**KEVAN FRANCIS and REBECCA
IVES, Individually, the Natural Parents
of S.I., Deceased; TIM MULVEY and
REBECCA IVES, Individually and on
Behalf of their Minor Child, J.M.,**

Plaintiff s,

v.

**UNITED STATES OF AMERICA, USDA
FOREST SERVICE, and JOHN DOES I-
X,**

Defendants.

**MEMORANDUM DECISION
AND ORDER**

Case No. 2:08cv244DAK

This matter is before the court on the United States of America's Motion to Dismiss. A hearing on the motion was held on November 19, 2008. At the hearing, the United States was represented by Amy J. Oliver and Jeffrey E. Nelson. Plaintiffs were represented by Allen K. Young, Tyler S. Young, and Sarah H. Young. Before the hearing, the court carefully considered the memoranda and other materials submitted by the parties. Since taking the motion under advisement, the court has further considered the law and facts relating to the motion. Now being fully advised, the court renders the following Memorandum Decision and Order.

INTRODUCTION

At issue in the instant motion is whether the United States is immune from suit for its alleged role in failing to prevent a tragic and fatal bear attack of a minor boy, S.I., who was camping in American Fork Canyon with his family during the night of June 17, 2007.

In the early morning hours of June 17, 2007, another camper, Jake Francom, had reported an aggressive bear at the very campsite at which SI's family later stayed. Based on Mr. Francom's report, state and federal officials determined that the bear was a Level III—the most dangerous level—nuisance bear that had to be found and destroyed. They searched for the bear with hounds but called off the search late in the afternoon.

Unfortunately, no further actions were taken, and the campground and specific campsite remained open. No one posted notices about the Level III bear, nor did anyone attempt to notify potential users of the campsite regarding the imminent danger presented by the bear. Around 6:00 p.m., Plaintiffs, along with S.I., arrived at the same campsite to camp for the night. Tragically, the bear returned sometime before midnight, ripped the tent in which S.I. was sleeping, and pulled S.I. out of the tent, fatally wounding him. On the following day, the bear was located and euthanized.

Plaintiffs, who are S.I.'s parents, have asserted a negligence claim based on the government's failure to close the campsite or provide some type of warning. In this motion, the United States argues that Plaintiffs' negligence claim must be dismissed

pursuant to Federal Rule of Civil Procedure 12(b)(1) because, it contends, the action is barred by the “discretionary function” exception to the Federal Tort Claims Act (“FTCA”), and therefore the United States is immune from suit. Plaintiffs, however, disagree that the government’s actions were protected by the discretionary function exception of the FTCA because no decision was actually made and no policy considerations were at issue in making—or failing to make—a decision about warning potential campers of this specific, known risk. The court agrees with Plaintiffs that, given the specific facts of this case, the discretionary function exception to the FTCA does not shield the United States from suit in this action, and therefore, the United States’ motion to dismiss is denied.

I. FACTUAL BACKGROUND¹

A. The Camping Area at Issue

The Timpooneke Campground (the “Campground”) is located in a mountainous area next to the Mt. Timpanogos Wilderness Area in American Fork Canyon, within the Uinta National Forest (the “Forest”). It provides many services, including fire rings, grills, picnic tables, restrooms, and water. The fee for a single campsite in 2007 was

¹ The parties agree that because this is a factual attack on the sufficiency of the jurisdictional averments, the court may look beyond the allegations in the Complaint, and it has wide discretion to allow documentary and testimonial evidence under Rule 12(b)(1). *Paper, Allied Indus., Chem, & Energy Workers Intern’l Union v. Continental Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005).

\$13.00.

“Dispersed camping” is also allowed in the Forest. Dispersed camping is the term used for camping anywhere in the Forest that is outside of a developed campground.

Dispersed campsites have no toilets, no treated water, and no fire pits or fire grates. There is no fee involved with camping in a dispersed site. Such areas exist because many people enjoy the solitude and primitive experience of camping away from developed campgrounds and other campers.

