1992

ShellHipwell v. Sharp : Brief of Appellant

Utah Supreme Court

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2

IN THE UTAH SUPREME COURT

SHELLY HIPWELL, an individual by and through her guardians, SHERRIE JENSEN and SHAYNE HIPWELL,

Plaintiffs/Respondents,

vs.

ROGER SHARP, TIM W. HEALY, and DOES I THROUGH X,

Defendants/Appellants.

Supreme Court No. 920218
Priority No. 11

BRIEF OF APPELLANT ROGER SHARP

**Interlocutory Appeal from the Order of the Third Judical District Court
Salt Lake County, State of Utah,
Honorable J. Dennis Frederick, Presiding**

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TABLE OF CONTENTS

Page

JURISDICTION 1

ISSUE ON APPEAL 1

CONSTITUTIONAL PROVISIONS AND STATUTES 2

STATEMENT OF THE CASE 2

STATEMENTS OF FACT 3

SUMMARY OF ARGUMENT 5

ARGUMENT

THE AMENDED UTAH GOVERNMENTAL IMMUNITY ACT LEGALLY LIMITS THE LIABILITY OF THE UNIVERSITY HOSPITAL TO $250,000. THUS, PLAINTIFFS' $250,000 SETTLEMENT IS REASONABLE AS A MATTER OF LAW 6

A. HISTORY OF GOVERNMENTAL IMMUNITY IN UTAH 6

1. At common law all state entities were absolutely immune from suit, absent consent to the contrary. Municipalities, on the other hand, were only granted immunity for "governmental functions" 7

2. In 1965 the State Gave its Limited Consent to be Sued by Adopting the Utah Governmental Immunity Act 16

3. Early Court Decisions Under the UGIA Correctly Recognized That the "Governmental Function"/ "Proprietary Function" Distinction Applies Only to Municipal Hospitals, and Not to State Hospitals 18

4. In 1978 the Legislature Amended the UGIA to Overrule Greenhalgh by Extending Immunity to Municipal Hospitals 19

5. Recent Court Decisions Have Mistakenly Applied the "Governmental Function"/"Proprietary Function" distinction to State Hospitals. . . 20

Page

6. The 1987 Amendment of the UGIA Corrects the Error Made in Condemarin and Reinstates the Limited Liability Status of the University Hospital. 27

B. THE 1987 UGIA, WHICH LIMITS THE LIABILITY OF THE UNIVERSITY HOSPITAL TO $250,000, IS CONSTITUTIONAL 29

1. The 1987 Amendment is Presumed to be Valid. . 29

2. The 1987 UGIA Does Not Violate the "Open Courts" Clause of the Utah Constitution . . . 31

3. The 1987 UGIA Does Not Violate Equal Protection or Due Process 37

C. THE CONTROL OF GOVERNMENTAL IMMUNITY IS GIVEN TO THE LEGISLATURE 41

D. THE LEGISLATURE HAS POWER TO REIMPOSE GOVERNMENTAL IMMUNITY AFTER IT HAS BEEN ABROGATED BY THE COURTS 44

CONCLUSION 48

TABLE OF AUTHORITIES

Page

Cases Cited

Adams v. City of Peoria, 396 N.E.2d 572 (Ill. App. 1979) 45

Alder v. Salt Lake City, 64 Utah 568, 231 P. 1102 (1924) 9, 24

Alewine v. State, 803 P.2d 1372 (Wyo. 1991) 42

Bailey Serv. & Supply Corp. v. State, 533 P.2d 882 (Utah 1975) 41

Bingham v. Board of Educ., 118 Utah 582, 223 P.2d 432 (1950) 8, 10, 11, 41

Brown v. Wichita State Univ., 547 P.2d 1015 (Kan. 1976) 34, 35, 45

Brown v. Wightman, 47 Utah 31, 151 P. 366 (1915) 33

Bruce v. Wichita State Univ., 429 U.S. 806 (1976) 45

Campbell Bldg. Co. v. State Road Comm'n, 95 Utah 242, 70 P.2d 857 (1937) 7

Carroll v. County of York, 437 A.2d 394 (Pa. 1981) 45

Cobia v. Roy City, 12 Utah 2d 375, 366 P.2d 986 (1961) . . . 43

Condemarin v. University Hosp., 775 P.2d 348 (Utah 1989) 3, 5, 6, 22, 23, 25-28, 32, 37, 47, 48

Cords v. State, 214 N.W. 2d 405 (Wis. 1974) 45

Crowe v. John W. Hartin Memorial Hosp., 579 S.W.3d 888 (Tenn. App. 1979) 15, 40

Davis v. Chicago Hous. Auth., 555 N.E. 2d 343 (Ill. 1990) 45

Emery v. State, 26 Utah 2d 1, 483 P.2d 1296 (1971) 18

Estate of Cargill v. City of Rochester, 406 A.2d 704 (N.H. 1979) 38

Page

Frank v. State, 613 P.2d 517 (Utah 1980) . . . 18, 20-22, 46-48

Fritz v. Regents of Univ. of Colorado, 586 P.2d 23 (Colo. 1978) 40, 45

Gasper v. Freidel, 450 N.W.2d 226 (S.D. 1990) 36

Gillmor v. Salt Lake City, 32 Utah 180, 89 P. 714 (1907) 9, 24

Greaves v. State, 528 P.2d 805 (Utah 1974) 30

Green v. Commonwealth, 435 N.E.2d 362 (Mass. App. 1982) 14

Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975) . . 17-19, 46

Hale v. Port of Portland, 783 P.2d 506 (Or. 1989) 12, 36

Hansen v. Salt Lake County, 794 P.2d 838 (Utah 1990) . . 23, 47

Hardin v. City of Devalls Bluff, 508 S.W.2d 559 (Ark. 1974) 44

High-Grade Oil Co., Inc. v. Sommer, 295 N.W.2d 736 (S.D. 1980) 36

Madsen v. Borthick, 658 P.2d 627 (Utah 1983) 32

Malone v. Univ. of Kansas Medical Center, 552 P.2d 885 (Kan. 1976) 41, 46

Martinez v. Harris County, 808 S.W.2d 257 (Tex. App. 1991) 35

Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Jacks, 960 F.2d 911 (10th Cir. 1992) 41

Morris v. Blake, 552 A.2d 844 (Del. Super. Ct. 1988) . . 36, 42

Neal v. Donahue, 611 P.2d 1125 (Okla. 1980) 40

Niblock v. Salt Lake City, 100 Utah 573, 111 P.2d 800 (1941) 9, 24

Prince George's County v. Blumberg, 407 A.2d 1151 (Md. App. 1979) 14

Page

Ramirez v. Ogden City, 3 Utah 2d 102,
279 P.2d 463 (1955) 8, 9

Randall v. Fairmount City Police Dep't.,
412 S.E.2d 737 (W. Va. 1991) 44

Rathbun v. Department of Highways,
496 P.2d 937 (Idaho 1972) 42

Riddoch v. State, 123 P. 450 (Wa. 1912) 15

Robson v. Penn Hills School Dist., 437 A.2d 1273
(Pa. Commw. Ct. 1981) 45

Rollow v. Ogden City, 66 Utah 475, 243 P. 791 (1926) . . . 9, 24

Roosevelt City Corp. v. Nebeker, 815 P.2d 738
(Utah App. 1991) 29

Sadler v. New Castle County, 524 A.2d 18,
25 (Del. Super. Ct. 1987), aff'd, 565 A.2d 917
(Del. 1989) 44

Sambs v. City of Brookfield, 293 N.W.2d 504
(Wis. 1980) 29

Sehy v. Salt Lake City, 41 Utah 535, 126 P. 691
(1912) 9, 24

Sibley v. Board of Superiors, 462 So.2d 149
(La. 1985) 39, 40

Standard Federal Sav. & Loan Assoc. v. Kirkbride,
821 P.2d 1136 (Utah 1991) 1

Standiford v. Salt Lake City Corp.,
605 P.2d 1230 (Utah 1980) 19

State v. District Court, Fourth Judic. Dist.,
94 Utah 384, 78 P.2d 502 (1937) 7

State v. McHenry, 687 S.W.2d 178 (Mo. 1985) 14

State v. Parker, 13 Utah 2d 65, 368 P.2d 585 (1962) 43

State v. Peruskov, 800 P.2d 15 (Ariz. App. 1990) 42

Page

State v. Pratt, 687 S.W.2d 184 (Mo. 1985) 10, 14

Stout v. Grand Prairie Indep. School Dist., 733 S.W.2d 290 (Tex. App. 1987) 36, 42, 45

Tarrant County Hosp. Dist. v. Ray, 712 S.W.2d 271 (Tex. App. 1986) 40, 42

Taylor v. State, 311 P.2d 733 (Nev. 1957) 42

Utah Associated Mun. Power Sys. v. Public Serv. Comm'n., 789 P.2d 298 (Utah 1990) 29

Whitmire v. Jewell, 573 P.2d 573 (Kan. 1977) 41, 45

Wilkinson v. State, 42 Utah 483, 134 P. 626 (1913) 7

Statutes and Constitutional Provisions Cited

Utah Code Ann. § 63-30-2 (1989) 28

Utah Code Ann. § 63-30-2(3) (1989) 2

Utah Code Ann. § 63-30-2(4) (1989) 2, 18

Utah Code Ann. § 63-30-2(9) (1989) 2

Utah Code Ann. § 63-30-3 (1966 and 1978) 2, 17, 19, 26

Utah Code Ann. § 63-30-34 (1989) 2

Utah Code Ann. § 78-2-2(3)(g) (Supp. 1992) 1

Utah Code Ann. § 78-2-2(3)(j) (Supp. 1992) 1

Utah Const., art. I, § 7 2

Utah Const., art. I, §11 . . . . . 2, 26, 31

Utah Const., art. I, § 24 2

Utah Const., art V, § 1 2

Utah Const., art. VIII, § 3 1

Other Authorities Cited

	Page
Annot., 43 A.L.R.4th 19 (1986)	39
Prosser and Keaton, The Law of Torts, 1043 (5th Ed. 1984)	15
Restatement of Torts, Section 887, Comment c (1939)	15
Tort Claims Against the State of Utah, 5 Utah L. Rev. 233 (1956)	10

IN THE UTAH SUPREME COURT

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Plaintiffs/Respondents,	)	Supreme Court No. 920218 Priority No. 11
vs.	)	
ROGER SHARP, TIM W. HEALY, and DOES I THROUGH X,	)	
Defendants/Appellants.	)	

JURISDICTION

This Court has jurisdiction to consider this appeal pursuant to Utah Const., art. VIII, § 3 and Utah Code Ann. §§ 78-2-2(3)(g) and (j) (Supp. 1992). The Third Judicial District Court denied defendants' motions for summary judgment on March 30, 1992 and defendants' joint petition for permission to appeal the interlocutory order was granted by this Court on June 23, 1992.

