Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1983

# Marjorie J. Durand v. Cedar City Corporation, H. L. Bradley, Arthur O. Stewart And Grant Hinchcliff : Respondent's Brief

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Allan L. Larson and Floyd W. Holm; Attorneys for Respondents

Recommended Citation
Brief of Respondent, *Durand v. Cedar City Corp.*, No. 19033 (1983).
https://digitalcommons.law.byu.edu/uofu_sc2/4578

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT

OF THE STATE OF UTAH

---

MARJORIE J. DURAND,

Plaintiff-Appellant,

vs. Case No. 19033

CEDAR CITY CORPORATION,
H. L. BRADLEY, ARTHUR O.
STEWART and GRANT HINCHCLIFF,

Defendants-Respondents.

---

# RESPONDENTS' BRIEF

---

Appeal from the Summary Judgment
of the Fifth Judicial District Court of Iron County,
the Honorable J. Harlan Burns, Judge

---


ALLAN L. LARSON
FLOYD W HOLM
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 3000
Salt Lake City, Utah 84110
Telephone: 521-9000
Attorneys for Respondents

PATRICK H. FENTON
154 North Main Street
Cedar City, Utah 84720
Telephone: 586-4351
Attorney for Appellant



FILED

NOV [illegible]

Clerk, Supreme Court, Utah

IN THE SUPREME COURT

OF THE STATE OF UTAH

---

MARJORIE J. DURAND,

Plaintiff-Appellant,

vs. Case No. 19033

CEDAR CITY CORPORATION,
H. L. BRADLEY, ARTHUR O.
STEWART and GRANT HINCHCLIFF,

Defendants-Respondents.

---

# RESPONDENTS' BRIEF

---

Appeal from the Summary Judgment
of the Fifth Judicial District Court of Iron County,
the Honorable J. Harlan Burns, Judge

---

ALLAN L. LARSON
FLOYD W HOLM
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 3000
Salt Lake City, Utah 84110
Telephone: 521-9000
Attorneys for Respondents

PATRICK H. FENTON
154 North Main Street
Cedar City, Utah 84720
Telephone: 586-4351
Attorney for Appellant

TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES . . . . . . . . . . . . . . . . . . . . | iii |
| STATEMENT OF THE NATURE OF THE CASE . . . . . . . . . . | 1 |
| DISPOSITION IN LOWER COURT . . . . . . . . . . . . . . . . | 1 |
| RELIEF SOUGHT ON APPEAL . . . . . . . . . . . . . . . . . | 1 |
| STATEMENT OF FACTS . . . . . . . . . . . . . . . . . . . . | 2 |
| ARGUMENT . . . . . . . . . . . . . . . . . . . . . . . . . | 5 |
| POINT I DEFENDANTS WERE NOT NEGLIGENT, AS A MATTER OF LAW . . . . . . . . . . . . . | 7 |
| POINT II DEFENDANTS OWED PLAINTIFF NO INDIVIDUAL DUTY TO PROTECT HER FROM HARM . . . . . . . . . . . . . . . . | 9 |
| POINT III PLAINTIFF'S CLAIMS ARE BARRED BY PROVISIONS OF THE UTAH GOVERNMENTAL IMMUNITY ACT . . . . . . . . . . . . . . . | 14 |
| A. Plaintiff's Claims are Barred by Governmental Immunity . . . . . . . | 14 |
| B. Plaintiff's Claims are Barred by Virtue of Her Failing to Comply with Sections 63-30-11 and 63-30-19 of the Governmental Immunity Act . . . . . . . . . . . . | 18 |
| CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . | 21 |

## TABLE OF AUTHORITIES

Page

### Cases Cited


Amato v. United States, 549 F. Supp. 863 (D.N.J. 1982) . . . . . . . . . . . . . . . . . . . . . . 16

Epting v. State, 546 P.2d 242 (Utah 1976) . . . . . . . . 15, 16

Evans v. Stuart, 17 Utah 2d 308, 410 P.2d 999 (1966) . 7

Evers v. Westerberg, 38 A.D.2d 751, 329 N.Y.S.2d 615 (1972) . . . . . . . . . . . . . . . . . . . . . . . . . 11, 12