Signs warning that Utah is bear country are located throughout the Forest. One such sign was located on the bulletin board at the Tank Canyon pull-out on the road up American Fork Canyon toward the Timpooneke Campground. The sign provides guidelines concerning bears that people should follow while in the Forest. Another general warning sign was located at the entrance to the Timpooneke Campground. Additional warnings about bears are contained on the Forest website.

B. The Events of June 17, 2007

On June 17, 2007, the Utah County Sheriff’s Office Dispatch received a call from Jake Francom, who reported that he had encountered a bear earlier that morning—at approximately 5:30 a.m.—while camping in a dispersed campsite (the “Campsite”) in an area above Mutual Dell in American Fork Canyon. Mr. Francom reported that the bear “stomped” on one person’s head, hit a camper at least twice, and then sliced into the side of a tent and put a paw through a camper’s pillow. The bear had also damaged his

cooler. He and his friends were able to scare the bear away.

The dispatcher stated that both the Utah Division of Wildlife Resources (the "Utah DWR") and federal Forest Service officials would be contacted. Thus, both the federal and state authorities were quickly notified of this incident. By no later than 10:13 a.m., an official from the federal Wildlife Specialist of the USDA was fully informed of the situation and had agreed to jointly deal with state officials in addressing the problem.

Pursuant to the Memorandum of Understanding between the USDA Forest Service, Intermountain Region, and the Utah DWR, the Utah DWR made the decision that day to classify the bear reported by Mr. Francom as a "Level III nuisance bear," which is the most dangerous category, and a Level III bear incident is considered to present "a threat to public safety." Pursuant to Utah State policy regarding the handling of black bears, the Utah DWR then proceeded to search for the bear in order to destroy it.

The bear was pursued by two individuals—one from Utah DWR and a United States Wildlife Specialist, who brought dogs to help track the bear. The bear was tracked for approximately four and a half hours, but without success. The trackers decided at that point to resume the search the next day. No action was taken to close or restrict access to the Campsite or to warn prospective users of the Campsite. The federal Forest Supervisor stated after the attack that "he is the only person who can close a campground and was not given the opportunity to make that call."

At approximately 6:00 p.m. on June 17, 2007, Plaintiffs arrived at the

Timpooneke Campground, intending to camp there. They stopped at the designated United States Forest Service ranger booth and pay station. They paid the fee required to travel and camp in the Forest area. Plaintiffs, however, did not have cash to pay the additional \$13.00 fee charged for camping within the Timpooneke Campground. Consequently, Plaintiffs left the Campground in search of a campsite above the Timpooneke Campground, for which there was no additional fee.

At the ranger booth and pay station, no one mentioned anything about the bear attack earlier that morning. On their way to the campsite, Plaintiffs passed a DWR pick-up truck with two occupants who waived at Plaintiffs, but they did not provide any information about the bear attack. After Plaintiffs pitched their tent, they cleaned up cans, wrappers, and other garbage left by previous campers, and then they put all of their coolers in their locked car and went to bed around 9:00 p.m.

Although the Campsite is not a formally developed campground, it is a well-established tent campsite. It is located right beside Forest Service Road 056, and it has an established fire pit, a place to park a car, and a flat area for pitching a tent. When Plaintiffs arrived, there was also cut and stacked kindling wood and logs for seating. The only way to access the Campsite is by driving first to the Timpooneke Campground, past a Forest Service booth at the entrance to that campground, and then continuing on Forest Service Road 056, which is a dirt road at that point. It is a dead-end road, and there is a gate at the entrance to the section just as one leaves the Timpooneke Campground. If the

gate is closed, there is no access to the Campsite. The Campsite is located about one mile beyond the Timpooneke Campground, and it is the first available campsite after the Timpooneke Campground.

The existence of the Campsite was known to federal officials. An employee of the Forest Service concessionaire that manages the Timpooneke Campground stated that when he spoke with Plaintiffs' camping party, they asked whether they could use the Campsite, and he responded that it was "open."