ISSUE ON APPEAL

Did the trial court err in concluding that the Amended Utah Governmental Immunity Act does not validly limit the liability of the University Hospital to $250,000? This is a legal determination for which the Court gives no deference, but rather reviews for correctness. Standard Federal Sav. & Loan Assoc. v. Kirkbride, 821 P.2d 1136, 1137 (Utah 1991).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. Utah Const., art. I, §§7, 11, and 24.
2. Utah Const., art V, § 1.
3. Utah Code Ann. §§ 63-30-2(3),(4), and (9) (1989).
4. Utah Code Ann. § 63-30-3 (1966 and 1978).
5. Utah Code Ann. § 63-30-34 (1989).

STATEMENT OF THE CASE

This case involves a legal malpractice action against defendants Roger Sharp and Tim Healy, plaintiffs' former attorneys. Plaintiffs retained Sharp and Healy to pursue a medical malpractice claim against the University Medical Center, which includes the University Hospital and the College of Medicine. Sharp and Healy subsequently negotiated a $250,000 settlement on plaintiffs' behalf. Plaintiffs later filed this action against defendants Sharp and Healy alleging that the amount of the settlement negotiated by defendants was inadequate.

Defendants moved for summary judgment, asserting that the $250,000 settlement was reasonable as a matter of law because the alleged negligent act was performed by an agent of the College of Medicine and, under the Utah Governmental Immunity Act (UGIA), the liability of the College of Medicine is limited to $250,000. Plaintiffs' opposing memorandum did not dispute the fact that the College of Medicine's liability is limited to $250,000. Instead, plaintiffs asserted that the University Hospital was also negligent, and that the liability limit of $250,000 was declared to

be unconstitutional by this court in Condemarin v. University Hospital insofar as it pertained to the University Hospital.

Defendants responded to plaintiffs' opposing memorandum by asserting that, even if the University Hospital were negligent, its liability is also limited to $250,000 because of a subsequent amendment to the UGIA. Defendants also suggested that inadequate briefing by the parties in Condemarin may have led to an improper result in that case. Because plaintiffs chose not to contest the liability limit of the College of Medicine, the central issue in this motion became whether the liability of the University Hospital is limited to $250,000. Defendants allowed plaintiffs to submit a supplemental memorandum in order to fully address this primary issue.

Although the trial court denied defendants' motions, the court nonetheless recognized that "the issue in dispute is pivotal and dispositive." The trial court further "urge[d] defendants to pursue an interlocutory appeal of the denial of their motions." (R. 725). Defendants then petitioned for and received permission to appeal the trial court's interlocutory order.

STATEMENTS OF FACT

1. In January of 1989, plaintiff Shelly Hipwell was injured as a result of alleged negligent treatment at the University Hospital in Salt Lake City, Utah. (R. 5).

2. Plaintiffs Sherrie Jensen and Shayne Hipwell were duly appointed to be the co-guardians of plaintiff Shelly Hipwell.

(R. 3).

3. Shelly Hipwell's guardians retained defendants Roger Sharp and Tim Healy to pursue Shelley's claims against the University Hospital and Medical Center. (R. 6-7).

4. Defendants Sharp and Healy negotiated a $250,000 settlement which was paid by the State of Utah to Shelly Hipwell and her co-guardians (hereinafter collectively referred to as "plaintiffs"). (R. 8).

5. Plaintiffs have subsequently filed suit against defendants Sharp and Healy claiming that the $250,000 settlement was inadequate. (R. 9-10).

6. Defendants moved for summary judgment, asserting that plaintiffs' $250,000 settlement was reasonable as a matter of law because the liability of the University Hospital is limited to $250,000 under the 1987 version of the UGIA. (R. 163, 165, 541).

7. The trial court denied defendants' motions for summary judgment, concluding that the 1987 Act is unconstitutional "for the reasons specified in plaintiffs' memoranda. . . ." No other explanation was given. (R. 725).

8. Defendants have subsequently received permission from this Court to pursue an interlocutory appeal of the denial of their motions for summary judgment. (R. 730).

9. On May 27, 1992, while defendants' petition for interlocutory appeal was pending, plaintiff Shelly Hipwell passed away. (R. 728).

SUMMARY OF ARGUMENT

The $250,000 settlement negotiated by defendants on plaintiffs' behalf is reasonable as a matter of law because the liability of the University Hospital is limited to $250,000 under the Utah Governmental Immunity Act (UGIA).

Plaintiffs contest this fact by asserting that the liability limit contained in the UGIA is unconstitutional insofar as it pertains to the University Hospital. In support of this claim, plaintiffs cite to this Court's decision in Condemarin v. University Hospital. However, Condemarin does not affect the outcome of this case for two reasons.

First, the Condemarin opinion was premised upon an erroneous assumption that, under the common law, state hospitals were capable of performing "proprietary functions" and were subject to suit for torts arising out of those functions. This led the Condemarin plurality to believe that the 1978 UGIA purported to extend immunity to the University Hospital as a "non-governmental function" rather than as a "governmental function." These incorrect assumptions ultimately led to the incorrect conclusion that the 1978 UGIA unconstitutionally limited the liability of the University Hospital. Because of these errors, Condemarin should be overruled and the liability cap reinstated.

Second, even if Condemarin is upheld, defendants are still entitled to summary judgment because the 1987 amendment to the UGIA remedied any constitutional defect that may have existed in the

Act. As it now stands, the 1987 UGIA is constitutional in every respect and validly limits the liability of the University Hospital to $250,000. Consequently, the trial court erred in denying defendants' motions for summary judgment.

ARGUMENT

THE AMENDED UTAH GOVERNMENTAL IMMUNITY ACT LEGALLY LIMITS THE LIABILITY OF THE UNIVERSITY HOSPITAL TO $250,000. THUS, PLAINTIFFS' $250,000 SETTLEMENT IS REASONABLE AS A MATTER OF LAW.

Plaintiffs' complaint asserts that defendants were negligent in settling plaintiffs' case for $250,000. Plaintiffs argue that, while the Utah Governmental Immunity Act (UGIA) limited the liability of the University Hospital in the past, such limited liability was found to be unconstitutional by this Court in Condemarin v. University Hosp., 775 P.2d 348 (Utah 1989). In contrast, defendants assert that Condemarin was decided in error and that in any event the liability limit has been reinstated by subsequent amendment of the UGIA. Defendants further assert that the liability limit in the amended Act is constitutional.

A. HISTORY OF GOVERNMENTAL IMMUNITY IN UTAH.

A correct understanding of the development of governmental immunity in Utah is crucial to the outcome of this case. For this reason, the history of governmental immunity is set out below, beginning with the status of governmental immunity at the time the Utah Constitution was adopted.

1. At common law all state entities were absolutely immune from suit, absent consent to the contrary. Municipalities, on the other hand, were only granted immunity for "governmental functions".

When the Utah Constitution was ratified, and continuing thereafter, the common law provided that the state was absolutely immune from suit, absent its statutory consent to the contrary:

> In the absence of either express constitutional or statutory authority an action against a sovereign state cannot be maintained. The doctrine is elementary and of universal application and so far as we are aware there is not a single authority to the contrary.

Wilkinson v. State, 42 Utah 483, 492-93, 134 P. 626, 630 (1913) (emphasis added).

This immunity extended to all subdivisions of the state:

> If the result of the action is to appropriate the state's funds to satisfy the judgment rendered in the action, the action is against the state, regardless of its form or against whom brought.

Id. at 630, 42 Utah at 493.

Apparently, all common law governmental immunity cases in Utah have similarly recognized that state entities are absolutely immune from suit, absent consent to the contrary. See, e.g., State v. District Court, Fourth Judic. Dist., 94 Utah 384, 389, 78 P.2d 502, 504 (1937) ("The state cannot be sued unless it has given its consent or has waived its immunity."); Campbell Bldg. Co. v. State Road Comm'n, 95 Utah 242, 249, 70 P.2d 857, 861 (1937) ("Action may not be maintained [against the state] unless the state has, through legislative or constitutional action, given consent to be sued.");

Bingham v. Board of Educ., 118 Utah 582, 592, 223 P.2d 432, 438 (1950) ("Under our constitution, the power to make departments of the state respond in damages for torts rests with the legislature, and without legislative enactment we are unable to impose any liability. . . .").

Standing in sharp contrast to the absolute immunity of the state is the partial immunity afforded to municipalities. Municipalities are not afforded absolute immunity under the common law because they are a hybrid of the state and a private corporation. On the one hand, municipalities act as agents of the state and perform many types of public or governmental functions. On the other hand, a municipality is a private corporation capable of acting in a private capacity. In order to account for this dual nature, the common law provides that a municipality can share in the state's immunity only when it is acting as an agent of the state and is thereby performing a public or "governmental function." However, municipalities are not allowed to share in the state's immunity when they are acting in their private capacities, or rather are performing "proprietary functions:"

> It has long been recognized in this jurisdiction that a municipal corporation may act both in a public and a private capacity and that when performing in a public or governmental function it is not subject to tort liability.

Ramirez v. Ogden City, 3 Utah 2d 102, 104, 279 P.2d 463, 464 (1955) (emphasis added).

In accordance with these principles, all common law govern-

mental immunity cases involving municipalities have applied the "governmental function"/"proprietary function" distinction, which distinction is not made in the cases involving state entities. These cases are very careful to limit the application of the "governmental function"/"proprietary function" distinction to municipal entities:

> The law in respect to the liability of municipal corporations in discharging governmental or public duties is well and tersely stated . . . in the following language: 'The rule is general that a municipal corporation is not liable for alleged tortious injuries to the persons or property of individuals, when engaged in the performance of public or governmental functions or duties. So far as municipal corporations exercise powers conferred on them for purposes essentially public, they stand as does sovereignty whose agents they are, and are not liable to be sued for any act or omission occurring while in the exercise of such powers, unless by some statute the right of action be given.'

Gillmor v. Salt Lake City, 32 Utah 180, 184, 89 P. 714, 715 (1907) (emphasis added). See also Ramirez v. Ogden City, 3 Utah 2d 102, 104-105, 279 P.2d 463, 464 (1955); Niblock v. Salt Lake City, 100 Utah 573, 575, 111 P.2d 800, 801 (1941); Rollow v. Ogden City, 66 Utah 475, 481, 243 P. 791, 793 (1926); Alder v. Salt Lake City, 64 Utah 568, 569-70, 231 P. 1102, 1102-1103 (1924); Sehy v. Salt Lake City, 41 Utah 535, 537, 126 P. 691 (1912).

As evidenced by the differing lines of cases involving state and municipal entities, the "governmental function"/"proprietary function" distinction applies only to municipalities at common law. The distinction has never applied to state entities, which have

always been absolutely immune from suit. By definition, the state is the government and thus any action it performs is a "governmental function." See Bingham v. Board of Educ., 118 Utah 582, 587, 223 P.2d 432, 435 (1950) (the duties of state agencies are "wholly governmental"); State v. Pratt, 687 S.W.2d 184, 186 (Mo. 1985) (the activities of a state entity are "exclusively governmental functions. . . . ").