Evett v. City of Inverness, 224 So. 2d 365 (Fla. App. 1969) . . . . . . . . . . . . . . . . . . . . . . 12

Go Real Estate Co. v. Smyth, No. 19057 (Utah November 4, 1983) . . . . . . . . . . . . . . . . . . . . 6 n.2

Keane v. City of Chicago, 98 Ill. App. 2d 460, 240 N.E.2d 321 (1968) . . . . . . . . . . . . . . . . . . . . 11

Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 376 (1969) . . . . . . . . . . . . . . . . . . . . . . . . . 10

Meese v. Brigham Young University, 639 P.2d 720 (Utah 1981) . . . . . . . . . . . . . . . . . . . . . . 7

Obray v. Malmberg, 26 Utah 2d 17, 484 P.2d 160 (1971) 9, 10

Roll v. Timberman, 94 N.J. Super. 530, 229 A.2d 281 (1967) . . . . . . . . . . . . . . . . . . . . . . . . . . 13

Scarborough v. Granite School District, 531 P.2d 480 (Utah 1975) . . . . . . . . . . . . . . . . . . . . . 19

Scott v. City of New York, 2 A.D.2d 854, 155 N.Y.S.2d 787 (1956), _aff'd_, 9 N.Y.2d 764, 215 N.Y.S.2d 72 (1961) . . . . . . . . . . . . . . . . . . . . . . . . . . 13

Simpson Food Fair, Inc. v. City of Evansville, 149 Ind. App. 387, 272 N.E.2d 871 (1971) . . . . . . . . . 11

Standiford v. Salt Lake City Corp., 605 P.2d 1230 (Utah 1980) . . . . . . . . . . . . . . . . . . . . . . 14, 15

Pa

Walker v. Rocky Mountain Recreation Corp., 29 Utah 2d 274, 508 P.2d 539 (1973) . . . . . . . . . . . . . .

Wong v. City of Miami, 237 So. 2d 132 (Fla. 1970) . . 17

Yates v. Vernal Family Health Center, 617 P.2d 352 (Utah 1980) . . . . . . . . . . . . . . . . . . . . 19

## Statutes Cited

Utah Code Ann. § 63-30-3 (Supp. 1983) . . . . . . . . . 14

Utah Code Ann. § 63-30-10(1)(a) (Supp. 1983) . . . . . . 15

Utah Code Ann. § 63-30-11 (Supp. 1983) . . . . . . . . 19

Utah Code Ann. § 63-30-13 (Supp. 1983) . . . . . . . . 20

Utah Code Ann. § 63-30-19 (Supp. 1983) . . . . . . . . 21

Utah Code Ann. § 76-9-701 (Supp. 1983) . . . . . . . . . 16, 1

## Rules Cited

Utah R. Civ. P. 56(e) . . . . . . . . . . . . . . . . 6

Utah R. Civ. P. 75(p) . . . . . . . . . . . . . . . . 2

## Secondary Authorities Cited

F. Pollock, Law of Torts (13th ed. 1929) . . . . . . . . 9

IN THE SUPREME COURT

OF THE STATE OF UTAH

---

MARJORIE J. DURAND,

Plaintiff-Appellant,,

vs. Case No. 19033

CEDAR CITY CORPORATION,
H. L. BRADLEY, ARTHUR O.
STEWART and GRANT HINCHCLIFF,

Defendants-Respondents.

---

RESPONDENTS' BRIEF

---

## STATEMENT OF THE NATURE OF THE CASE

This is an action to recover damages for plaintiff's personal injuries occurring when a subject of an arrest fired a rifle at the defendant police officers and a bullet entered the plaintiff's nearby trailer home.

## DISPOSITION IN LOWER COURT

The lower court granted defendants' Motion for Summary Judgment and entered summary judgment in favor of defendants.

## RELIEF SOUGHT ON APPEAL

Defendants seek affirmance of the summary judgment of the lower court.