Later that night, at approximately 11:00 p.m., Plaintiff Tim Mulvey contacted Mr. Sheely, the campground manager at the Timpooneke Campground, and reported that someone had cut open their tent and taken his stepson, S.I. Mr. Sheely immediately drove to the Timpanogos Cave National Monument to call the Utah County Dispatch to report the incident. S.I. was later found deceased, and it was apparent that his injuries were consistent with a bear attack. The bear believed to be responsible for the death of S.I. was tracked and killed on June 18, 2007.

C. Relevant Statutes, Regulations, and Policies of the Forest Service

Federal statute establishes that the "national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 528. The Secretary of Agriculture is "directed to develop and administer the renewable surface forests for multiple use." 16 U.S.C. § 529. Forest Service regulations establish that the "overall goal of managing the N[ational] F[orest]

S[ystem] is to sustain the multiple uses of its renewable resources in perpetuity while maintaining the long-term productivity of the land. Resources are to be managed so they are utilized in the combination that will best meet the needs of the American people.” 36 C.F.R. § 219.1(b). Forest Service regulations further provide that in the context of wildlife management, the Forest Service “may enter into such general or specific cooperative agreements with appropriate State officials” to secure and maintain “desirable populations of wildlife species.” 36 C.F.R. § 241.2.

Title 2300 of the Forest Service Manual (“FSM”) sets forth the guidelines for “Recreation, Wilderness, and Related Resource Management.” Section 2302 of the FSM identifies the “OBJECTIVES” to be achieved by managing recreation and wilderness as:

1. To provide nonurbanized outdoor recreation opportunities in natural appearing forest and rangeland settings.
2. To protect the long-term public interest by maintaining and enhancing open space options, public accessibility, and cultural, wilderness, visual, and natural resource values
3. To promote public transportation and/or access to National Forest recreation opportunities.
4. To shift land ownership patterns as necessary to place urbanized recreation settings into other ownerships to create more public open space and/or natural resource recreation values.
5. To provide recreation opportunities and activities that:
 - a. Encourage the study and enjoyment of nature;
 - b. Highlight the importance of conservation;
 - c. Provide scenic and visual enjoyment; and
 - d. Instill appreciation of the nation’s history, cultural resources, and traditional values.

In addition, Section 2330 of the FSM governs “Publicly Managed Recreation Opportunities ” Section 2330.2 of the FSM identifies the Objective of developing and managing Forest Service recreation sites and facilities as follows

- 1 To maximize opportunities for visitors to know and experience nature while engaging in outdoor recreation
2. To develop and manage sites consistent with the available natural resources to provide a safe, healthful, esthetic, non-urban atmosphere.
3. To provide a maximum contrast with urbanization at National Forest System sites.

Section 2332, which governs Public Safety at developed recreation sites, provides:

To the extent practicable, eliminate safety hazards from developed recreation sites. Inspect each public recreation site annually before the beginning of the managed-use season. Maintain a record of the inspections and corrective actions taken with a copy of the operation and maintenance plan.

Immediately correct high-priority hazards that develop or are identified during the operating season or close the site.

FSM 2300, Chapter 2330 identifies only two types of hazards: tree hazards (2332.11) and other natural hazards. With regard to other natural hazards at developed recreation sites, the FSM provides the following:

If practicable, correct known natural hazards when a site is developed and open for public use. If the hazards remain or new natural hazards are identified, take steps to protect the public from the hazards. Tailor the action taken to each hazardous situation. Consider posting signs, installing barriers, or, if necessary, closing the site to address concerns of public safety.

II. DISCUSSION

It is well settled that the United States, as a sovereign entity, “is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain that suit.” *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). Thus, suit against the United States can be entertained only when Congress has specifically waived the United States’ immunity. *See id.* Furthermore, such waiver of sovereign immunity cannot be implied; it must be unequivocally expressed. *See Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002).