Numerous cases and articles have recognized the differing treatment that is given to states and municipalities at common law, including the Utah Law Review:

> The Utah Supreme Court, early in its history declared the immunity rule to be an elementary and universal principle and held that an action against a sovereign state cannot be maintained in the absence of express constitutional or statutory authority. The doctrine cannot be circumvented by suing a state agency; the test is that where a judgment would have to be satisfied from state funds, there is in essence an action against the state.
>
> * * *
>
> Municipal corporations do not fully partake of the state's immunity because of their peculiar nature. They are on the one hand subdivisions of the state exercising governmental powers, yet on the other hand they engage in activities similar to those of private corporations. Because of this dual character, the immunity of the state is extended to the municipality only when it acts in a governmental capacity. Where the municipal corporation acts in a private or corporate capacity, it is liable for its torts. This rule of law seems to be uniform throughout the country. . . .

Note, Tort Claims Against the State of Utah, 5 Utah L. Rev. 233, 234 & 236-37 (1956) (emphasis added).

This Court has similarly recognized the differing treatment that was given to state entities and municipalities at common law, as illustrated in Bingham v. Board of Educ., 118 Utah 582, 223 P.2d 432 (1950).

The plaintiff in Bingham was suing the Board of Education for negligence and for nuisance. The Board of Education claimed that it was absolutely immune from suit as an agent of the state. The plaintiff asserted that the Board of Education was merely a municipality and was thus subject to suit for torts it committed during the performance of a "proprietary function." Thus, the issue faced by the Court was whether the Board of Education was a state entity or a municipality. This issue arose because, on the one hand, the Board of Education had an independent existence as a Utah corporation similar to a municipality, while on the other hand, the board was founded, supervised, and controlled directly by the state as are other state agencies.

This Court ultimately concluded that the Board of Education was more like a state agency than a municipality. The Court referred to the board as a "quasi-municipal corporation" rather than as an ordinary municipal corporation. The Court then described in great detail the differing treatment that was given to municipal corporations and "quasi-municipal corporations" (i.e. state agencies) at common law:

> The authorities seem to make a distinction between municipal corporations and what are termed "quasi-municipal" corporations. This distinction is better understood when consider-

> ation is given to the fact that school boards are created exclusively for school purposes and are mere agencies of the state . . . and that, as to tort liability, such agencies or authorities occupy a status different from that of municipal corporations which ordinarily have a dual character and which may exercise proprietary as well as governmental functions.
>
> It is pertinent to state here that there is a distinction between municipal corporations proper and quasi-municipal corporations concerning liability for torts, and that the general rule is that the latter is not liable for torts unless allowed by statute.
>
> [Quasi-municipal corporations] are usually treated as public or state agencies, and their duties are ordinarily wholly governmental. They exercise the greater part of their functions as agencies of the state. . . . On the other hand, it is recognized that the municipal corporation proper has functions which are performed by it not as a mere agent of the state, but in its capacity as a corporation serving alone the local inhabitants. If the city should be regarded as a state agency at all times, . . . there would exist no logical ground for holding it liable for damages due to negligence, since in no instance is a state held liable under the general principles of law.

Id. at 435, 118 Utah at 587-88 (emphasis added, citations and quotations omitted).

After concluding that the Board of Education was a state entity, the Court extended absolute immunity to the board, rather than the partial immunity that is afforded municipalities.

An additional example is found in Hale v. Port of Portland, 783 P.2d 506 (Or. 1989). The Plaintiff in Hale had filed a personal injury action against both the Port of Portland (a state entity) and the County of Multnomah (a municipality). When the

trial court limited the defendant's damages to $100,000 pursuant to a statutory liability cap, the plaintiff appealed, claiming that the cap violated the "open-courts" provision of the state constitution. Both defendants argued that the "open-courts" provision was not violated because, at the time the "open-courts" provision was adopted, government entities were absolutely immune from suit under the common law.

In deciding the controversy, the Oregon Supreme Court pointed out that the common law differed with respect to state entities and municipalities. While state entities were granted absolute immunity at common law, municipalities were only immune for "governmental functions." The court thus held that limiting the liability of the Port (a state entity) did not conflict with the "open-courts" provision of the state constitution:

> Unlike cities, but like other port districts, the Port is an instrumentality of the state government, performing state functions.
>
> * * *
>
> The Port, being a part of the state's government, therefore is immune from suit to the same extent the state as such is immune. It follows that, contrary to the contention of plaintiff here, [the liability cap] does not deny plaintiff any right he has against the Port by virtue of the ["open-courts"] guaranty in Oregon Constitution Article I, Section 10, because there never was such a right.

Id. at 511-12.

After upholding the cap with regard to the state entity, the court addressed the validity of the statute with regard to the

municipality. In doing so the court found that municipalities, unlike state entities, were not absolutely immune from suit at common law. Rather, at common law municipalities were immune for "governmental functions," but not for "proprietary functions":

> At common law, the state's immunity from suit extended to municipal corporations only when they were engaged in so-called "governmental" functions. Immunity did not extend to torts municipal corporations committed while performing "proprietary" acts. . . .

Id. at 512 (emphasis added).

Thus, the Oregon Supreme Court concluded that the statutory liability cap conflicted with the "open-courts" provision with regard to the municipality, but not with regard to the state.

Numerous other courts have similarly held that the "governmental function"/"proprietary function" distinction applies only to municipalities, and not to state entities which have always been absolutely immune from suit. See State v. Pratt, 687 S.W.2d 184, 186 (Mo. 1985) ("The traditional rule . . . permits the application of the governmental-proprietary distinction . . . only as to municipalities. Any other public entity . . . is in effect an arm of the state exercising exclusively governmental functions. . . ."); State v. McHenry, 687 S.W.2d 178, 181-82 (Mo. 1985) ("The proprietary-governmental dichotomy applies only in the law of municipal corporations, and not to activities of the state."); Green v. Commonwealth, 435 N.E.2d 362, 364 (Mass. App. 1982) ("The common law . . . did not recognize a proprietary-function exception to the general rule of sovereign immunity."); Prince George's

County v. Blumberg, 407 A.2d 1151, 1177 (Md. App. 1979) ("In contrast to the situation with municipal agencies, the distinction between governmental and proprietary actions has no relevance with respect to the state or state agencies."); Crowe v. John W. Hartin Memorial Hosp., 579 S.W.3d 888, 890-91 (Tenn. App. 1979) (while a state entity is absolutely immune, municipalities can only share in the state's immunity when they are engaged in a "governmental function", as opposed to a "proprietary function"); Riddoch v. State, 123 P. 450, 452 (Wa. 1912) (The "governmental function"/ "proprietary function" distinction applies only to municipalities. The court knows of no precedent holding otherwise.). See also Prosser and Keaton, The Law of Torts, pp. 1043 & 1051 (5th Ed. 1984) (at common law state entities were absolutely immune from suit while municipalities were only granted immunity for governmental activities, as opposed to proprietary ones); Restatement of Torts, Section 887, Comment c (1939) (Only the state has complete immunity from tort liability. Municipal corporations have immunity only for "governmental functions.").

As the preceding authorities demonstrate, state entities have always been absolutely immune from suit under the common law. The "governmental function"/"proprietary function" distinction applied only to municipalities. The University Hospital, as an agent of the state, was therefore absolutely immune from suit at common law. Prior to the passage of the UGIA, individuals had no remedy against the University Hospital.

2. In 1965 the State Gave its Limited Consent to be Sued by Adopting the Utah Governmental Immunity Act.

In 1965 the statutory consent needed to sue the state (and municipalities engaged in "governmental functions") was finally given when the legislature adopted the Utah Governmental Immunity Act. This Act performs three tasks:

> 1) First, the Act codifies the absolute immunity that was extended to state entities and the partial immunity that was extended to municipalities at common law.[1] (Utah Code Ann. § 63-30-3 (1965));
>
> 2) Second, the Act then waives the immunity granted under the preceding section for most state activities. (Utah Code Ann. §§ 63-30-5 through 63-30-10.5 (1965)); and
>
> 3) Third, the Act then limits the liability of the state for those activities where immunity was waived under the preceding section. Currently, the liability cap is set at $250,000 for injuries to a single person (Utah Code Ann. § 63-30-34 (1989)).

The net result of these three tasks is that individuals now have a remedy of up to $250,000 against state entities (and also against municipalities performing "governmental functions") where no remedy previously existed. Incredibly, plaintiffs are seeking to have the UGIA declared unconstitutional. If they succeed, the law of governmental immunity will revert back to the common law and plaintiffs will be left without a remedy of any kind.

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[1] The comments made on the Senate floor regarding the UGIA clearly demonstrate that § 63-30-3 of the Act was intended to codify common law immunity. In 1965, when the UGIA was adopted, the courts in many of the surrounding states had judicially abolished the doctrine of governmental immunity. As a result of this judicial waiver, the states were completely overwhelmed with lawsuits. The original UGIA was intended to codify the common law doctrine of governmental immunity in order to prevent such a judicial waiver from occurring in Utah. As stated on the Senate floor, the original UGIA was intended to "reaffirm" common law governmental immunity and then "carve out" various areas in which immunity would be waived. A transcript of relevant portions of the Senate's deliberations are found on pages 9 through 14 of the Addendum.

The difficulties in this case, along with the difficulties in many previous governmental immunity cases, stem from the manner in which the legislature performed task "one" (i.e., the manner in which the legislature codified the common law). In its original form, the statute performing task "one" read as follows:

> Except as may be otherwise provided in this Act, all governmental entities shall be immune from suit for any injury which may result from . . . the exercise and discharge of a governmental function.

Utah Code Ann. § 63-30-3 (1965) (emphasis added).

By extending immunity to "governmental functions" this statute simply codified the common law. As previously discussed, the phrase "governmental function" encompasses all activities performed by a state entity, as well as those activities that a municipality performs while acting as an agent of the state. "The legislature was aware of this and . . . they used their language advisedly. . . . It [is] plain enough that the intent of the statute was to retain the then existing law, both as to immunity and as to liability. . . ." Greenhalgh v. Payson City, 530 P.2d 799, 801 (Utah 1975).

The fact that the legislature did not define "governmental function" in the UGIA but rather relied upon the common law definition of that phrase has resulted in extensive litigation. Over the years the common law definition has gradually been forgotten. As a result the courts have been forced to hear many cases in which the meaning of the phrase was at issue. These cases

could have been avoided if the legislature would have set forth the common law definition of "governmental function" in the UGIA. The legislature remedied this problem in 1987 by amending the UGIA to include the common law definition of "governmental function." See Utah Code Ann. § 63-30-2(4) (1989). The validity of this 1987 amendment is the central issue in the instant case.