## STATEMENT OF FACTS

Plaintiff has failed to comply with this court's Or[illegible] October 3, 1983 in that her Statement of Facts contains [illegible] citations to the record on appeal and thereby fails to con- form with Rule 75(p), Utah Rules of Civil Procedure. Rather than controverting each of the numerous facts alleged in plaintiff's Statement of Facts that are totally unsupported by the record, defendants submit the following Statement of Facts, which is fully supported by the record.

On February 21, 1979, shortly after midnight, defendants H. L. Bradley (hereinafter "Bradley"), Arthur O. Stewart (hereinafter "Stewart") and Grant Hinchcliff (hereinafter "Hinchcliff"), three officers of the Police Department of defendant Cedar City Corporation, were involved in a gunfight with Mr. Neil Anderson (hereinafter "Neil") at Kelly's Trailer Park in Cedar City, Utah. The gunfight resulted in the death of Neil. Plaintiff, another resident of Kelly's Trailer Park, received a gunshot wound in her right foot, resulting in the injuries of which she complains. (R. 54, Deposition of Marjorie Jane Durand at 35-37).

Earlier, on the evening of February 20, 1979, Neil was a passenger in a vehicle being driven by Eugene Anderson (here- inafter "Eugene"), his brother. At approximately 11:20 that evening, Hinchcliff and officer Bruce Marshall, also of the

Cedar City Police Department, stopped the vehicle Eugene was driving because they suspected that he was operating the vehicle under the influence of alcohol. Upon approaching the Anderson vehicle, it was apparent to the officers that both were intoxicated. Eugene was arrested for driving under the influence of alcohol and both Andersons were taken to the Iron County jail. (R. 21, ¶¶ 2-3). After breathalyzer tests were performed at the jail, Hinchcliff contacted Neil's wife, Sharlene Anderson (hereinafter "Sharlene"), and requested that she come to the jail and transport Neil to the Anderson home (the car was impounded as neither Eugene nor Neil were fit to drive). When Sharlene arrived, she protested taking her husband home because in her opinion he could be argumentative and make trouble when intoxicated. Nevertheless, because Neil was controllable and cooperative, he was released to his wife's custody and was taken home. (R. 21, ¶¶ 4-5; R. 29, ¶¶ 2-4).

When Neil arrived at home, he began making threats about getting his gun and returning to the jail to obtain his brother's release by force. Sharlene, alarmed by her husband's conduct, telephoned the Cedar City Police Department offices and notified the person answering that her husband was being very abusive and threatening force with his gun. (R. 21, ¶ 6; R. 22, ¶ 2; R. 23, ¶ 2; R. 29, ¶ 4).

Bradley, Stewart and Hinchcliff responded to Sharlene's call and traveled to the trailer park in two separate police cars. When they arrived at the Anderson trailer, Bradley observed Neil inside with a rifle in his hand. Sharlene believes that Bradley could have disarmed Neil in the trailer. (R. 29, ¶ 4). However, Bradley states that when he approached the trailer, Neil had the rifle in his hands and there was no opportunity to disarm him. (R. 22, ¶¶ 5-6). It is undisputed that at some time all the officers retreated and Neil stepped onto the porch with the rifle. Despite the efforts of the three officers, and Sharlene, to assure Neil that Eugene was being released from jail, Neil would not put the gun down. (R. 21, ¶¶ 7, 9-11; R. 22, ¶¶ 3-5, 7-8; R. 23, ¶¶ 3-5, 7-8; R. 29, ¶ 4).

Plaintiff's trailer was located across the street west of the Anderson trailer and was situated such that the south half of it was in a direct line with the porch where Neil was standing. Stewart took a position in a small grassy area slightly northwest of the porch where Neil was standing and due east of plaintiff's trailer. Hinchcliff took cover in the street behind a pickup truck northwest of the Anderson trailer and Bradley took cover behind the northwest corner of the Anderson trailer. (R. 21, ¶¶ 8-10, 12 & attached diagram; R. 22, ¶¶ 3, 5, 7; R. 23, ¶¶ 3-5, 1, 10).