The FTCA is a limited waiver of the United States’ sovereign immunity. The FTCA’s waiver of immunity is limited to causes of action against the United States arising out of certain torts committed by federal employees acting within the scope of their employment. *See United States v. Orleans*, 425 U.S. 807, 813 (1976). Because the FTCA is only a limited waiver of the United States’ sovereign immunity, it is subject to a number of exceptions. *See, e.g.*, 28 U.S.C. §§ 1346(b) and 2680; *Orleans*, 425 U.S. at 813. These exceptions are to be “strictly observed and exceptions thereto are not to be implied.” *Lehman*, 453 U.S. at 160 (quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957)).

One of the exceptions to the jurisdiction granted by the FTCA is the “discretionary function exception,” 28 U.S.C. § 2680(a). *See United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 809 (1984). The burden is on

Plaintiffs to prove that their claims are not based upon actions immunized from liability under the discretionary function exception. *See Elder v. United States*, 312 F.3d 1172, 1176 (10th Cir. 2002). The discretionary function exception precludes the imposition of liability against the United States for conduct “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. § 2680(a). This exception “marks the boundary between Congress’ willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.” *Elder*, 312 F.3d at 1176 (internal quotations and citation omitted). The exception applies regardless of whether the government agent was negligent in his duties, so long as his duties were discretionary. *See Dalehite v. United States*, 346 U.S. 15, 32 (1953); *Lopez v. United States*, 376 F.3d 1055, 1057 (10th Cir. 2004).

Analysis of the discretionary function exception is a threshold jurisdictional issue, and “it is irrelevant whether the government employees were negligent.” *Elder*, 312 F.3d at 1176. Because the waiver of sovereign immunity is jurisdictional, the court lacks subject matter jurisdiction over a claim that falls within the discretionary function exception. *Aragon v. United States*, 146 F.3d 819, 823 (10th Cir. 1998). To determine the applicability of the discretionary function exception, courts employ a two-part test. *See United States v. Gaubert*, 499 U.S. 315, 322-23 (1991); *Berkovitz*, 486 U.S. at 536-37; *Elder*, 312 F.3d at 1176. First, a court must determine whether the challenged

conduct at issue involved a matter of judgment or choice. *See Berkovitz*, 486 U.S. at 536. The discretionary function exception does not apply if a “federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow” and “the employee has no rightful option but to adhere to the directive.” *Gaubert*, 499 U.S. at 322. The standards set forth by federal statute, regulation, or policy will bar the application of the discretionary function exception only if such standards are “both specific and mandatory.” *Aragon*, 146 F.3d at 823. It is the nature of the conduct that is at issue, not whether the conduct may have been negligent. *Gaubert*, 499 U.S. at 321.

Second, if the challenged conduct involves an element of judgment, a court must next “determine whether that judgment is of the kind that the discretionary function exception was designed to shield.” *Berkovitz*, 486 U.S. at 536. The discretionary function exception “protects only governmental actions and decisions based on considerations of policy.” *Id.* Congress specifically enacted the discretionary function exception ““to prevent judicial “second-guessing” of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”” *Id.* at 537 (quoting *Varig Airlines*, 467 U.S. at 814) (emphasis added).

“When established governmental policy, as expressed or implied by statute, regulation or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent’s acts are grounded in policy when exercising that discretion.” *Gaubert*, 499 U.S. at 324. To avoid dismissal, Plaintiffs “must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said

to be grounded in the policy of the regulatory regime.” *Id.* at 324-25. “The focus of the inquiry is not on the agent’s subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.” *Id.* at 325.

In this case, the parties do not disagree as to the law, but as to whether the actions at issue in this case were discretionary under the two prongs of the above-mentioned test, commonly referred to as the “*Berkovitz* test.” In short, the United States claims that both prongs of the *Berkovitz* test have been satisfied, and thus, that its decision was discretionary. Consequently, it argues that the United States is immune from suit, and this action must be dismissed.