3. Early Court Decisions Under the UGIA Correctly Recognized That the "Governmental Function"/"Proprietary Function" Distinction Applies Only to Municipal Hospitals, and Not to State Hospitals.

Shortly after the UGIA was adopted this Court applied the Act to both a state hospital and to a municipal hospital. Consistent with the legislative intent and with the common law, this Court applied the "governmental function"/"proprietary function" distinction only to the case involving the municipal hospital. The distinction was not applied to the state hospital, where this Court did not even question the fact that the state hospital was performing a "governmental function."

In Emery v. State, 26 Utah 2d 1, 483 P.2d 1296 (1971), "the Utah State Hospital was granted governmental immunity in a case involving the death of a mental patient, the necessary implication being that the operation of the facility in question was a governmental function." Frank v. State, 613 P.2d 517, 519 (Utah 1980), citing Emery v. State, 26 Utah 2d 1, 483 P.2d 1296 (1971).

However, in Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975) this Court applied the "governmental function"/"proprietary function" distinction to a municipal hospital to determine whether

it qualified for immunity under the UGIA. The Court correctly recognized that the phrase "governmental function" does not include proprietary functions of a municipality:

> It is therefore our conclusion that proprietary functions of a municipality are not within the coverage of the Utah Governmental Immunity Act.

Id. at 801 (emphasis added).

These cases demonstrate that, even after the adoption of the UGIA, the "governmental function"/"proprietary function" distinction was applied only to municipal hospitals. State hospitals had always been performing and continued to perform only "governmental functions."

4. In 1978 the Legislature Amended the UGIA to Overrule Greenhalgh by Extending Immunity to Municipal Hospitals.

In 1978 the Utah Legislature amended § 63-30-3 of the UGIA. This amendment was in "direct response to the decision in Greenhalgh" that municipal hospitals are not granted immunity under the UGIA. Standiford v. Salt Lake City Corp., 605 P.2d 1230, 1238 (Utah 1980). The 1978 amendment read as follows (underlined portions were added by the amendment):

> Except as may be otherwise provided in this Act, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility.

Utah Code Ann. § 63-30-3 (1978) (emphasis added).

The effect of the 1978 amendment was to extend the state's immunity to municipal hospitals, even if the hospitals were

performing "proprietary functions." In such situations, the Act thus denied individuals of a remedy against a municipal hospital that had previously existed at common law.

Significantly, the 1978 amendment did not affect the immunity of state hospitals. State hospitals already qualified for immunity as "governmental functions" under the UGIA and did not need to be singled out for a specific grant of immunity. Nonetheless, after the 1978 amendment, state hospitals qualified for immunity under the UGIA as not only a "governmental function," but also as a "governmentally-owned hospital."

5. Recent Court Decisions Have Mistakenly Applied the "Governmental Function"/"Proprietary Function" distinction to State Hospitals.

The fact that the 1978 amendment extends immunity to state hospitals as both "governmental functions" and as "governmentally owned hospitals" has resulted in confusion in the courts. More specifically, the amendment has caused the courts to forget that all state entities, including state hospitals, qualify as "governmental functions" as of right. Instead, the courts have recently focused on the "governmentally-owned hospital" portion of the statute that was added in 1978 when determining whether state hospitals qualify for immunity under the UGIA.

The first government hospital decision interpreting the 1978 amendment was Frank v. State, 613 P.2d 517 (Utah 1980). Just like the instant case, Frank also involved an action for negligence against the University Medical Center. The defendants in Frank

moved for summary judgment on the grounds that the University Medical Center was immune from suit under the UGIA. This Court ultimately concluded that the University Medical Center did in fact qualify as a "governmental function" under the UGIA, and thus qualified for limited immunity. However, in concluding that the University Medical Center was engaged in a "governmental function" the Court relied heavily upon the language added in the 1978 amendment. The Court apparently felt that this new language evidenced a legislative intent to include the Medical Center within the definition of "governmental function." The Court did not recognize that the medical center already qualified as a "governmental function" as of its own right under the common law principles previously discussed:

> [The 1978 amendment] granted immunity from suit for injury relating to the public ownership and operation of a hospital, nursing home, or other health care facility. . . . [W]e are disinclined, as a matter of judicial policy, to disregard the obvious manifestation of legislative intent reflected in the amendment. For this reason, we hold the operation of a governmentally-owned health care facility such as the University Medical Center to be a "governmental function" as contemplated by the statute prior to amendment.

Id. at 519 (emphasis added).

While Frank correctly concluded that the University Medical Center is engaged in a "governmental function," the Court apparently found it necessary to rely upon the 1978 amendment to reach such a result rather than simply concluding that the medical center qualified as a "governmental function" as of its own right.

To this extent, Frank strayed from the original intent of the UGIA and also from the common law.

The second case to analyze the immunity of the University Hospital under the 1978 UGIA was Condemarin v. University Hosp., 775 P.2d 348 (Utah 1989). Condemarin is extremely important to the outcome of this case because, in the trial court, plaintiffs relied on this opinion to support nearly every aspect of their case. Condemarin involved an action against the University Hospital arising from the negligent treatment of the plaintiff's child. The plaintiff moved for summary judgment seeking to have portions of the UGIA declared unconstitutional. When the plaintiff's motion was denied, she appealed to this Court.

On appeal, summary judgment was granted in the plaintiff's favor and the liability cap contained in the UGIA was declared to be unconstitutional insofar as it limited the liability of the University Hospital. The plurality's holding was based primarily upon its interpretation of the 1978 amendment to the UGIA. The plurality interpreted the 1978 amendment as extending immunity to the University Hospital as a "governmentally-owned hospital" rather than as a "governmental function":

> The net result of [the 1978 amendment] is that government-owned health care facilities . . . have been singled out for . . . immunity for non-governmental functions.
>
> * * *
>
> The legislature did not make the operation of a health care facility a "governmental function" as contemplated by the statute. . . . Rather,

> the legislature simply added to the category of government entities covered by § 60-30-3 (i.e., those exercising governmental functions) a new category consisting of government-owned health care facilities, whether or not those facilities are exercising governmental or non-governmental functions. The plain language and structure of § 63-30-3 admit of no other construction.
>
> * * *
>
> The [governmental immunity] act does not purport to define the operation of a hospital per se as the exercise of a governmental function; it only gives hospitals the same status under the act as government entities which are performing governmental functions.

Id. at 350-52 (emphasis in original). See also Hansen v. Salt Lake County, 794 P.2d 838, 843 n.10 (Utah 1990).

As this language from Condemarin indicates, the plurality was not aware that the University Hospital, as a state entity, qualified for immunity as a "governmental function" and not just as a "governmentally-owned hospital." If the plurality had been aware of this fact, it would have, by its own admission, upheld the validity of the statutory liability limit:

> It is true, as defendants argue, that there is no fundamental right to recover unlimited damages from government entities performing governmental functions.

Id. at 352 (emphasis added).

However, the plurality did not consider the University Hospital to be a "governmental function" because, after analyzing the 1978 amendment, it determined that there was "no statutory or factual basis for such an assumption." Id.

Thus, the plurality held that the 1978 amendment extended

immunity to the University Hospital as a "non-governmental function" rather than as a "governmental function."

The plurality's incorrect belief that state entities were capable of performing "proprietary functions" at common law led the plurality to incorrectly assume that the "governmental function"/ "proprietary function" distinction applies to all government entities, and not just to municipalities:

> Immunity from liability existed as a matter of common law in Utah for government entities engaging in governmental, as opposed to proprietary, activities.
>
> * * *
>
> At common law the proprietary or nongovernmental functions of government entities were not protected from liability in Utah. . . .

Id. at 349 and 351 (emphasis in original).

Significantly, all of the cases cited in support of this holding were cases involving municipalities. See Id. at 350. Not a single case was cited in which the "governmental function"/ "proprietary function" distinction applied to a state entity.[2] As already demonstrated in detail, such a distinction did not apply to state entities because state entities were only capable of performing "governmental functions" at common law.

The plurality's misapplication of the "governmental function"/ "proprietary function" distinction to state entities is easy to

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[2] Those cases cited were: Gillmor v. Salt Lake City, 32 Utah 180, 89 P.714 (1907); Sehy v. Salt Lake City, 41 Utah 535, 126 P. 691 (1912); Alder v. Salt Lake City, 64 Utah 568, 231 P. 1102 (1924); Rollow v. Ogden City, 66 Utah 475, 243 P. 791 (1926); Niblock v. Salt Lake City, 100 Utah 573, 111 P.2d 800 (1941).

understand, in light of the fact that the issue had not been recognized or briefed by the parties. Rather, the brief submitted by the University Hospital erroneously assumed that the distinction applied to state entities:

> Under [the] common law there was always discrimination between a person injured by a state employee functioning in a government capacity and one injured by a state employee functioning in a proprietary capacity. Under sovereign immunity the person injured in the governmental function was absolutely barred from any recovery whereas a complete recovery was possible as to the proprietary function.
>
> * * *
>
> Since government entities were immune from suit for government activities the important distinction as to the liability of the entity itself was whether the function was proprietary or governmental.

Brief of University Hospital, pp. 35 & 41. (Addendum pp. 15-16).

As illustrated, the defendant in Condemarin misstated to this Court that the "governmental function"/"proprietary function" distinction applied to state entities. The plaintiff did nothing to remedy this misstatement. Consequently, this Court was erroneously led to believe that the distinction applied to state entities at common law.

Based upon the incorrect belief that the 1978 amendment extended immunity to the University Hospital as a "proprietary function" and that state entities were liable for "proprietary functions" at common law, the Condemarin plurality held that the liability cap contained in the 1978 UGIA was unconstitutional. The

plurality stated that the cap deprived plaintiffs of a common law remedy against the University Hospital in violation of the "open courts" provision of the Utah Constitution. The plurality's reasoning is set forth below in its own words.

"The right to recover for personal injuries [is] an important substantive right [guaranteed by the 'open courts' provision contained in Article I Section 11 of the Utah Constitution]." Id. at 360. "[The 'open courts' clause provides] that an individual may not be arbitrarily deprived of effective remedies designed to protect basic individual rights." Id. at 357. "The term 'remedy,' as used in the open courts clause, means the full, fair and complete remedy provided by the common law." Id. at 372. "At common law the proprietary or non-governmental functions of government entities were not protected from liability in Utah. . . ." Id. at 351 (emphasis in original). "Consequently, immunity for . . . government entities performing non-governmental functions was created, not retained, by the 1978 amendment. Such immunity was a new development." Id. (emphasis in original). "To the extent that § 63-30-3 created immunity for employees of government-owned health care facilities not engaged in governmental functions, it created immunity where none had existed at common law." Id. at 360.

Under this analysis, the Condemarin plurality determined that the 1978 UGIA conflicted with the "open courts" provision of the Utah Constitution. As a result, the plurality subjected the Act to "heightened scrutiny" under both an equal protection and a due

process analysis. The result of the heightened scrutiny was that the liability cap contained in the 1978 UGIA was found to be unconstitutional with regard to the University Hospital.

