1983

Mrs. Herman Foster And John Ewing, Natural Parents of Jeffrey Adrian Ewing, aka Jeffrey Ewing Foster, Deceased, A Minor, And David Mac Kelly v. Salt Lake County, A Body Corporate And Politic of the State of Utah : Brief of Appellant

IN THE SUPREME COURT

OF THE

STATE OF UTAH

MRS. HERMAN FOSTER and JOHN EWING, natural parents of Jeffrey Adrian Ewing, aka Jeffrey Ewing Foster, Deceased, a minor, and DAVID MAC KELLY,	:	
Plaintiffs-Respondents,	:	No. ~~16608~~ 19051
-vs-	:	
SALT LAKE COUNTY, a body corporate and politic of the State of Utah,	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE
DISTRICT COURT OF SALT LAKE COUNTY
HONORABLE DAVID B. DEE, JUDGE

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MRS. HERMAN FOSTER and JOHN EWING, natural parents of Jeffrey Adrian Ewing, aka Jeffrey Ewing Foster, Deceased, a minor, and DAVID MAC KELLY,	:	
Plaintiffs-Respondents,	:	
-vs-	:	No. 19051
SALT LAKE COUNTY, a body corporate and politic of the State of Utah,	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

NATURE OF THE CASE

Plaintiffs' claim of recovery in this case is based upon the theory that Salt Lake County is an "implied insurer" of employees driving Salt Lake County vehicles even though not within the course and scope of their employment.

DISPOSITION IN THE LOWER COURT

The trial court held that the defendant was indebted to plaintiffs in the amount of $15,000 plus costs, attorney's fees and [illegible] interest on $150,000.00.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Judgment entered by the trial court.

STATEMENT OF FACTS

All statutory references are to the Utah Code Annotat 1953.

Prior to July 1, 1977, Salt Lake County's vehicles we insured by a commercial insurance company. On June 13, 1977, t Salt Lake County Commission voted to investigate a self-insura program. On June 27, Salt Lake County applied to the Insurance Commissioner for a Certificate of Self-Insurance pursuant to th Automobile No-Fault Insurance Act (Record p.138). The Certific of Self-Insurance was issued on the 7th of July, 1977 (Record p Consequently, the commercial insurance was not renewed at the e piration of the policy period.

On January 26, 1978, Deputy Sheriff David Mac Kelly w off-duty at 4:00 p.m. At approximately 11:00 p.m., while drivi a Salt Lake County vehicle under the influence of alcohol, Depu Kelly collided with a pedestrian, Jeffrey Adrian Ewing, plainti sixteen-year-old son, and Deputy Kelly fled the scene of the ac dent. Jeffrey Ewing died as a result of the injuries received.

Deputy Kelly was terminated from the Sheriff's Depart and convicted of automobile homicide and leaving the scene of a accident (Record Exh. D-15). Jeffrey Ewing's parents filed a wrongful death action against Deputy Kelly, former Sheriff Del Larson, Sheriff Rex L. Vance and Salt Lake County (Civil Case No. C-78-1377). Kelly contacted his private insurance carrier sent a letter to the Salt Lake County Commission, with a copy the Summons and Complaint, stating, "It would appear that your surance applies" (Record p.34).

On March 23, 1978, the Salt Lake County Attorney's Office declined to represent Mr. Kelly for Mr. Kelly's failure to comply with the Indemnification of Public Officers and Employees Act (§63-48-1 et seq.) (Record p.93).

On January 4, 1979, the plaintiffs voluntarily dismissed defendants Larson, Vance and Salt Lake County from the lawsuit (Record p.208). Salt Lake County did not know at the time of the dismissal that Kelly had secretly entered into an agreement with plaintiffs whereby he agreed not to contest his negligence in causing the death of Jeffrey Ewing. Kelly also agreed, as a part of this secret arrangement, to assign any cause of action he may have had against Salt Lake County to Foster and Ewing, and they, in turn, agreed not to execute against Kelly's personal assets (Record p.12-16).

On January 5, 1979, the day following the voluntary dismissal, plaintiffs presented their evidence in an uncontested trial before Third District Court Judge David K. Winder. Salt Lake County was not informed of this hearing and, of course, was not present. Judge Winder awarded a judgment against Kelly in the amount of $150,000.00.

Plaintiffs then filed this action against Salt Lake County seeking a judgment declaring Salt Lake County to be liable to the plaintiffs in the amount of $100,000.00.