Plaintiffs, on the other hand, claim that the United States cannot satisfy either prong of *Berkovitz*. First, they claim that there was a specific policy applicable to the actions of the United States, and thus, no discretion was involved. Second, they claim that even if there was discretion involved, the failure to close the Campsite or otherwise keep campers from using the Campsite until the bear was destroyed did not involve the type of public policy decision that is protected by the discretionary function doctrine.

A. First Prong of *Berkovitz*:

To prevail on the first prong, Plaintiffs must demonstrate that the challenged decisions involved “no ‘element of judgment or choice.’” *Elder*, 312 F.3d at 1176-77 (quoting *Kiehn v. United States*, 984 F.2d 1100, 1102 (10th Cir. 1993)). To do so, they must show that Forest Service “employees violated a federal statute, regulation, or policy

that is both ‘specific and mandatory.’” *Id.* at 1177 (quoting *Aragon*, 146 F.3d at 823).

Plaintiffs argue that Utah has an extensive regulation (the “Regulation”) describing what to do when there is a nuisance bear at large:

Division employees should request that land management agencies close or restrict the use of campgrounds where nuisance black bears are active until the source of the problem (attractant) has been removed and/or the offending bear has been removed.

Plaintiffs, thus, claim that both state and federal authorities failed to implement the part that required keeping attractants –campers and their food –away from the Campsite until the bear had been destroyed. In light of the word “should,” however, the court cannot conclude that this Regulation mandates a specific course of action.

Plaintiffs also claim that a Forest Service policy independently establishes that, at a minimum, the Forest Service was required to post warning signs after the first bear attack at the Campsite. Specifically, the Forest Service Manual provides:

If practicable, correct known natural hazards when a site is developed and open for public use. If the hazards remain or new natural hazards are identified, take steps to protect the public from the hazards. Tailor the action taken to each hazardous situation. Consider posting signs, installing barriers, or, if necessary, closing the site to address concerns of public safety.

The court, however, cannot conclude that this policy sets forth a mandatory course of action that should have been followed in this case.² The court finds that there is no statute, regulation, or agency policy mandating the precise manner in which the United

² The Government points out that “determining what is *practicable* requires the exercise of discretion.” *Rosebush v. United States*, 119 F.3d 438, 442 (6th Cir. 1997).

States should have managed this situation. This determination, however, does not end the court's inquiry. Plaintiffs may still establish that the United States' actions are not protected by the discretionary function exception if, under the second *Berkovitz* prong, Plaintiffs can demonstrate that the challenged conduct was not the type of conduct that the discretionary function exception was designed to shield, as more fully explained below.

B Second Prong of *Berkovitz*

To prevail on the second prong of *Berkovitz* and avoid dismissal, Plaintiffs "must allege facts [that] would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *Gaubert*, 499 U.S. at 324-25. According to the United States, "it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Gaubert*, 499 U.S. at 324. The Government argues that Plaintiffs cannot overcome this presumption.

The United States also cites to cases from numerous courts, including the Tenth Circuit and this court, which, the Government claims, have found similar decisions to fall within the discretionary function exception. For example, in *Gadd v. United States*, 971 F. Supp. 502, 509 (D. Utah 1997), this court found that the decision not to warn of black bears involved "balancing of considerations of resource management and safety along with how best to handle safety concerns when absolute safety is not possible." Similarly, the United States relies on *Elder v. United States*, 312 F.3d at 1181-84 (10th Cir. 2002), in which the court granted immunity under the discretionary function test,

finding that a decision not to provide additional warnings required the National Park Service to balance safety, access, cost, preservation of natural resources and aesthetic values, and the likely benefit of additional signage, and thus was protected.