As this discussion demonstrates, Condemarin was based upon an erroneous assumption that state entities were capable of performing "proprietary functions" at common law and were liable for torts arising out of those functions. This erroneous assumption, caused by inadequate briefing, led the Condemarin plurality to construe the 1978 amendment as extending immunity to the University Hospital where none previously existed. Because the underpinning of the Condemarin holding was based upon the erroneous assumption urged by the University Hospital, the decision should be overturned and the liability cap contained in the UGIA should be upheld as to the University Hospital.

6. The 1987 Amendment of the UGIA Corrects the Error Made in Condemarin and Reinstates the Limited Liability Status of the University Hospital.

Even if Condemarin is upheld, defendants are entitled to summary judgment in this case. In 1987 the legislature once again amended the UGIA. This amendment rectified the concerns raised by the plurality in Condemarin by demonstrating once and for all that the University Hospital qualifies for immunity as a "governmental function," and not as a "non-governmental function" as suggested by Condemarin. The amendment made this change by adding the common law definition of "governmental function" to the UGIA. This definition includes all state activities, including the activities

of the University Hospital, within the definition of "governmental function":

> (4)(a) "Governmental function" means any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.
>
> * * *
>
> (3) "Governmental Entity" means the state and its political subdivisions as defined in this chapter.
>
> * * *
>
> (9) "State" means the state of Utah, and includes any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality of the state.

Utah Code Ann. § 63-30-2 (1989) (emphasis added).

This definition of "governmental function" alleviates the concerns expressed in Condemarin over the fact that immunity was being extended to a "non-governmental function." Under the 1987 amendment the University Hospital's activities now qualify for immunity as "governmental functions." The amendment thus reinstates the liability limit of $250,000 to the University Hospital.

By including all state activities within the definition of "governmental function," the 1987 amendment simply codifies the

common law, as per the original intent of the UGIA. It is difficult to understand how plaintiffs can argue that the 1987 amendment is unconstitutional when the common law has never been unconstitutional. As shown below, the 1987 UGIA is constitutional in every respect.

B. THE 1987 UGIA, WHICH LIMITS THE LIABILITY OF THE UNIVERSITY HOSPITAL TO $250,000, IS CONSTITUTIONAL.

1. The 1987 Amendment is Presumed to be Valid.

When dealing with constitutional issues, the Utah courts have repeatedly emphasized that statutes carry a strong presumption of validity:

> When we are engaged in statutory construction, we are obligated to construe statutes when possible to effectuate the legislative intent and to avoid potential constitutional conflicts. It is also a well established rule of statutory construction that statutes are endowed with a strong presumption of validity; and should not be declared unconstitutional if there is any reasonable basis upon which they can be found to come within the constitutional framework.

Roosevelt City Corp. v. Nebeker, 815 P.2d 738, 739 (Utah App. 1991) (quotations and citations omitted; emphasis added).

This Court has repeatedly stressed that the party attacking the constitutionality of a statute carries the burden of proof. See Utah Associated Mun. Power Sys. v. Public Serv. Comm'n., 789 P.2d 298, 301 (Utah 1990) (The burden of proof is on those who would have the Court strike down a statute). Additionally, "the challenger must prove abuse of legislative discretion beyond a reasonable doubt." Sambs v. City of Brookfield, 293 N.W.2d 504,

511 (Wis. 1980). See also, Greaves v. State, 528 P.2d 805, 806-07 (Utah 1974).

In accordance with these principles, the 1987 UGIA is entitled to a strong presumption of validity. This statute must be given effect until plaintiffs can prove beyond a reasonable doubt that the statute is unconstitutional.

Plaintiffs have not even begun to satisfy their burden of proof in this case. In the trial court defendant Sharp relied upon two different statutes in support of summary judgment. The first statute was the 1987 amendment that is at issue on this appeal. (See R. 542, 551). This statute constituted the primary argument advanced by Sharp in support of summary judgment and was also adopted by defendant Healy. In spite of this fact, plaintiffs' opposing memoranda completely failed to address the constitutionality of the 1987 amendment and instead addressed only the alternative argument being asserted by defendants. The only reference made to the 1987 amendment throughout plaintiffs' entire opposing memoranda is found in a single-sentence footnote that summarily concludes that the amendment is "invalid":

> The legislature's enactment of § 63-30-2(4) in 1987 purporting to define 'governmental function' as anything the government does or doesn't do regardless of whether the act is "core" or "unique" or "proprietary" is clearly invalid under the Supreme Court's standard.

Plaintiffs' Supplemental Memorandum, p. 46 n.4.

This single response is woefully inadequate to overcome the strong presumption of validity that attaches to legislative

enactments. Nonetheless, in spite of plaintiffs' complete failure to address the constitutionality of the 1987 amendment, the trial court somehow concluded that the 1987 amendment is unconstitutional "for the reasons specified in plaintiffs' memoranda." (R. 725). No other explanation was given.

Based upon this fact alone, the trial court clearly erred in denying defendants' motions for summary judgment. In order to avoid summary judgment, plaintiffs must prove that the 1987 amendment is unconstitutional. Plaintiffs have not met their burden of proof by any stretch of the imagination.

In any event, it is clear that plaintiffs could not satisfy their burden of proof even if they were to try. As demonstrated below, the liability limit contained in the 1987 UGIA is constitutional in every respect.

2. The 1987 UGIA Does Not Violate the "Open Courts" Clause of the Utah Constitution.

The "open courts" clause of the Utah Constitution found in Article I, Section 11 provides as follows:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay. . . .

Utah Const. art. I, § 11.

In order to prove that the 1987 UGIA is unconstitutional, plaintiffs must first prove that the statute conflicts with the "open courts" clause quoted above. This is true regardless of whether plaintiffs attack the statute under an equal protection

theory, a due process theory, or some other constitutional theory. Unless the statute violates the "open courts" clause, the statute will not be subjected to the heightened level of scrutiny necessary to overturn the statute under any constitutional theory. See Condemarin, 775 P.2d at 359 & 373.

Defendants' motions for summary judgment must be granted because plaintiffs cannot prove that the 1987 UGIA violates the "open courts" clause. This Court and the courts of virtually every other state have held that the "open courts" clause only applies to causes of action that existed when the state constitution was ratified. When the Utah Constitution was ratified, individuals had no remedy against state entities whatsoever because of the doctrine of sovereign immunity, as previously discussed. Thus, subsequent statutes codifying governmental immunity, such as the 1987 amendment, do not deprive plaintiffs of any remedy because, at common law, they had no remedy.

As pointed out by this Court in Madsen v. Borthick, 658 P.2d 627 (Utah 1983), Utah's "open courts" clause does not effect the state's immunity. In Madsen, the plaintiffs filed suit against the State of Utah and its commissioner of financial institutions. The trial court found that the action was barred by the 1978 UGIA and dismissed the case. On appeal, the plaintiffs claimed that statutory and common law sovereign immunity deprived them of a common law remedy in violation of the "open courts" clause. However, this Court disagreed and held that the "open courts"

clause has no effect on the state's immunity because, at common law, individuals had no remedy against the state:

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

Id. at 629 (citations omitted; emphasis added).

This principle was further illustrated in Brown v. Wightman, 47 Utah 31, 151 P. 366 (1915). The plaintiff in Brown was attempting to bring a wrongful death action. Because wrongful death actions did not exist at common law the case was dismissed. On appeal, the plaintiff argued that he was being denied a remedy in violation of the "open courts" clause of the Utah Constitution. This argument was rejected by this Court:

> [The "open courts" clause] is a general provision, which in the same or similar language will be found in the constitutions of at least 28 states in the union. . . . The courts have, however, always considered and treated those provisions, not as creating new rights, or as giving new remedies where none otherwise are given, but as placing a limitation upon the legislature to prevent that branch of the state government from closing the doors of the courts against any person who has a legal right which is enforceable in accordance with some known remedy. Where no right of action is given, however, or no remedy exists, under either the common law or some statute, those constitutional provisions create none. . . . The right and

> power, as well as the duty, of creating rights and to provide remedies, lies with the legislature, and not with the courts. Courts can only protect and enforce existing rights, and they may do that only in accordance with established and known remedies.

Id. at 366-67, 47 Utah at 34 (emphasis added).

Utah is by no means alone in holding that a state's immunity is not affected by an "open courts" clause. Indeed, the vast majority of states have similarly recognized that, because states were absolutely immune from suit at common law, statutes that extend immunity to state entities do not deprive individuals of a remedy in violation of an "open courts" clause. One of many examples is found in Brown v. Wichita State Univ., 547 P.2d 1015 (Kan. 1976). In Brown a statute reimposing governmental immunity was challenged under an "open courts" clause similar to Utah's:

> All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.

Id. at 1023 (quoting Section 18 of the Kansas Bill of Rights). The plaintiffs claimed that the state governmental immunity statute denied them a remedy against the government in violation of this constitutional provision. However, the Kansas Supreme Court upheld the validity of the governmental immunity statute:

> Section 18 [the "open courts" clause] does not create any new rights, but merely recognizes long established systems of law existing prior to the adoption of the constitution. Since the right to sue the state for torts was a right denied at common law, such right is not protected by Section 18. . . . It seems unlikely framers of our constitution intended

> Section 18 to abrogate governmental immunity. Were this true, our early court decisions would have reached that result. Instead, our prior decisions uphold governmental immunity.

Id. (emphasis added).

A similar challenge was made in Martinez v. Harris County, 808 S.W.2d 257 (Tex. App. 1991), under a constitutional provision stating that, "all courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." Id. at 261 (quoting Texas Const., art. I, § 13). As in Brown, the Martinez court upheld the constitutionality of the Governmental Immunity Act:

> In order for the open courts analysis to apply, there must be some abrogation of a litigant's right to bring a cause of action, either common law or statutory. . . .
>
> * * *
>
> [Plaintiff] did not have a common law cause of action for suit against Harris County; he only had a right to sue the county under the Texas Tort Claims Act. Under the common law doctrine of sovereign immunity the state and its political subdivisions . . . may not be held liable for torts absent a statutory provision creating such liability. The Texas Tort Claims Act provides the exception to the doctrine of sovereign immunity for counties. Thus, [plaintiff's] remedy is not rooted in the common law, but is statutorily created. Because he cannot establish he had a cognizable cause of action that was restricted by [the statute in question], he has failed to show a violation of the open courts provision of the constitution.