The case was set for a jury trial on June 28, 1979. The trial did not proceed as scheduled. Rather, Judge James S. Sawaya heard a Motion for Summary Judgment on the pleadings at that time. He granted Judgment against Salt Lake County in the amount of $150,000.00 (even though the Complaint only prayed for $100,000.00).

This Court reversed the order granting summary judgme in Foster v. Salt Lake County, Utah, 632 P.2d 810 (1981) and re the case for trial (Record p. 322).

The trial was held on September 13, 1982, before the Honorable David B. Dee, District Judge, without a jury.

ARGUMENT

POINT I

THE EXTENT OF SALT LAKE COUNTY'S LIABILITY AS A "SELF-INSURER" IS LIMITED TO PAYMENT OF NO-FAULT BENEFITS.

A. Applicability of Utah Automobile No-Fault provis

Prior to the adoption of the Utah Automobile No-Fault surance Act in 1973, public entities were not required to carry public liability insurance. Section 41-12-33 specifically exem the United States, the State of Utah, or any of its political s divisions, from the provisions of the Safety Responsibility Act In 1973, however, the Legislature adopted the Utah Automobile No-Fault Insurance Act, Section 31-41-1, et seq., which provide in part as follows:

> The State of Utah and all of its political subdivisions and their respective departments, institutions, or agencies shall maintain in effect continuously in respect to their motor vehicles, the security provided for in Section 31-41-5.

The provisions of Section 31-41-5 provide two mutuall exclusive alternative methods whereby the required security can provided. Subsection (a) authorizes security to be provided th an automobile insurance policy which qualifies under the Safety Responsibility Act. Subsection (b) permits security to be pro "by any other method approved by the Department (of Insurance) affording security equivalent to that offered by a policy of in

ance." That subsection also states that the "person providing this type of security shall have all of the obligations and rights of an insurer under this act," i.e., the Utah Automobile No-Fault Insurance Act of 1973 (emphasis added).

In this case, Salt Lake County provided security through the means of an annual tax levy from which judgments against the County could be paid. The Insurance Commissioner is empowered to issue a Certificate of Self-Insurance when he finds that an applicant qualifies under Section 31-41-5. On July 1, 1977, a Certificate of Self-Insurance was issued to Salt Lake County by the Insurance Department of the State of Utah (Record p.140). The Certificate in pertinent part states as follows:

> "THIS IS TO CERTIFY, that pursuant to the Insurance Code of the State of Utah, Salt Lake County has complied with Section 31-41-5(1)(b) of the Utah Automobile No-Fault Insurance Law and has qualified as a self-insurer."

In order to determine the obligations of the self-insurance which Salt Lake County assumed, it is necessary to refer to the No-Fault Insurance Act. The limits of liability to the County are as set forth in the No-Fault Act which provides in detail the extent of benefits to which an injured party may be entitled. By thus defining the benefits, the limits of liability applicable to the public entity are clearly established.

The method for providing security as approved by the Insurance Commissioner, i.e., the levy of taxes for the payment of judgments and the establishment of coverage as provided in the No-Fault Insurance Act were properly found by the Insurance Commissioner to constitute a substantially equivalent security. Neither the

adequacy of the security nor the approval by the Insurance Comm sioner is challenged.

The duties of a self-insurer under the No-Fault Act clearly established. As pointed out above, Section 31-41-5(1) provides that the party providing the alternate type of securit ". . . shall have all of the obligations and rights of an insur . . ." under the No-Fault Act. The obligations of an insurer u the Act, which constitute the terms of the policy, are set fort in detail in Section 31-41-6 (a copy of that statute is attache the Appendix of this Brief). The language of the statute is si nificant:

> "(1) Every insurance policy or other security complying with the requirements of Subsection 1 of Section 31-41-5 shall provide personal injury protection providing for payments to the insured and all other persons suffering personal injury arising out of an accident involving a motor vehicle, except as otherwise provided in this Act, in at least the following minimum amounts." (emphasis added).

Subsection (2) sets forth the manner in which the med expenses are to be determined and the remaining subsections fur clarify the application of the section.

Thus the "other security" approved by the Insurance C missioner as qualifying a governmental entity to become a self- insurer under the No-Fault Act requires the entity to undertak responsibilities of an insurer and become obligated to pay not to the insured but to "all other persons suffering personal in arising out of an accident involving a motor vehicle" owned by political subdivision, in "at least the minimum amounts", as sp fied in that Act. There is no dispute in this case that Salt L County has paid the no-fault benefits to the plaintiffs as requ

by this Act.