While pointing the rifle in Stewart's direction, Neil fired the rifle and Stewart heard the bullet pass him to the right, heading directly toward plaintiff's trailer. All three officers returned fire, striking Neil, who collapsed, firing one more round that struck a Chevrolet parked in the Anderson driveway. Stewart and the other officers were at all times standing with their backs to plaintiff's trailer during the exchange of gunfire. (R. 21, ¶¶ 12-15, 17; R. 22, ¶¶ 10-12, 14; R. 23, ¶¶ 10-12, 15). Indeed, plaintiff admits in her deposition that the bullet that entered her trailer and hit her came from the direction of the Anderson trailer. (R. 54, Deposition of Marjorie Jane Durand at 41-44 & Exhibit 1). There is no evidence that the bullet that injured plaintiff was fired by anyone other than Neil.

## ARGUMENT

Although it is unclear from a reading of plaintiff's brief, she apparently maintains that there are three genuine issues of material fact:

1. Whether defendants were negligent in allowing Neil to leave the jail in a drunken condition with full knowledge of his dangerous nature and propensity for violence;

2. Whether defendants were negligent in failing to respond to Sharlene's call in a professional manner by f[illegible] ing to disarm Neil and confronting him, resulting in the exchange of gunfire; and

3. Whether defendants' acts should be legally protected.[1]

The third issue is clearly a question of law answered in the affirmative by the lower court. It is, of course, one of the ultimate legal issues to be decided by this court.

Neither the affidavit of Sharlene Rowley nor the deposition of plaintiff, the only evidence presented to counter defendants' affidavits,[2] raise any genuine issue as to whether defendants were negligent. Indeed, even when the

---

1 Plaintiff has apparently abandoned her previous claim that defendants were negligent in scattering gunfire in the trailer park.

2 Plaintiff submitted the affidavits of Patrick H. Fenton and Jay Jenson at the time of the original hearing on the Motion for Summary Judgment (R. 28, 30). The affidavit of Patrick H. Fenton merely contained the opinions, interpretations and conclusions of counsel regarding the affidavits of Hinchcliff, Bradley and Stewart, a function that is the province of the court. The affidavit of Jay Jenson expresses an opinion concerning the bullet that entered plaintiff's trailer, which opinion was wholly without foundation. Both affidavits would be inadmissible as evidence. Therefore, both affidavits were properly stricken by the lower court pursuant to Rule 56(e), Utah Rules of Civil Procedure. Walker v. Rocky Mountain Recreation Corp., 29 Utah 2d 274, 508 P.2d 538, 542 (1973). See also Go Real Estate Co. v. Smyth, No. 19057 (Utah November 4, 1983).

are viewed entirely in plaintiff's favor and even if defendants were shown to be negligent in some respect, such facts are immaterial because defendants had no special duty to protect plaintiff and her claims are barred by the provisions of the Utah Governmental Immunity Act.

## POINT I

### DEFENDANTS WERE NOT NEGLIGENT, AS A MATTER OF LAW

The affidavits submitted by both parties, and any other facts presently in the record, establish that there is no genuine issue of material fact regarding whether defendants were negligent.

In general, this court has defined negligence as "the failure to do what a reasonable and prudent person would have done under the circumstances, or doing what such person under such circumstances would not have done." Meese v. Brigham Young University, 639 P.2d 720, 723 (Utah 1981). Accord, Evans v. Stuart, 17 Utah 2d 308, 410 P.2d 999, 1001 (1966).

An application of the definition of negligence to the circumstances indicates that there is no issue as to whether defendants were negligent; they clearly were not. While plaintiff claims that defendants negligently released Neil, it is clear they had no legal basis to hold him. Neil could not be held for drunken driving since he was not driving, nor could defendants legally have held Neil simply because

Sharlene was concerned about what he <u>might</u> do, especially since Neil was cooperative and rational when leaving the jail. Having no realistic basis to detain Neil, defendants had no choice but to release him. Thus, under the circumstances of the situation, defendants could not be negligent for releasing Anderson.