Id. (emphasis added)

Numerous other courts have similarly concluded that "open courts" provisions do not affect a state's immunity. See, e.g.,

Gasper v. Freidel, 450 N.W.2d 226 (S.D. 1990) (The "open courts" clause of the state constitution is not violated when no remedy existed at common law); Hale v. Port of Portland, 783 P.2d 506, 509-512 (Or. 1989) (sovereign immunity was firmly in place when the state constitution was ratified; thus a statutory liability cap is not unconstitutional under "open courts" clause); Morris v. Blake, 552 A.2d 844 (Del. Super. Ct. 1988) (No cause of action existed against the state at common law and thus the "open courts" clause of the state constitution does not affect the doctrine of sovereign immunity); Stout v. Grand Prairie Indep. School Dist., 733 S.W.2d 290 (Tex. App. 1987) (The common law doctrine of sovereign immunity preceded the "open courts" clause of the state constitution and thus the "open courts" clause does not affect the constitutionality of governmental immunity statutes); High-Grade Oil Co., Inc. v. Sommer, 295 N.W.2d 736 (S.D. 1980) (The doctrine of sovereign immunity predates the constitution and thus the "open courts" clause of the state constitution has no effect on state statutes imposing governmental immunity).

As demonstrated, in Utah and in virtually every other state an "open courts" clause does not effect statutes granting immunity to state entities because the statutes do not deprive individuals of a common law remedy. At common law individuals had no remedy against state entities whatsoever. It was not until the UGIA became effective in 1966 that individuals were granted a remedy against Utah and its agencies, but even then the remedy has always

been limited in amount. The only exception is this Court's decision in Condemarin, which granted an unlimited remedy because it was erroneously led to believe that the University Hospital's activities were "non-governmental functions" and thus subject to suit at common law. In all other cases, individuals have never had an unlimited remedy against the University Hospital since the time of statehood.

It is ironic that plaintiffs are attempting to have the UGIA declared unconstitutional. If they succeed, plaintiffs will have revoked the state's consent to be sued. The state's immunity would then be governed by the common law, under which the state would not be subject to any liability whatsoever. In such an event plaintiffs would have no recovery against the University Hospital, making their $250,000 settlement more than reasonable.

3. The 1987 UGIA Does Not Violate Equal Protection or Due Process.

In order to prove that the 1987 UGIA violates equal protection or due process, plaintiffs must first prove that the Act violates the "open courts" clause. Unless the "open courts" clause is violated, plaintiffs will not be able to obtain the heightened level of scrutiny needed to overturn the 1987 UGIA. Instead, the Court will apply a "rational basis test," under which "the statute will surely be found constitutional." Condemarin, 775 P.2d at 359 (See all comments in italics).

Because the 1987 UGIA does not violate the "open courts" clause, as demonstrated, the clause cannot be used indirectly to

obtain a heightened level of judicial scrutiny under an equal protection or due process analysis. This was illustrated in Estate of Cargill v. City of Rochester, 406 A.2d 704 (N.H. 1979).

In Cargill the plaintiffs sought several million dollars in damages from their local government for personal injuries. The government claimed that its liability was limited to $50,000 by statute. The plaintiffs then filed a declaratory action to determine the constitutionality of the liability cap.

The plaintiffs claimed that the liability cap violated the "open courts," equal protection, and due process clauses of the state constitution. However, the New Hampshire Supreme Court disagreed with the plaintiffs on all counts. The court first held that the statute did not violate the "open courts" clause. The court then had to decide how strictly it would scrutinize the statute under its equal protection and due process analysis. The plaintiffs argued that a heightened level of scrutiny should be applied because the statute conflicted with the "open courts" clause by inhibiting the right to recover for one's injuries. However, the court rejected this argument and said:

> Where . . . the statute under consideration does not directly violate part 1, article 14 of our constitution [the 'open courts' clause], we fail to see how it could violate the same constitutional provision indirectly under the guise of equal protection analysis.

Id. at 707.

Statutes that limit the liability of government entities are certainly constitutional, as evidenced by the vast majority of cases throughout the country. This is true regardless of the form of the attack. The cases have been so one-sided that an annotation has recently summarized the opinions as follows:

> Courts have almost uniformly recognized that legislative bodies have the power to prescribe [liability] limits, and that the limits prescribed are constitutionally valid. Though they may abridge the remedies of victims of government, as opposed to private torts, damage limitation statutes or ordinances are almost unanimously viewed as having a rational basis in the government's need to provide for effective risk management. . . . In addition to repelling equal protection attacks on damage limitation laws, the courts have also consistently rejected arguments that such enactments violate due process, or that they abridge state constitutional guarantees of access to courts for redress of grievances, or impair vested rights.

Annot., 43 A.L.R.4th 19, 25 (1986) (emphasis added).

Not surprisingly, nearly all cases involving State Hospitals and Medical Centers have similarly concluded that statutory liability limits are constitutional. A prime example is found in Sibley v. Board of Superiors, 462 So.2d 149 (La. 1985). The plaintiff in Sibley had been transferred from a private hospital to a University Medical Center. As a result of her treatment at the Medical Center the plaintiff suffered massive brain damage, leaving her with the functional IQ of a 10 year old child. The plaintiff had a normal life expectancy, but would be unable to take care of herself. Prior to trial the plaintiff's medical expenses exceeded

$423,000. It was expected that a much greater amount would be required to meet her future long-term needs.

At trial judgment was entered for the plaintiff but the state's liability was limited to $500,000 pursuant to statute. The plaintiff appealed, claiming that the liability limit was unconstitutional under the "open courts", equal protection, and due process clauses. In deciding the issue, the court first held that the statute did not violate the "open courts" clause. As a result, the court only scrutinized the statute under "the lesser standard of rational basis [scrutiny]." Id. at 157. The court then concluded that the rational basis test was satisfied and that the liability cap did not "unconstitutionally violate either the equal protection or due process clauses of the state or federal constitutions. . . ." Id. at 158.

Thus, Sibley upheld the statutory liability cap placed on the University Medical Center. Other cases involving government hospitals have produced the same results. See Tarrant County Hosp. Dist. v. Ray, 712 S.W.2d 271 (Tex. App. 1986) (statute limiting liability of county hospital to $100,000 does not violate equal protection); Neal v. Donahue, 611 P.2d 1125 (Okla. 1980) (statute extending immunity to state hospital does not violate "open courts," equal protection, or due process); Crowe v. Harton Memorial Hosp., 579 S.W.2d 888 (Tenn. App. 1979) (statute limiting the liability of a government hospital to $20,000 does not violate "open courts," equal protection, or due process); Fritz v. Regents

of Univ. of Colorado, 586 P.2d 23 (Colo. 1978) (statute limiting a person's ability to sue the University Hospital does not violate equal protection); Whitmire v. Jewell, 573 P.2d 573 (Kan. 1977) (statute extending immunity to University Medical Center does not violate constitution); Malone v. University of Kansas Medical Center, 552 P.2d 885 (Kan. 1976) (statute extending immunity to University Medical Center does not violate constitution).

As the preceding authorities overwhelmingly demonstrate, statutes that limit the liability of state hospitals are constitutional in every respect. Thus, the 1987 UGIA legally limited plaintiffs' recovery against the University Hospital to $250,000. The trial court erred in ruling otherwise.

C. THE CONTROL OF GOVERNMENTAL IMMUNITY IS GIVEN TO THE LEGISLATURE.

Virtually every court throughout the country agrees that the legislature, and not the courts, controls the area of governmental immunity. See, e.g., Bailey Serv. & Supply Corp. v. State, 533 P.2d 882, 883 (Utah 1975) ("Only the legislature can waive sovereign immunity. . . ."); Bingham v. Board of Educ., 118 Utah 582, 589, 223 P.2d 432, 436 (1950) ("If . . . [state agencies] are to be stripped of immunity, the stripping process should be by legislative enactment and not by court decree." Similarly, "Under our constitution the power to make departments of the state respond in damages for torts rests with the legislature, and without legislative enactment we are unable to impose any liability or obligation. . . . " Id. at 438); Merrill Lynch, Pierce, Fenner &

Smith, Inc., v. Jacks, 960 F.2d 911, 913 (10th Cir. 1992) ("Only congress, not the courts, can waive the sovereign immunity of the United States. Therefore, in the absence of clear congressional consent, then, there is no jurisdiction to entertain suits against the United States."); Alewine v. State, 803 P.2d 1372, 1375 (Wyo. 1991) ("The power to determine whether, and to what extent, the state is liable to suit is vested in the legislature."); State v. Peruskov, 800 P.2d 15, 18 (Ariz. App. 1990) ("The . . . legislature is the only state institution with the power to determine whether the state shall be subject to suit."); Morris v. Blake, 552 A.2d 844, 850 (Del. Super. Ct. 1988) ("Only an act of the general assembly may waive sovereign immunity."); Stout v. Grand Prairie Indep. Dist., 733 S.W.2d 290, 295 (Tex. App. 1987) ("[The] determination of the wisdom, justice, necessity or reasonableness of [governmental immunity] is the duty of the legislature, not the courts."); Tarrant County Hosp. Dist. v. Ray, 712 S.W.2d 271, 273 (Tex. App. 1986) ("If the doctrine of sovereign immunity ought to be re-examined and abolished, or further waived, then surely that would be the proper task of the legislature and not this intermediate court."); Rathbun v. Department of Highways, 496 P.2d 937, 938 (Idaho 1972) ("It is clear that . . . immunity [can] be waived only through express action of the legislature."); Taylor v. State, 311 P.2d 733, 734 (Nev. 1957) ("It is not within the power of the courts . . . to strip the sovereign of its armor. . . . It is the legislature alone which has the power to waive immunity or

to authorize such waiver.").

Because the control of governmental immunity is given solely to the legislature, this Court has recognized that a judicial waiver of the state's immunity violates the separation of powers clause contained in Utah Const., art. V § 1:

> To [waive the state's immunity] would do violence to our concept of separation of powers, we believe. We have left to the constitution and legislature the matter of waiver of immunity in such cases.
>
> * * *
>
> We must not judicially legislate, but must, in our tri-partite form of government, leave to the legislature whether there should be a waiver of immunity. . . .

Cobia v. Roy City, 12 Utah 2d 375, 377-78, 366 P.2d 986, 988 (1961). See also State v. Parker, 13 Utah 2d 65, 71, 368 P.2d 585, 589 (1962) ("any drainage of tax payers' funds by abolition of the doctrine [of sovereign immunity], is the subject of legislative attention in our tri-partite system of government, -- not the court's.") (J. Henroid, rebutting the dissenting opinion).

As evidenced above, the control of governmental immunity is unquestionably vested in the legislature. Only the legislature has the power to waive the state's immunity. The trial court encroached upon the legislature's power when it overturned the 1987 UGIA and completely waived the University Hospital's immunity. Thus, the trial court's ruling should be reversed and defendants' motion for summary judgment should be granted.

D. THE LEGISLATURE HAS POWER TO REIMPOSE GOVERNMENTAL IMMUNITY AFTER IT HAS BEEN ABROGATED BY THE COURTS.

Because governmental immunity is controlled by the legislature, courts uniformly agree that the legislature has the power to reimpose governmental immunity after it has been abrogated by the courts. One recent example is Randall v. Fairmount City Police Dep't., 412 S.E.2d 737 (W. Va. 1991).