B. The trial court correctly held that the defendant is not an insurance carrier nor is there an insurance contract involved in this case.

Plaintiffs' Complaint alleges:

"4. That under the provisions of the Utah Code Annotated and by action of the Salt Lake County Commission and specifically pursuant to the provisions of 63-30-1 through 34, the defendant is required to provide indemnity and insurance coverage to the judgment debtor, David Mac Kelly, in the sum of $100,000 plus interest, costs, and attorney's fees, and that plaintiffs are entitled to the proceeds of that contract of indemnity;

5. That defendant is the automobile liability insurer of plaintiff, David Mac Kelly, and as such is indebted to all plaintiffs as alleged in paragraph 4 of this complaint;..." (emphasis added).

Prior to trial, plaintiffs' theory was that in order for the County to be liable, it was either the insurance carrier of plaintiff Kelly or bound by an insurance contract between the County and plaintiff Kelly. Plaintiffs' position was clearly represented to the trial court as follows:

"MR. KIPP: If there isn't a contract of insurance, express or implied, by which they are bound, I don't win.

THE COURT: That's right.

MR. KIPP: If there is, I win, presuming we meet the terms. That's what this case is all about." (p.42 trial transcript)

The trial court at page 2 of its Memorandum Decision stated

that "...no insurance policy is involved." It went on to hold County liable to the minimum limits of Section 41-12-1(k) as a self-insurer. (Finding of Fact No. 1)[1]

Plaintiffs' theory of recovery under a contract, expr or implied, was specifically rejected by the trial court and sh have been the key finding of fact in a judgment of no cause of

The statute (31-41-5(b)) provides that a self-insurer has the obligations of an insurer under this act. "This act" i the no-fault act. The obligations of an insurer under the act set out in Section 31-41-6 as payment of no-fault benefits. To that the County is a self-insurer under the Safety Responsibili Act would absolutely contradict Section 42-12-33 of that act wh specifically states that the act does not apply to governmental entities.

C. Section 63-30-29.5 and Allstate v. USF&G should be given retroactive application in this case.

The trial court's decision is based upon a strained c struction of the Supreme Court's holding in Allstate Insurance U.S.F.& G., Utah 619 P.2d 329 (1980). The Allstate case holds an insurance policy which is used as security under the No-Faul Act must comply with the "qualifications" of an insurance polic set forth in Section 41-12-21 of the Safety Responsibility Act. Allstate case did not deal with equivalent security which the C has used to qualify as a self-insurer.

[1]It is interesting to note that the trial court casually brushe aside the defendant's uncontroverted case law dealing with se insurance from other jurisdictions cited in its Trial Brief b stating: "The statute does not refer to self-insurance so its argument in this regard is not germain." (Page 2, Memorandum Decision).

This action was filed more than one year before this Court's decision in the Allstate case which explains why the plaintiffs never raised the Allstate theory in their Complaint and never relied on that case because it limits their recovery to the sum of $15,000.00.

The Allstate case is not controlling because it applies to contracts of insurance used as security under the No-Fault Act and should not be retroactively applied in this case because (1) plaintiffs never relied upon it, and (2) the County had no statutory notice or guidance from this Court when the cause of action arose in 1978 that it could be held liable under the provisions of the Safety Responsibility Act.

The same rationale applies to the newly-enacted Section 63-30-29.5 which extends coverage for permissive users to governmental entities as of May, 1983.

D. Self-insurers, in most other jurisdictions, are not obligated under any rules of extended policy situations such as permissive use.

The District Court of Appeal, First District, Division 1, California, had a very similar factual situation in the case of Glens Falls Insurance Co. v. Consolidated Freightways, 51 Cal. Rptr. 789 (1966), wherein that Court ably articulated the differences involved in "self-insurance" settings. Although in the Glens Falls case the defendant had obtained a certificate of self-insurance under the California Safety Responsibility Act (and the County has obtained one in this case only under the No-Fault Act), that Court stated at p.797:

"Defendant Consolidated is not an insurance carrier. Nor does this case involve any motor vehicle liability policy issued and outstanding at the time of the accident. Consolidated is merely an authorized self-insurer or, to put it more exactly, a company to which the Motor Vehicle Department has issued a certificate of self-insurance. Neither the Vehicle Code sections referring to self-insurance (§§16055, 16056) nor any other sections of said code contain any provisions that such certificate is or constitutes a policy of motor vehicle liability insurance or that said certificate shall be deemed to incorporate or embrace provisions required in such policies (§16451). Indeed the Vehicle Code nowhere intimates any connection between section 16451 and sections 16055, 16056. A certificate of self-insurance is not a motor vehicle liability policy of insurance. In a word, it is not an insurance policy at all and plaintiff has offered no authority that it is. As we previously explained, it is merely one of the several methods provided by law for establishing exemption from furnishing security. Faced with these realities, Glens Falls attempts to transmogrify the certificate of "self-insurance" by dropping the word "self", to assume that the resultant product is "insurance" and thereafter to engraft on such "insurance" all of the rules dealing with liability insurance. No authority, statutory or decisional, supports such a construction.

The simple answer here is that this case does not involve the contractual obligations of an insurance company. Nor are any obligations or any rules of extended policy situations in any way imposed upon Consolidated." (emphasis added)

The California Court thus held that the plaintiff's attempt to engraft standard form insurance provisions onto a "self insurer" program of risk retention was devoid of merit. It specifically held at page 795 that:

"...[S]ection 16451 [the requirement of an omnibus coverage of permissive users] does not create any independent legal liability for the negligent operation of a motor vehicle by a permissive user. As we have explained, that section merely prescribes the necessary terms and provisions of an insurance policy furnished as proof of ability to respond in damages and thus constituting one of the several methods of establishing exemption from the requirement of depositing security to satisfy any final judgment or judgments for bodily injury or property

> damage (§16057). Indeed, the Automobile Financial Responsibility Law 'does not in so many words make mandatory the procuring of a liability insurance policy prior to the first accident and judgment***'" (Continental Cas. Co. v. Phoenix Constr. Co., supra 46 Cal. 2d 423, 436, 296 P.2d 801, 808, 57 A.L.R. 2d 914.)

The Court of Appeals of New York has similarly held that self-insurance is not "insurance" at all when dealing with financial responsibility acts. In Guercio v. Hertz Corp., 358 N.E.2d 261, 264 (1976) that Court held:

> "Generally, self-insurance is no insurance at all. Rather, self-insurance in this context, is a convenient shorthand for describing the manner in which a class of vehicle owners may comply with the requirements of the Motor Vehicle Financial Security Act."
>
> "...The crux of the matter is that a financially able fleet owner may avoid the necessity of obtaining liability insurance and paying insurance premiums. By undertaking to assure payment of judgments, the owner does not become an "insurer" of anything other than his own ability to pay for damages for which he is legally responsible. (citations omitted). In sum, self-insurance is not insurance but an assurance -- an assurance that judgments will be paid."

The Court went on to conclude that absent a separate rental agreement between Hertz and the customer, liability for damages caused by permissive users would not arise simply because Hertz was a self-insurer. [Similar conclusions in Location Auto Leasing Corp. v. Lembo Corp., 310 N.Y.S. 2d 365 (1970); Aetna Cas. & Sur. Co. v. World Wide Rent-A-Car, Inc., 284 N.Y.S. 2d 807 (1967)].

The Texas Supreme Court has also followed the general rule already addressed by the California and New York Courts that a certificate of self-insurance does not constitute other valid and collectable insurance within the meaning of an operator's liability policy issued to an employee driving a self-

insured employer's car with its permission on personal business at the time of the accident The Home Indemnity Company v. Humble Oil and Refining Co., 314 S.W.2d 861 (Tex. Civ. App. 1958); Allstate Insurance Company v. Zellars, 457 S.W.2d 539 (Tex. Civ. App. 1970), affirmed by Supreme Court of Texas in 462 S.W.2d 550, 552 [1] (197

Under California law, all policies of insurance issued a certified in that state must include coverage for any permissive user of an insured motor vehicle. In a recent case, Western Pioneer Insurance v. Estate of Taira (September 29, 1982), California Court of Appeal, Fifth Appellate District, that court dealt with a surprisingly similar factual situation (except that the driver of the state vehicle was within the course and scope of his employment). On January 23, 1978, two state parole agents, Eugene Taira, the driver, and Roy Longmire, passenger, were killed when a state-owned 1974 Plymouth driven by Taira collided with another vehicle. There was evidence that both Taira and Longmire were under the influence of alcohol. Taira and Longmire were in the course and scope of their employment at the time of the accident and Taira was driving the 1974 Plymouth with permission of the owner and his employer, the State of California. Subsequently, Longmire's widow and child brought an action for wrongful death against the estate of Taira and others under Labor Code Section 3601(a)(2), which permits suit against a fellow employee for injury or death resulting from intoxication. As a result of that action, Western Pioneer, the insurance carrier for decedent driver, Taira, brought an action for declarat relief to determine whether its policy of insurance covered Taira while he was driving a state owned car, and whether the state, a

self-insured owner of the vehicle, was liable to defend and indemnify the estate of Taira in Longmire's wrongful death action.