Plaintiff then claims that defendants were negligent in failing to disarm Neil and choosing instead to confront him in the gunfight. Assuming that Bradley or any of the other defendants had an opportunity to disarm Neil in the trailer, as suggested by the affidavit of Sharlene Rowley, there is no evidence that their failure to do so constituted negligence. Sharlene offers the unsupported opinion that Bradley could have disarmed Neil, yet offers no explanation as to how it could have been accomplished. It is clear that she is attempting to second-guess Bradley's decision. Bradley had no knowledge of the conditions in the trailer. Under the circumstances, it would have been unreasonable for Bradley or the other defendants to risk their lives and the lives of others, perhaps children, to attempt to disarm Neil and confront him in the confined trailer. Surely, defendants cannot be negligent in failing, by some undisclosed method, to disarm Anderson under the circumstances at the time.

Furthermore, what choice did defendants have once Neil came onto the porch with a rifle pointed at them? No reasonable person would expect them to request Neil to go to a secluded field to wield his gun and shoot at defendants. Under the circumstances, defendants had no choice but to confront Anderson in the trailer park.

## POINT II

### DEFENDANTS OWED PLAINTIFF NO INDIVIDUAL DUTY TO PROTECT HER FROM HARM

Even assuming that defendants were negligent in some respect, such negligence is not material because without the breach of legally recognized duty, there can be no recovery. "Negligence in the air, so to speak, will not do." F. Pollock, Law of Torts 468 (13th ed. 1929).

Defendants do not deny that the police have a general duty to protect the health, lives and morals of the public. However, a city or its police have no duty to an individual for injuries directly resulting from the criminal acts of a third person, even if the city or its police somehow breached the general duty to protect the safety of the public. In Obray v. Malmberg, 26 Utah 2d 17, 484 P.2d 160 (1971), plaintiff filed suit against the Cache County Sheriff and his deputy seeking damages and the officers' removal from office for their alleged willful and wanton failure to investigate a burglary of the plaintiff's store. Upon defendants' motion,

the lower court dismissed the complaint. On appeal, this court affirmed the dismissal. Citing Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 376 (1969), this court wrote:

> [W]e believe that defendants' contention that failure by a public sheriff to investigate a crime claimed by an individual to have been committed, ordinarily is a matter of judgment and discretion, not actionable or compensable, and not pursuable by an individual since the public official's duty is to the public, - he being accountable to and removable in a proper proceeding, by the public.

Obray v. Malmberg, 26 Utah 17, 484 P.2d 160, 162 (footnotes omitted).

In Massengill, a deputy sheriff failed to apprehend and arrest two speeding, intoxicated drivers before they were involved in an accident resulting in the death of plaintiffs' decedent. The trial court dismissed the action by plaintiffs against the County and the Arizona Supreme Court affirmed, holding that the defendant owed no duty to the deceased as an individual. Massengill v. Yuma County, 104 Ariz. 518, 456 P.2d 376, 381 (1969). The Arizona court further stated that the duty imposed upon a police officer was a duty to the public in general and not to any particular person. Accordingly, the failure to adequately discharge a police officer's function would result in a public rather than a private injury, with recourse being had, if at all, through public prosecution rather than through a civil action for damages. Id., 456 P.2d at 379.

Another case supporting the Obray rule is Keane v. City of Chicago, 98 Ill. App. 2d 460, 240 N.E.2d 321 (1968). There, the trial court dismissed an action brought by the husband of a school teacher for failing to provide police protection to the teacher, who was attacked and killed by a student while on school premises. The Illinois Court of Appeals affirmed, holding that the duty of the city to protect the plaintiff's decedent from criminal acts was no greater than its "general duty to all citizens to protect the safety and well-being of the public at large." Id. at 322. The court also provided the following public policy support for its holding that there should be no recovery for breach of a general public duty:

> To hold that under the circumstances alleged in the complaint the city owed a "special duty" to Mrs. Keane for the safety and well-being of her person would impose an all but impossible burden upon the City, considering the numerous police, fire, housing and other laws, ordinances and regulations in force.

Id. Accord, Simpson Food Fair, Inc. v. City of Evansville, 149 Ind. App. 387, 272 N.E.2d 871, 873-76 (1971).