In Randall the plaintiff filed suit against a government entity. The suit was dismissed under the governmental immunity act. On appeal, the plaintiff pointed out that prior judicial decisions had abolished the doctrine of governmental immunity. Although this immunity had been reinstated by the legislature, the plaintiff claimed that the statute reimposing immunity was unconstitutional because it deprived her of a remedy in violation of the "open courts" clause of the state constitution. The West Virginia Supreme Court rejected this argument and upheld the validity of the statute reimposing governmental immunity:

> Our holding is supported by almost all of the authorities elsewhere. Virtually every reported case involving a "certain remedy" challenge to the broad, legislative reinstatement of local governmental tort immunity, after judicial abrogation of such immunity originating at common law, has rejected that challenge. . . . Consistent with the great weight of authority, we hold that the . . . provisions . . . do not violate the certain remedy provision of . . . the constitution of West Virginia.

Id. at 744-45 (emphasis added) (citing Hardin v. City of Devalls Bluff, 508 S.W.2d 559 (Ark. 1974); Sadler v. New Castle County, 524 A.2d 18, 25 (Del. Super. Ct. 1987), aff'd, 565 A.2d 917, 923-24

(Del. 1989); Davis v. Chicago Hous. Auth., 555 N.E. 2d 343, 345-46 (Ill. 1990); Adams v. City of Peoria, 396 N.E.2d 572, 574-75 (Ill. App. 1979); Carroll v. County of York, 437 A.2d 394, 396 (Pa. 1981); Robson v. Penn Hills School Dist., 437 A.2d 1273, 1276-77 (Pa. Commw. Ct. 1981); Stout v. Grand Prairie Indep. School Dist., 733 S.W.2d 290, 293-95, 296-97 (Tex. App. 1987), writ of error ref'd (no reversible error) (Tex. Oct. 7, 1987), cert. denied., 485 U.S. 907 (1988); Brown v. Wichita State Univ., 547 P.2d 1015 (Kan. 1976); Bruce v. Wichita State Univ., 429 U.S. 806 (1976); Cords v. State, 214 N.W. 2d 405, 410 (Wis. 1974)).

Consistent with this majority rule, the courts have routinely held that legislatures can re-extend immunity to University Hospitals and Medical Centers after the courts have taken it away. In Fritz v. Regents of Univ. of Colorado, 586 P.2d 23 (Colo. 1978), the plaintiff sued the state for injuries she sustained as a patient in a state hospital. The defendants were granted summary judgment and the plaintiff appealed, claiming that a portion of the state's governmental immunity act was unconstitutional. However, the Colorado Supreme Court disagreed and upheld the statute. The court explained that the legislature had validly reinstated governmental immunity:

> The General Assembly restored governmental immunities in part by its enactment of the Governmental Immunity Act. . . . In doing so, it had full authority to specify what actions may be brought against the State and its subdivisions.

Id. at 25-26. See also Whitmire v. Jewell, 573 P.2d 573 (Kan.

1977) (statute re-extending immunity to University Medical Center is constitutional); Malone v. Univ. of Kansas Medical Center, 552 P.2d 885 (Kan. 1976) (statute reimposing immunity of University Medical Center does not violate constitution).

As demonstrated above, the Utah legislature clearly has the ability to reinstate the immunity of the University Hospital by including the hospital's activities within the definition of "governmental function." This power was already recognized by this Court in Frank v. State, 613 P.2d 517 (Utah 1980).

Prior to Frank, this Court had held that at least some government-owned hospitals were capable of performing "proprietary functions" within the meaning of the original UGIA. See Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975). As a result, the Utah Legislature amended the UGIA in 1978 to extend immunity to all government entities engaged in "the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility." Frank, 613 P.2d at 519 (quoting Utah Code Ann. § 63-3-3 (1978)).

After scrutinizing the 1978 amendment, this Court found that the amendment was intended to reinstate immunity to government-owned hospitals by including the hospitals within the definition of "governmental function." Significantly, this Court recognized the legislature's right to pass such an amendment and upheld the apparent reinstatement of immunity to the government hospitals:

> [W]e are disinclined, as a matter of judicial policy, to disregard the obvious manifestation

> of legislative intent reflected in the [1978] amendment. For this reason, we hold the operation of a governmentally-owned health care facility such as the University Medical Center to be a "governmental function" as contemplated by the statute. . . .

Id. at 519.

Frank thus illustrates a very important principle; namely, that this Court will characterize the activities of the University Hospital as "governmental functions" when it perceives that the legislature intended the activities to be so characterized. Although other court opinions have reinterpreted the 1978 amendment, this Court has recognized that Frank remains controlling for the principle cited herein. See Hansen v. Salt Lake County, 794 P.2d 838, 843 n.10 (Utah 1990).

The Condemarin opinion itself reflects this Court's deference to the legislature on governmental immunity issues. Indeed, the plurality's opinion was premised upon the perceived legislative intent of the 1978 amendment to extend immunity to the University Hospital as a "non-governmental function" rather than as a "governmental function." Condemarin, 775 P.2d at 351-52. Now, the recent 1987 amendment shows that the legislature's intent is exactly the opposite and that the activities of the University Hospital are intended to be "governmental functions." This Court should adhere to this more recent expression of intent and acknowledge that the activities of the University Hospital are in fact "governmental functions." This is the same situation that was previously presented to this Court in Frank, wherein this Court

abandoned prior precedent and allowed the legislature to include the activities of the University Hospital within the definition of "governmental function." Frank, standing alone, thus provides ample precedent for reversing the trial court.

CONCLUSION

In Condemarin, a plurality of this Court concluded that the 1978 UGIA was unconstitutional insofar as it limited the liability of the University Hospital. This decision was based on an erroneous assumption that, at common law, state hospitals were capable of performing "proprietary functions" and were subject to suit. This erroneous assumption led the plurality to construe the 1978 amendment as extending immunity to the University Hospital's activities as "non-governmental functions" in violation of the "open courts" clause of the Utah Constitution. Because of its erroneous underpinnings, Condemarin should be overturned and defendants' motions for summary judgment should be granted.

Even if Condemarin is upheld, defendants are still entitled to summary judgment. Since the cause of action in Condemarin arose the Utah Legislature has amended the UGIA to include the activities of the University Hospital within the definition of "governmental function." This amendment alleviates the concerns raised in Condemarin and once again limits the liability of the University Hospital to $250,000. Plaintiffs received $250,000 under the terms of their settlement agreement, thus obtaining the maximum recovery from the University Hospital allowed by law.

To avoid summary judgment plaintiffs must prove beyond a reasonable doubt that the 1987 UGIA is unconstitutional. In order to prove the Act unconstitutional, plaintiffs must first prove that the Act deprives them of a common law remedy in violation of the "open courts" clause. Plaintiffs cannot meet this burden of proof because no common law remedy existed against the state. The Utah Governmental Immunity Act thus remains applicable, limiting plaintiffs' claim against the University Medical Center to $250,000. Plaintiffs received this full amount, rendering their settlement reasonable as a matter of law.

In light of these facts, defendant Roger Sharp respectfully requests this Court to reverse the trial court's denial of his summary judgment motion and to order the trial court to enter summary judgment in his favor.

DATED this 25 day of Sept., 1992.

STRONG & HANNI

By _____
Glenn C. Hanni

By _____
David R. Nielson
Attorneys for Defendant
Roger T. Sharp

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ADDENDUM

CONSTITUTION OF UTAH

ARTICLE I

DECLARATION OF RIGHTS

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Sec. 11. [Courts open — Redress of injuries.]

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

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

ARTICLE V

DISTRIBUTION OF POWERS

Section 1. [Three departments of government.]

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

UTAH CODE
ANNOTATED

CHAPTER 30
GOVERNMENTAL IMMUNITY ACT

63-30-2. Definitions.

As used in this chapter:

(1) "Claim" means any claim or cause of action for money or damages against a governmental entity or against an employee.

(2) (a) "Employee" includes a governmental entity's officers, employees, servants, trustees, commissioners, members of a governing body, members of a board, members of a commission, or members of an advisory body, student teachers certificated in accordance with Section 53A-6-101, educational aides, students engaged in providing services to members of the public in the course of an approved medical, nursing, or other professional health care clinical training program, volunteers, and tutors, but does not include an independent contractor.

(b) "Employee" includes all of the positions identified in Subsection (2)(a), whether or not the individual holding that position receives compensation.

(3) "Governmental entity" means the state and its political subdivisions as defined in this chapter.

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

(b) A "governmental function" may be performed by any department, agency, employee, agent, or officer of a governmental entity.

(5) "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, or estate, that would be actionable if inflicted by a private person or his agent.

(6) "Personal injury" means an injury of any kind other than property damage.

(7) "Political subdivision" means any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or other governmental subdivision or public corporation.

(8) "Property damage" means injury to, or loss of, any right, title, estate, or interest in real or personal property.

(9) "State" means the state of Utah, and includes any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality of the state.

History: L. 1965, ch. 139, § 2; 1973, ch. 103, § 2; 1978, ch. 27, § 1; 1981, ch. 116, § 1; 1983, ch. 129, § 2; 1987, ch. 75, § 2; 1987 (1st S.S.), ch. 4, § 1; 1988, ch. 2, § 338.

Amendment Notes. — The 1987 amendment alphabetized the definitions of this section and renumbered the subsections accordingly, added present Subsection (4), and made minor changes in phraseology and punctuation.

63-30-3. Immunity of governmental entities from suit.—Except as may be otherwise provided in this act, all governmental entities shall be immune from suit for any injury which may result from the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function.

History: L. 1965, ch. 139, § 3.

(Original -- 1965)

63-30-3. Immunity of governmental entities from suit.

Except as may be otherwise provided in this act, all governmental entities [~~shall be~~] are immune form suit for any injury which [~~may result form the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function~~] results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility.

(1978 amendment)

63-30-3. Immunity of governmental entities from suit.

Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

History: L. 1965, ch. 139, § 3; 1978, ch. 27, § 2; 1981, ch. 116, § 2; 1984, ch. 33, § 1; 1985, ch. 93, § 1.

Amendment Notes. — The 1985 amendment inserted "and other natural disasters" in the second paragraph.

(Controlling statute)

63-30-34. Limit of judgment against governmental entity or employee.

(1) Except as provided in Subsection (3), if a judgment for damages for personal injury against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, exceeds $250,000 for one person in any one occurrence, or $500,000 for two or more persons in any one occurrence, the court shall reduce the judgment to that amount, regardless of whether or not the function giving rise to the injury is characterized as governmental.

(2) Except as provided in Subsection (3), if a judgment for property damage against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, exceeds $100,000 in any one occurrence, the court shall reduce the judgment to that amount, regardless of whether or not the function giving rise to the damage is characterized as governmental.

(3) The damage limits established in this section do not apply to damages awarded as compensation when a governmental entity has taken or damaged private property without just compensation.