The declaratory relief action was tried by the court without a jury. The trial court determined that Western Pioneer Insurance Company provided no coverage for the accident. It further determined that the state was required to provide a defense and to indemnify the estate of Taira, holding that the state, as a self-insured owner of the motor vehicle, owed the same duty to indemnify and defend as that owed by an insurance carrier. The State of California appealed and the court of appeal reversed.

Under California Insurance Code Section 11580.1(b), certain required provisions are set forth which must be included in each policy of liability insurance. One of these requirements is coverage for "permissive users."

In California, the obligations arising from a policy of insurance do not extend to a self-insurer. Metro U.S. Services, Inc. v. City of Los Angeles, 96 C.A. 3d 678 (1979).

The respondent in Western Pioneer also argued that the state, as employer, was liable under the dual capacity doctrine because liability was being imposed upon the state as an insurer, rather than an employer. The appellate court reiterated its position that the state's duties as a self-insurer are not the same as an insurer, and thus the dual capacity doctrine did not apply.

POINT II

THE COURT ERRED IN HOLDING THAT THE INDEMNIFICATION OF PUBLIC OFFICERS AND EMPLOYEES AND GOVERNMENTAL IMMUNITY ACTS DO NOT APPLY TO THIS CASE.

The trial court ruled as a matter of law that the Indem-

nification of Public Officers and Employees Act (Section 63-48-1 et. seq.), and the Governmental Immunity Act (Section 63-30-1 et seq.), do not apply to this case. Although this was a reserved issue of law in the Pretrial Order (para. II C.), the Amended Findings of Fact and Conclusions of Law fail to mention the court's ruling on this issue contained in its Memorandum Decision.

A. The Indemnification of Public Officers and Employees

Pursuant to Section 63-48-3, the County declined to defe Kelly or to pay any compromise, settlement or judgment resulting from said personal injury action. This decision was based on Kelly failure to timely tender his defense, cooperate in his defense, an his grossly negligent conduct which occurred outside the scope of his employment.

The Indemnification Act was analyzed in 1974 Utah Law Review 622 as follows:

> "The public entity is not obligated to defend or indemnify an officer or employee unless he requests a defense in writing within ten days after service of process upon him. If the request for defense is properly made, the public entity chooses to defend, to defend with reservation, or not to defend. If the public entity chooses to defend and the officer or employee reasonably cooperates in the defense, then the public entity is obligated to pay any judgment, compromise, or settlement resulting from the suit. If the officer or employee does not reasonably cooperate, the public entity may terminate the defense and pay nothing. If the public entity chooses to defend with reservation, it may reserve the right not to pay any judgment, compromise, or settlement until it is established that the claim arose out of an act or omission occurring "during the performance of [the officer's or employee's] duties, within the scope of his employment, or under color of authority. If the public entity chooses not to defend, the officer or employee may recover from the public entity the costs of his defense and any judgment (not a compromise or settlement), only if

(a) [h]e establishes that the act or omission upon which the judgment is based occurred during the performance of his duties, within the scope of his employment, or under color of authority and that he conducted the defense of the claim against him in good faith; and

(b) [t]he public entity fails to establish that the officer or employee acted or failed to act due to gross negligence, fraud, or malice. [§63-48-4(2)]

If the public entity pays any portion of a judgment (not a compromise or settlement) it may recover that payment from the officer or employee by establishing that he acted or failed to act due to gross negligence, fraud, or malice. Otherwise, the officer or employee is not liable to indemnify the public entity for defense costs or payments made by it as a result of any claim made against the public entity or against the officer or employee.