These cases, however, are distinguishable from the case at bar in that they did not involve an immediate, known risk, specific in time and location. For example, in *Gadd*, a camper was severely injured by a bear attack in a United States Forest. The plaintiff alleged that the injury was due to negligence in the government's management of that national forest. The court relied on the following facts: a black bear had never before been seen on the peninsula where the campground at issue was located; the peninsula was uninviting to bears and a poor quality bear habitat at best, in contrast to the area across the reservoir where ample cover and food sources existed; the only bear sighting ever in the larger area was across the reservoir, and that sighting was two years before the attack at issue; the offending bear had been killed, and there had been no more bear sightings.

Accordingly, the court held that the decision whether to post warning signs would be discretionary "where a hazard such as bears is not a known natural hazard directly associated with a particular site." *Id.* Thus, the court agreed with the United States that Forest service decisions regarding the matters complained of in *Gadd* were "grounded in diverse public policies and involve balancing of considerations of resource management and safety along with how best to handle safety concerns when absolute safety is not possible." *Id.* at 509.

No case cited by the United States addresses a situation similar to the instant case

in which the handling of a very specific, immediate, known risk was being considered, as opposed to a general risk of recreating in wilderness areas. The facts involved in the cases cited by Plaintiffs are much more similar to the instant case, rendering their holdings to be more persuasive –if not controlling.

For example, in *Smith v. United States*, 546 F.2d 872 (10th Cir. 1976), a visitor to Yellowstone National Park was injured when he fell into a thermal pool. The thermal pool in question was in an undeveloped area, in that it had no boardwalk or other amenities, but there was a parking area very close to it, and a well-worn path to the pool. The court held that the decision to leave the area undeveloped was discretionary, but that the decision to place no warning signs by the pool was not. *Id.* at 877 (“The Government’s decision . . . not to warn of the known dangers or to provide safeguards cannot rationally be deemed the exercise of a discretionary function.”).

Also, in *Boyd v. United States*, 881 F.2d 895 (10th Cir. 1989), the government allowed both boating and swimming in a section of a lake, and a swimmer was killed by a passing boat. The court held the decision to zone that section of the lake to allow both boating and swimming was immunized by the discretionary function doctrine, but the decision to place no warnings of any kind for swimmers was not. *Id.* at 898.

It is helpful to specifically compare two Tenth Circuit cases, the first pertaining to a generalized risk and the second to a specific risk. First, in *Zumwalt v. United States*, 928 F.2d 951 (10th Cir. 1991), a hiker was injured when he left a marked trail and fell into a cave. The Tenth Circuit held that the negligence claim was barred by the discretionary

function doctrine because “the absence of warning signs was part of the overall policy decision to maintain the Trail in its wilderness state.” *Id.* at 955.

In contrast, in *Duke v. Department of Agriculture*, 131 F.3d 1407 (10th Cir. 1997), a camper was injured when a boulder rolled down a hillside and smashed into his tent. The plaintiffs were camping near a dam. The construction of a state road had created a risk of boulders rolling down a particular hill. The plaintiffs were not in a developed campsite, but rather on the other side of the road from a developed campsite. In *Duke*, the Forest Service admitted that although there were no signs designating the spot for camping, camping had always been allowed there, as reflected in the fact that there was an existing fire ring. *Id.* at 1409-10.

The *Duke* court ruled that the failure to provide any warning of this risk was not protected by the discretionary function doctrine because, in contrast to other failure-to-warn cases, this situation involved a specific, known risk, and there were no public policy considerations at issue. *Id.* at 1411. The court contrasted the generalized risks of the wilderness and the public policy considerations that go into keeping an area pristine, with those cases in which the court had found that a failure to warn did not involve a public policy type of decision:

In each of these cases the court could not perceive in the record before it any significant social, economic or political policy in the action or inaction that allegedly contributed to the injury giving rise to the lawsuit. In these cases a specific hazard existed, distinct from the multitude of hazards that might exist in, for example, a wilderness trail through a national park or forest, where warnings might detract from the area’s character or safety structures might be costly.

Id.