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

	:	MINUTE ENTRY
HIPWELL, SHELLY	:	
PLAINTIFF	:	CASE NUMBER 910905017 CV
	:	DATE 03/30/92
VS	:	HONORABLE J. DENNIS FREDERICK
	:	COURT REPORTER
SHARP, ROGER T	:	COURT CLERK CLB
HEALY, TIM W DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY.
D. ATTY.

AFTER REVIEW OF THE PLEADINGS AND AFTER HAVING HEARD ORAL ARGUMENT ON DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT, THE COURT HAVING TAKEN ITS DECISION UNDER ADVISEMENT, RULES AS FOLLOWS:

1. DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT ARE DENIED, FOR THE REASONS SPECIFIED IN PLAINTIFFS' MEMORANDA IN OPPOSITION THERETO.

2. COUNSEL FOR PLAINTIFFS TO PREPARE THE ORDER.

3. THE ISSUE IN DISPUTE IS PIVOTAL AND DISPOSITIVE. THIS COURT WOULD URGE DEFENDANTS TO PURSUE AN INTERLOCUTORY APPEAL OF THE DENIAL OF THEIR MOTIONS.

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

SHELLY HIPWELL, an individual by and through her guardians, SHERRY JENSEN and SHAYNE HIPWELL, Plaintiff, -vs- ROGER SHARP, TIM W. HEALY, and DOES I through X, Defendants.	ORDER Civil No. 910905017 CV Judge J. Dennis Frederick

The Motions for Summary Judgment of Defendants Roger T. Sharp and Tim W. Healy came on regularly for hearing before the above-entitled court on March 30, 1992 at the hour of 10:30 a.m. Defendant Sharp appeared by and through his counsel of record, Glenn C. Hanni and Strong & Hanni and Defendant Healy appeared by and through his counsel of record, Thomas L. Kay of Snell & Wilmer. Plaintiff appeared by and through her counsel of

record, Richard D. Burbidge of Burbidge & Mitchell and Simon Forgette.

The court, having reviewed the respective motions, supporting and opposing memoranda, having heard oral argument, and being fully apprised in this matter,

HEREBY ORDERS that the Motions for Summary Judgment are hereby denied.

DATED this 14th day of ~~March~~ April, 1992.

BY THE COURT:

HONORABLE J. DENNIS FREDERICK
THIRD DISTRICT COURT JUDGE

Approved as to form:

STRONG & HANNI

Glenn C. Hanni
Attorneys for Defendant Sharp

SNELL & WILMER

Thomas L. Kay
Attorneys for Defendant Healy

js hipwell\order.3

IN THE SUPREME COURT OF THE STATE OF UTAH

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Regular May Term, 1992 June 23, 1992

Shelly Hipwell, an individual
by and through her guardians,
Sherrie Jensen and Shayne
Hipwell,
Plaintiffs and Appellees,
v. No. 920218
Roger Sharp, Tim W. Healy, 910905017CV
and Does I through X,
Defendants and Appellants.

Appellant's Petition for Interlocutory Appeal having been considered, and the Court being sufficiently advised in the premises, it is ordered that an Interlocutory Appeal be, and the same is, granted as prayed.

Senate Debate on the Utah Governmental Immunity Act

January 18, 1965

Senator Welch (introducing the bill):

Now, I'd like to, I'd like to very briefly, uh, explain to you the experience that has occurred in our neighboring states. And this is one of the reasons why, in my opinion, it is very important that we act upon this bill.

About a year, about two years ago now, the Supreme Court of the State of California, by a court order in response to a, a case, a specific case brought before that court, just by a court rule and court order abolished -- completely abolished -- governmental immunity in that state. Within overnight practically, that state was besieged with millions of dollars worth of suits and claims against the State of California and its entities. This matter was of such great importance to the people of the State of California that a, that a special session of the legislature of the State of California was called. And that special session passed a moratorium on suits against the government of the State of California or its entities. And this moratorium was for a year's time, until such time as they could make a study and come back with recommendations to the legislature.

They did come back and they did make recommendations and they did pass a bill. They passed a series of bills, a very complex series of bills. We have, we have had the benefit of those bills. We have studied them. That those bills in that state, uh, that

legislature, set out immunity by statute in the State of California and as we go along you'll find out that's exactly what we've done. They set up immunity by statute and then out of the immunity the State of California, through its legislative process, carved out certain areas in which an action might be brought by the citizens of that state against the government of the State of California or its entities or subdivisions. This is a matter of controlling, to a certain extent, rather than leaving the thing wide open.

I would like to also emphasize that about a year ago in the State of Arizona the Supreme Court did exactly the same thing. And I could read you that decision if you like, I have it here, but I'm not going to bore you with it. But the supreme court in essence said this: The rule of governmental immunity is a rule that has been set up and adopted by the courts. It is not a statutory creature and therefore it can be abolished by the courts and we therefore abolish statutory or I mean governmental immunity from suit in our state.

I was on a panel with the assistant director of uh, the legislative council of the State of Arizona. This was about two months ago over in the State of Wyoming at the Western Conference of the Council of State Governments. I was uh, chairman of the panel in connection with governmental immunity and I have there, on the panel with me, this man from Arizona. We also had a professor from the State of California whose is largely responsible for the, for the research and work that went into the California act. This

man from Arizona said immediately upon the, upon the, uh, abolition or striking out and, uh, overruling of governmental immunity in their state by this court order, that they were beset by Six Million Dollars worth of suits. And they are very anxiously working and planning to solve the problem such as the way California did. And I have provided them with materials which we have, which we have uh, been able to develop in this state.

Now, this isn't all. About six months ago the court of the State of Nevada did exactly the same thing. Now I want to merely point out to you, what I'm trying to point out to you and trying to get over to you is the fact that a court order or a court decision which completely waives and does away with the doctrine of governmental immunity then throws the doors wide open to all and every kind of suit that might be brought. And I'd like to, to state that, that our approach to this matter has been to take a middle of the road course. To open the door for those people where there's obvious uh, serious handicap to the individual who has been injured, but not to leave it open, that door wide open so that it will be detrimental to the interest of the state and its subdivisions.

Tape No. 2, Lines 8.3 to 14.5.

* * *

Now I'd like to, after going through that general, general discussion, I'd like to just, just briefly run through some of the provisions of this bill and I'll appreciate it if you'll turn to

the bill. It's Senate Bill 4, Senate Bill 4 in your file there. Now if you'll note the first part of this bill just has to do with definitions and I don't think we'll need to spend any time on that. Section 2, if you'll read it, reaffirms for this state the doctrine of governmental immunity. It does it by statute. We do not have governmental immunity by statute in the State of Utah. We have governmental immunity only by reason of having the court having said so. And therefore the court could waive it if it wanted to. So we reaffirm in this statute, in this bill, the doctrine of governmental immunity, Section 2. I'm, I'm uh, I think I'm wrong. Section 3. Section 3. It says "Except as may be otherwise provided in this act, all governmental entities shall be immune from suit for any injury which may result from the activity of said entity wherein said entity is engaged in the exercise and discharge of a governmental function." Now, we reaffirm that and then later on we carve out of that immunity various areas.

Tape 2, Line 24 to 26.

* * *

I have uh, uh, about gone through this bill uh, gentlemen. I want to assure you that, that in my opinion this is a necessary bill. I think that it will not hurt the State of Utah or its subdivisions. I think that it will be helpful because I think that uh, we have just as much a possibility of the court, the courts taking this matter into their hands and determining that there is, that there should be a doing away with this doctrine. I'm not

going to foretell when and how, but it has happened in the surrounding states and I think that this, this approach that we have seen is the reasonable approach. It is not, it is not opening the door all the way, and I've said this about three times and I want to emphasize it, it is not opening the door all the way to allowing suits of every kind against the state and its entities. It opens it part-way. But this part-way opening does protect the citizens of our state.

Tape 3, Line 20 to 22.

SENATE CHAMBER
STATE OF UTAH
SALT LAKE CITY

CERTIFICATION OF LEGISLATIVE TRANSCRIPT

I hereby certify that the attached document consisting of 5 **signed pages is a true and authentic verbatim record of the discussion of Senate Bill/House Bill No.** S.B. 4 **which occurred in the Senate Chamber during the** General **Legislative Session on** 1/18/65 **and is recorded on Disk/Tape No.** 2&3 **in the Senate Office.**

Annette B. Moore
Name

Leadership Secretary
Title

9/23/92
Date Certified

of $100,000 placed upon him while a person who is injured by a similar governmental employee also performing a "non-essential" function has no limit. (Appellants' Brief, pp. 31-32). Respondents would dispute that the University of Utah Medical Center is a "non-essential" function of government especially to these persons like Mrs. Condemarin whose very life may depend on it. In any event, this argument must fail for two reasons. First, under common law there was always discrimination between a person injured by a state employee functioning in a government capacity and one injured by a state employee functioning in a proprietary capacity. Under soverign immunity the person injured in the governmental function was absolutely barred from any recovery whereas a complete recovery was possible as to the proprietary function. Again, however, this inequality does not give rise to a constitutional claim since its roots were developed long before any constitutions were written.

Second, while this section is inapplicable to this case, the new revised code Section 63-30-35 places a financial limit of $250,000 recovery for one person or $500,000 for two or more persons regardless of whether the tort feasor was acting in a governmental or non-governmental capacity. Under this new statute Appellants' assumption that an unlimited recovery can be obtained for a person injured in a non-governmental function is simply incorrect. The distinction between governmental and proprietary functions has totally been abandoned in the new Governmental Immunity Act "to escape the inevitable

> The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matters the rules of equity shall prevail.

As noted by one Pennsylvania court:

> [A] person has no property, no vested right, in any rule of common law. . . . [T]he law itself, as a rule of conduct, may be changed at the will, or even the whim, of the Legislature, unless prevented by constitutional limitations. The great office of statutes is to remedy defects in the common law as they are developed and to adapt it to changes of time and circumstances. See Munn v. Illinois, 94 U.S. 113 (1877). Robson v. Penn Hills School District, 437 A.2d 1273, 1277 (Pa. Commw. Ct. 1981).

The original scheme of liability for government entities and employees evolved on a case by case basis. Since government entities were immune from suit for government activities the important distinction as to the liability of the entity itself was whether the function was proprietary or governmental. Standiford v. Salt Lake City Corp., 605 P.2d 1230 (Utah 1980). On the other hand, as to a governmental employee the question was whether that employee was acting in a discretionary or ministerial capacity. As noted by this Court:

> A governmental agent performing a discretionary function is immune from suit for injury arising therefrom, whereas an employee acting in a ministerial capacity, even though his acts may involve some decision making, is not so protected. Frank v. State, 613 P.2d 517, 520 (Utah 1980).

It would serve no useful purpose to list the numerous cases decided by this Court involving government employees.

CERTIFICATE OF HAND DELIVERY

I hereby certify that on this 25th day of September, 1992, I caused to be hand delivered four true and correct copies of the foregoing to:

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