Analysis--Before the enactment of the Indemnification Act, the extent to which public officers and employees would be personally liable for their official actions was often subject to the discretionary power of superiors. The boundaries of official immunity are vague and are determined according to federal standards in federal courts and state standards in state courts. Permissive insurance coverage provided by a public entity can vary according to budgetary pressures, the judgment of those empowered to obtain insurance, and the status of the officer or employee. Indemnification by petition to the Board of Examiners and the legislature can be time consuming and difficult to obtain, inconsistent from case to case, and arbitrarily administered, since no standards are defined. Under the Indemnification Act, the protection from personal liability is comprehensive, covering intentional as well as negligent actions; mandatory rather than permissive; and extends to all officers and employees whatever their position or function..."

"The Indemnification Act seems to give broad discretion to the public entity in deciding whether or not to defend an officer or employee requesting such defense, since the Act contains no guidelines or procedural protections."

The County asserted six affirmative defenses under the Indemnification Act:

(1) Failure to properly tender defense within ten days;

(2) Failure to cooperate in defense;

(3) Employee was on a "frolic" of his own and not within the course and scope of his employment;

(4) Employee was grossly negligent;

(5) Employee's defense was not conducted in good faith; and,

(6) Employee has paid nothing, is under no liability for payment and is therefore not entitled to be indemnified.

(1) Utah's Indemnification Statute is an actual loss pl

The general rule at common law has long been that the indemnitee must first pay an obligation before indemnification is required. 42 CJS Indemnity §14c. Thus, in Cunningham v. Metropolit Gov't., 476 S.W.2d 640 (Tenn. 1972), the court held a city did not have to pay a judgment, under their indemnification statute, again a police officer who was killed in the accident giving rise to the suit. The estate was insolvent and no payment to the plaintiff wa available. The court recognized that the indemnity statutes were to protect the employee which, in this case, no longer needed protection.

A close reading of the Indemnification Act supports the payment first requirement. There is no mandatory language in Section 63-48-3 that the County indemnify any employee except should the County conduct his defense. Inasmuch as the County did not conduct Kelly's defense, the language of Section 63-48-4(1) is the only basis for any indemnification. That section provides for indemnification once the "...employee pays any judgment..." The in

demnification plan is, therefore, that if the employee conducts his own defense, the employee will pay his own judgment. Then, after the judgment is paid, he may be indemnified if it turns out that the County has such an obligation. This approach is entirely consistent with the literal meaning of indemnification and reflects a legislative encouragement that defenses be conducted by the municipality involved.

(2) Should the Court find that the Indemnification Act applies but that it is a libility plan, Kelly has no liability for which to be indemnified.

The Indemnification Act is clear, Section 63-48-1 states that the purpose of the Act is to protect employees. There is no indication that the Act is intended to be an insurance plan whereby third parties are paid for torts of the employee. Therefore, absent liability, there is no legislative purpose in paying an employee.

A close reading of the compromise settlement agreement shows that Kelly has no liability. The judgment creditors (former plaintiffs) have covenanted not to seek recovery from Kelly. It is difficult to conceive how the County is obligated to indemnify a person that has no liability.

The law is well-settled that a release of a servant releases the master of liability where the master's alleged tort is asserted under respondeat superior. Holmstead v. Abbott G.M. Diesel, Inc., 493 P.2d 625 (Utah 1972). Similarly, the law has long been that the release of a debtor releases a surety. Shuttee v. Coalgate Grain Co., 172 P. 780 (Okla. 1918). Utah law also follows the common law rule that relase of one tort-feasor releases all tort-feasors unless there has been a reservation of rights against the others (see Section 15-4-5).

Though this Court has not ruled specifically on whether the release of an indemnitee releases the indemnitor, there is no apparent reason to follow a separate rule from that above. In fa policies involved make it even more appropriate to apply the rele rule in indemnification because no protection of the employee is needed, which is at the very heart of the purpose of indemnificati

The reservation of rights in the contract releasing Kell is without meaning. A judgment creditor has no rights in Kelly's indemnification. They cannot reserve what they do not have. Ther fore, relieving Kelly of liability relieves the County of any obli gation to indemnify him for incurring no loss or liability.

B. The Utah Governmental Immunity Act.

Section 63-30-7 provides:

> Immunity from suit of all governmentalentities is waived for injury resulting from the negligent operation by any employee of a motor vehicle or other equipment while in the scope of his employment. . . (emphasis added).

The plaintiffs initially relied upon the Governmental Immunity Act to establish liability and plead in their complaint that Kelly was in the course and scope of his duties with Salt Lak County. However, there was no finding of fact that Kelly was with or outside the scope of his employment at the time of the collisio

Salt Lake County, as a governmental entity, is immune from suit for money damages, except as immunity is waived by the Utah Governmental Immunity Act.