In the instant case, the bear that had earlier attacked campers at that very Campsite presented a “specific hazard, distinct from the multitude of hazards that might exist in . . . a wilderness,” *id.*, similar to the situation in *Duke*. It is difficult to conceive of what policy considerations could have been at play in failing to keep campers away from that Campsite while the bear was being tracked—or failing to at least warn campers about the situation. Moreover, the evidence set forth thus far in this litigation demonstrates, tragically, that no decision was ever actually made about how to handle this threat to public safety. The government official with the authority to close the Campsite stated that he was never given the opportunity to make that call. Plaintiffs contend, and the court agrees, that this was a simple and tragic failure to act, which does not fall under the discretionary function exception to the FTCA.

Even if a decision had been made (*i.e.*, to do nothing), such a decision is simply not susceptible to a policy analysis, and thus fails the second prong of the *Berkovitz* test. There was no significant social, economic, or political policy involved in failing to warn campers of the specific risk at issue here. “Decisions that require choice are exempt from suit under the FTCA only if they are “susceptible to policy judgment and involve an exercise of political, social, [or] economic judgment.” *Gaubert*, 499 U.S. at 325. As the Tenth Circuit has eloquently pointed out, the government can almost always argue

that decisions—or nondecisions—that involve choice and any hint of policy concerns are discretionary and within the exception. We agree with the D.C. Circuit that “[t]his approach . . . would not only eviscerate the second step of the analysis set out in *Berkovitz* and *Gaubert*, but it would allow the exception to swallow the FTCA’s sweeping waiver of sovereign immunity.”

Duke 131 F.3d 1407, 1411 (10th Cir. 1997) (quoting *Cope v. Scott*, 45 F.3d 448, 449 (D.C. Cir. 1995)).

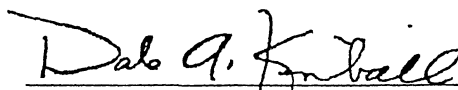
Here, there was known danger— specific in time and location. No policy judgment was involved, nor was there an exercise of political, social, or economic judgment. There might have been a different outcome to this motion had the earlier bear attack happened several miles away or several days or weeks before, but such a scenario is not before the court. In this case, United States officials knew that an aggressive bear had been present at the Campsite earlier that day—and those officials had decided that the bear was dangerous enough that it need to be tracked and euthanized. When the bear was not found that afternoon, no other action was taken—and there is no evidence of any discussion about what might have been done. Tragically, S.I. and his family later set up camp at that very site. The court finds that the United States' failure to take any precautionary measures regarding the Level III bear, which was still on the loose, does not fall under the discretionary function exception to the FTCA. Accordingly, the United States is not immune from suit, and its motion to dismiss is denied.

CONCLUSION

Accordingly, IT IS HEREBY ORDERED that the United States of America's Motion to Dismiss [docket #6] is DENIED.

DATED this 30th day of January, 2009.

BY THE COURT:



DALE A. KIMBALL
United States District Judge

A-30

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Title/Chapter/Section:

Go To

Utah Code

Title 63G General Government

Chapter 7 Governmental Immunity Act of Utah

Section 301 Waivers of immunity -- Exceptions.

63G-7-301. Waivers of immunity -- Exceptions.

(1) (a) Immunity from suit of each governmental entity is waived as to any contractual obligation.

(b) Actions arising out of contractual rights or obligations are not subject to the requirements of Sections **63G-7-401**, **63G-7-402**, **63G-7-403**, or **63G-7-601**.

(c) The Division of Water Resources is not liable for failure to deliver water from a reservoir or associated facility authorized by Title 73, Chapter 26, Bear River Development Act, if the failure to deliver the contractual amount of water is due to drought, other natural condition, or safety condition that causes a deficiency in the amount of available water.