The proposition that defendants owed plaintiff no special duty is further illustrated in Evers v. Westerberg, 38 A.D.2d 751, 329 N.Y.S.2d 615 (1972). There, the police allowed an intoxicated motorist to drive his car away from the scene of an accident. The driver was involved in a second collision some 20 minutes later, killing another motorist. The lower

court entered judgment for plaintiff, who was administratr[ix] of the estate of the deceased motorist. The New York Sup[reme] Court, Appellate Division, modified the judgment, holding that although the intoxicated driver defendant was liable, the defendant village was not liable for failing to arrest the intoxicated driver and allowing him to leave the scene of the first accident. The court further stated:

> It is well settled that a municipality, acting in its governmental capacity for the protection of the general public, cannot be cast in damages for a mere failure to furnish adequate protection to a particular individual to whom it has assumed no special duty. The Village's alleged failure to enforce its regulations and the Vehicle and Traffic Law by arresting Westerberg for intoxication, taking his car keys or impounding his automobile falls squarely within this rule of nonliability. It owed no special duty to Mr. and Mrs. Evers and through its officers, did not take any _affirmative_ action which resulted in injury to a member of the public.

_Id._, 329 N.Y.S.2d at 618 (citations omitted) (emphasis in original). _Accord_, _Evett v. City of Inverness_, 224 So. 2d 365, 366-67 (Fla. App. 1969).

In the instant case, plaintiff cannot demonstrate any special duties owed to her by defendants, aside from their general duty to protect the public. Indeed, the negligence, if any, of defendants in releasing Neil from police custody while he was still intoxicated, or in failing to disarm him, is much less culpable than that of the police in _Evers_, who released an intoxicated driver who they did have a legal

...is to detain and who had already been involved in one ...cident.

In the event that plaintiff's earlier additional contention that defendants were negligent in scattering gunfire comes before this court, there is overwhelming authority, in addition to the foregoing, to the effect that municipalities are not liable for injuries to others resulting from the fulfillment or breach of the general duty to apprehend wrongdoers. See, e.g., Roll v. Timberman, 94 N.J. Super. 530, 229 A.2d 281, 284 (1967) (police not liable for injuries to bystander, caused by apprehension of fleeing motorist whose reckless acts are the proximate cause of the injuries); Scott v. City of New York, 2 A.D.2d 854, 155 N.Y.S.2d 787, 788 (1956) (innocent bystander injured by gunshot wound resulting from police apprehension of escaped prisoner cannot recover from city who owed no special duty to bystander even if the police were negligent in permitting the escape), aff'd, 9 N.Y.2d 764, 215 N.Y.S.2d 72 (1961).

Based upon Obray and the ample authority from other jurisdictions, it is evident that even if defendants were somehow negligent by releasing the intoxicated Neil, in failing to disarm him, or in confronting Neil in the gunfight and scattering gunfire, they cannot be liable to plaintiff because she has not shown, and cannot show, that defendants breached any more than their general duty to the public.

Thus, although plaintiff could perhaps maintain a cause of action against Neil's estate for Neil's acts in initiating the confrontation with defendants, she has no basis for recovery against defendants.

POINT III

PLAINTIFF'S CLAIMS ARE BARRED BY THE PROVISIONS OF THE UTAH GOVERNMENTAL IMMUNITY ACT

A. Plaintiff's Claims are Barred by Governmental Immunity.

Aside from the fact that defendants cannot be liable to plaintiff for any negligent breach of their general duty to the public, they are immune from suit under the provisions of the Utah Governmental Immunity Act, which provides: "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 . . . ." Utah Code Ann. § 63-30-3 (Supp. 1983).

There is no dispute that defendants were involved in a governmental function under the test established in Standiford v. Salt Lake City Corp., 605 P.2d 1230 (Utah 1980). There, this court stated the following general rule for determining whether an activity is a governmental function: "[T]he test for determining governmental immunity is whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agen

or that it is essential to the core of governmental activity." Id. at 1236-37.

Nothing could be more essential to the core of governmental activity than the enforcement of the laws and maintenance of peace and order performed by a city police department and its officers. Consequently, other provisions of the Utah Governmental Immunity Act apply. The applicable section of the act provides:

> (1) Immunity from suit of all governmental entities is waived for injury proximately caused by negligent act or omission of an employee committed within the scope of his employment except if the injury:
>
> (a) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused . . . .

Id., § 63-30-10(1)(a) (emphasis added).

Assuming defendants had a choice regarding whether to release Neil or whether to disarm or confront him, those choices were discretionary functions within the meaning of Section 63-30-10(1)(a). Although plaintiff argues that these decisions were a matter of "duty", not discretion, she cites no legal authority in support of that contention.

This court has applied Section 63-30-10(1)(a) to a fact situation analogous to the one at bar. In Epting v. State, 546 P.2d 242 (Utah 1976), the minor children of a murder victim sued the State of Utah on the theory that its

employees were negligent in allowing a state prison inmate to go on a work release program from which the prisoner left and murdered plaintiffs' mother. The trial court dismissed the complaint and this court affirmed, holding that the prison officials were involved in the exercise of a discretionary function when they placed the prisoner on work release and thus were immune from suit under Section 63-30-10(1)(a). The court further stated that it was discretionary with prison officials as to whether it would be valuable and practicable to place a particular prisoner on the work release program. Id. at 243-44. See also Amato v. United States, 549 F. Supp. 863, 866 (D.N.J. 1982) (decision not to arrest person prior to his commission of bank robbery that it was known by police officers would be committed was a discretionary function under the virtually identical discretionary function exemption of the Federal Tort Claims Act). In the instant case, the decision of whether to release Neil, assuming there was some legal ground to hold him the first place, was also discretionary and defendants are immune from suit pursuant to Section 63-30-10(1)(a).

At best, the only possible legal basis that defendants had for arresting and holding Neil (a basis that is only tenuously supported by the record) was for the offense of intoxication. Utah Code Ann. § 76-9-701 (Supp. 1983). However,

tion 76-9-701 further provides that a peace officer may at discretion release an individual arrested for intoxication if he believes imprisonment would be unnecessary. Id. § 76-9-701(2). Thus, even if defendants could have held Neil for intoxication, the very statute giving them the right to hold Neil provides that the decision to release him was the exercise of a discretionary function.

According to the Florida Supreme Court, the decision not to disarm Neil and to otherwise confront him was also discretionary. In Wong v. City of Miami, 237 So. 2d 132 (Fla. 1970), plaintiffs alleged that a decision not to confront political demonstrators constituted negligence and had proximately caused property damage that resulted when the demonstration got out of control. The lower court dismissed the complaint and both the Florida Court of Appeals and the Florida Supreme Court affirmed, holding that the decision of whether to confront the demonstrators was discretionary, and that the decisionmakers were not subject to liability. The court stated further:

> While sovereign immunity is a salient issue here, we ought not lose sight of the fact that inherent in the right to exercise police powers is the right to determine strategy and tactics for the deployment of those powers . . . . The sovereign authorities ought to be left free to exercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence.

Id. at 134.

The rule of Wong is applicable in the instant case. The decision of whether to release Neil and the decision of whether to attempt to disarm him or confront him were decisions involving judgment, tactics and strategy. The defendants were confronted with a dangerous and difficult situation which they handled as well as they could, and according to their own best judgment. Their actions should not be judicially second-guessed since they clearly involve matters of discretion. Therefore, pursuant to Section 63-30-10(1)(a), defendants are immune from suit and plaintiff's action against them should be barred.

B. Plaintiff's Claims are Barred by Virtue of Her Failing to Comply with Sections 63-30-11 and 63-30-19 of the Governmental Immunity Act.

In addition to providing defendants immunity from suit in this case, the Utah Governmental Immunity Act requires that plaintiff file a proper and adequate notice of claim and that she provide or file a bond or undertaking. Contrary to plaintiff's contention that these procedural requirements were raised by separate motion, defendants' original Motion for Summary Judgment specifically states as one of its grounds that plaintiff failed to comply with the above requirements. Thus, since the lower court's reasons for

...ting the summary judgment were not stated (R. 46, 47), ...ntiff's failure to comply with these provisions could well have been a basis for the grant of summary judgment.