(2) Immunity from suit of each governmental entity is waived:

(a) as to any action brought to recover, obtain possession of, or quiet title to real or personal property;

(b) as to any action brought to foreclose mortgages or other liens on real or personal property, to determine any adverse claim on real or personal property, or to obtain an adjudication about any mortgage or other lien that the governmental entity may have or claim on real or personal property;

(c) as to any action based on the negligent destruction, damage, or loss of goods, merchandise, or other property while it is in the possession of any governmental entity or employee, if the property was seized for the purpose of forfeiture under any provision of state law;

(d) subject to Subsection **63G-7-302(1)**, as to any action brought under the authority of Article I, Section 22, of the Utah Constitution, for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation;

(e) subject to Subsection **63G-7-302(2)**, as to any action brought to recover attorney fees under Sections **63G-2-405** and **63G-2-802**;

(f) for actual damages under Title 67, Chapter 21, Utah Protection of Public Employees Act; or

(g) as to any action brought to obtain relief from a land use regulation that imposes a substantial burden on the free exercise of religion under Title 63L, Chapter 5, Utah Religious Land Use Act.

(3) (a) Except as provided in Subsection (3)(b), immunity from suit of each governmental entity is waived as to any injury caused by:

(i) a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or

(ii) any defective or dangerous condition of a public building, structure, dam, reservoir, or other public improvement.

(b) Immunity from suit of each governmental entity is not waived if the injury arises out of, in connection with, or results from:

(i) a latent dangerous or latent defective condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or

(ii) a latent dangerous or latent defective condition of any public building, structure, dam, reservoir, or other public improvement.

(4) Immunity from suit of each governmental entity is waived as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of

employment.

(5) Immunity from suit of each governmental entity is not waived under Subsections (3) and (4) if the injury arises out of, in connection with, or results from:

(a) the exercise or performance, or the failure to exercise or perform, a discretionary function, whether or not the discretion is abused;

(b) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights;

(c) the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization;

(d) a failure to make an inspection or by making an inadequate or negligent inspection;

(e) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;

(f) a misrepresentation by an employee whether or not it is negligent or intentional;

(g) riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;

(h) the collection of and assessment of taxes;

(i) the activities of the Utah National Guard;

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

(k) any natural condition on publicly owned or controlled lands;

(l) any condition existing in connection with an abandoned mine or mining operation;

(m) any activity authorized by the School and Institutional Trust Lands Administration or the Division of Forestry, Fire, and State Lands;

(n) the operation or existence of a pedestrian or equestrian trail that is along a ditch, canal, stream, or river, regardless of ownership or operation of the ditch, canal, stream, or river, if:

(i) the trail is designated under a general plan adopted by a municipality under Section **10-9a-401** or by a county under Section **17-27a-401**;

(ii) the trail right-of-way or the right-of-way where the trail is located is open to public use as evidenced by a written agreement between the owner or operator of the trail right-of-way, or of the right-of-way where the trail is located, and the municipality or county where the trail is located; and

(iii) the written agreement:

(A) contains a plan for operation and maintenance of the trail; and

(B) provides that an owner or operator of the trail right-of-way or of the right-of-way where the trail is located has, at minimum, the same level of immunity from suit as the governmental entity in connection with or resulting from the use of the trail.

(o) research or implementation of cloud management or seeding for the clearing of fog;

(p) the management of flood waters, earthquakes, or natural disasters;

(q) the construction, repair, or operation of flood or storm systems;

(r) the operation of an emergency vehicle, while being driven in accordance with the requirements of Section **41-6a-212**;

(s) the activities of:

(i) providing emergency medical assistance;

(ii) fighting fire;

(iii) regulating, mitigating, or handling hazardous materials or hazardous wastes;

(iv) emergency evacuations;

(v) transporting or removing injured persons to a place where emergency medical assistance can be rendered or where the person can be transported by a licensed ambulance service; or

(vi) intervening during dam emergencies;

-- the failure to exercise or perform, any function pursuant to Title

73, Chapter 10, Board of Water Resources - Division of Water Resources; or

(u) unauthorized access to government records, data, or electronic information systems by any person or entity.

Renumbered and Amended by Chapter 382, 2008 General Session

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