In Scarborough v. Granite School District, 531 P.2d 480, 482 (Utah 1975), this Court stated that "full compliance with [the Utah Governmental Immunity Act] requirements is a condition precedent to the right to maintain a suit." Plaintiff has failed to properly comply with Sections 63-30-11 and 63-30-19 of the Utah Governmental Immunity Act.

The 1978 version of Section 63-30-11, the version most likely applicable here, provides:

> Any person having a claim for injury to person or property against a governmental entity or its employee shall, before maintaining an action under this act, file a written notice of claim with such entity for appropriate relief including money damages. The notice of claim shall set forth a brief statement of the facts and the nature of the claim asserted, shall be signed by the person making the claim or such person's agent, attorney, parent or legal guardian, and shall be directed and delivered to the responsible governmental entity within the time prescribed in section 63-30-12 or 63-30-13, as applicable.

Id., § 63-30-11 (Supp. 1981). See also Yates v. Vernal Family Health Center, 617 P.2d 352, 354 (Utah 1980); Scarborough v. Granite School District, 531 P.2d 480, 482 (Utah 1975).

Defendants admit that plaintiff filed a purported notice of claim with the Cedar City Corporation and that it was

filed within the prescribed time. A copy of the notice of claim that was filed is attached as Exhibit "F" to plaintiff's brief. However, that purported notice of claim did not comply with the essentials established in Section 63-30-11. It merely reports facts and makes legal conclusions. There is no formal demand for any kind of money damages or other relief from the city. Furthermore, the nature of the claim asserted is unclear. Consequently, since the purported notice of claim attached to plaintiff's brief is improper, and plaintiff failed to file a proper and timely notice of claim within one year after the cause of action arose, Utah Code Ann. § 63-30-13 (Supp. 1983), she is barred from maintaining this action.

Even assuming that plaintiff has filed a proper and timely notice of claim in compliance with Section 63-30-11, she has not obtained or filed a bond as required under Section 63-30-19. Plaintiff has evidently filed a bond pursuant to Section 78-11-10 of the Utah Code, as required by virtue of her action against the three individual respondents in this case, but Section 63-30-19 requires an additional bond be filed in order for plaintiff to maintain an action against Cedar City Corporation. It provides:

> At the time of filing the action the plaintiff shall file an undertaking in a sum fixed by the court, but in no case less than the sum of $300, conditioned

> upon payment by the plaintiff of taxable costs incurred by the governmental entity in the action if the plaintiff fails to prosecute the action or fails to recover judgment.

Utah Code Ann. § 63-30-19 (1978). Based upon Scarborough, appellant's failure to provide and file the bond required by Section 63-30-19 precludes her from pursuing this action.

## CONCLUSION

Plaintiff has failed to file a proper and timely notice of claim and has failed to obtain and file an appropriate bond as required by Sections 63-30-11 and 63-30-19 of the Governmental Immunity Act. Thus, her action is precluded at the outset. But, even assuming plaintiff has met these procedural requirements, her action still fails on the merits.

The record establishes that there is no genuine issue of material fact. Defendants were not negligent, as a matter of law, since under the circumstances, they simply had no choice but to act as they did.

Assuming, arguendo, that the defendants were negligent in some respect, such negligence at best amounted to only a breach of a general duty owed to the public at large for which defendants cannot be held civilly liable to plaintiff.

Finally, pursuant to Section 63-30-10(1)(a) of the Utah Governmental Immunity Act, defendants are immune from suit

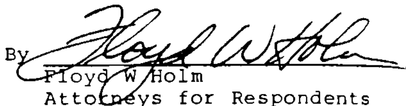
since their alleged acts of negligence involved the perfor-mance of a discretionary function. Consequently, plaintiff's action is barred.

For the above reasons, the summary judgment of the lower court should be affirmed.

DATED this 28th day of November, 1983.

Respectfully submitted,

SNOW, CHRISTENSEN & MARTINEAU

By 
Floyd W Holm
Attorneys for Respondents

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of November, 1983, two copies of the foregoing Respondents' Brief were mailed to Appellant's attorney at the following address, by first-class mail, postage prepaid:

Patrick H. Fenton
154 North Main Street
Cedar City, Utah 84720