> 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. Section 63-30-3.

In this case, since there is no affirmative finding that plaintiff Kelly was within the course and scope of his employment, the defendant, Salt Lake County, is under no obligation to indemnify the plaintiff Kelly or his assignees (Foster and Ewing), nor has the defendant County waived its immunity from suit.

This immunity from suit applies equally to any theory of recovery the Court relied upon. Plaintiffs cannot avoid this issue by merely claiming that they are not pursuing their action under the Governmental Immunity Act. That act made it possible for certain actions to be maintained against governmental entities that were formerly immune from suit. Those entities retain immunity against suits for injury resulting from the negligent operation by an employee of a motor vehicle while outside the scope of his employment.[2]

The County asserted Section 63-30-7 as an affirmative defense at trial, and the Court erred in finding the Act inapplicable.

POINT III

THE COURT ERRED IN HOLDING THAT SALT LAKE COUNTY IS BOUND BY THE JUDGMENT AGAINST DEPUTY KELLY.

A. The judgment obtained by plaintiffs Foster and Ewing against plaintiff Kelly cannot be enforced against the County because it was obtained through collusion.

(1) Factual background. The lawsuit against Deputy David Mac Kelly (Civil No. C-78-1377) originally included Salt Lake County as a co-defendant under a theory of respondeat superior. The affidavit of defendant's counsel of July 27, 1979, asserts that on January 3, 1978, counsel received a telephone call from the plaintiff's attorney, Carman E. Kipp. Mr. Kipp indicated that his

[2] Except for the newly-enacted provisions of Section 63-30-29.5 U.C.A. 1953.

intention was to secure a judgment against David Mac Kelly and the pursue his claim against his client's uninsured motorist carrier. Upon this representation, the County agreed to a voluntary dismis The County did not know, and Mr Kipp did not inform opposing coun that on December 12, 1978, the plaintiffs had entered into a compromise settlement agreement with David Mac Kelly whereby Kelly consented to allow plaintiffs to proceed with a non-jury trial wherein Kelly would not contest the issue of negligence and liability. Secondly, Kelly agreed to assign any rights he may have against Salt Lake County to the plaintiffs. Thirdly, plaintiffs agreed not to execute upon any personal assets of Kelly but instead to pursue their claims against Salt Lake County only. Further, the plaintiffs agreed that after two years, or the conclusion of any litigation against Salt Lake County, the judgment would be released and satisfied against Kelly.

On January 4, 1979, the County's attorney of record signe a stipulation for an order of dismissal without prejudice. The trial was scheduled to begin January 29, 1979, and the County's representatives intended to attend. A special trial setting for January 5, 1979, was prearranged by plaintiffs' counsel for the day following the signing of the stipulation. The County was not informed of the trial setting, although it was obviously known of prior to January 4, 1979. At that hearing, the plaintiffs presente their evidence. Although Deputy Kelly was represented by counsel, no evidence was presented to rebut any of the plaintiffs' contenti

After plaintiffs' closing argument, the Court asked Kell attorney, "Do you wish to respond?" Kelly's attorney responded,

"I have no statement."

No objections were made to any of plaintiffs' evidence. None of the plaintiffs' witnesses were cross-examined. Kelly's attorney presented no evidence to support Kelly's affirmative defenses contained in his answer, i.e., comparative negligence of the decedent (wearing dark clothing and crossing a heavily-traveled street at night not at a marked pedestrian crossing). The Court entered a judgment against Kelly in the amount of $150,000, the exact amount prayed for by plaintiffs' counsel.

(2) Collusion defined. Webster's New Collegiate Dictionary, 1977, defines collusion as "secret agreement or cooperation for an illegal or deceitful purpose". It defines deceitful as "having a tendency or disposition to deceive; a: not honest, b: deceptive, misleading".

"Collusion" has been judicially defined as:

> ". . . a corrupt agreement between the parties to impose a case on the court, either by the suppression of evidence or the manufacture thereof, as well as an agreement that no defense shall be made." (emphasis added).[3]

In Curb and Gutter District No. 37 v. Parrish, 110 P.2d 902, 907 (8th Cir. 1940) the Court said:

> "It is generally recognized that collusion in law embraces either a fictitious or assumed state of facts in order to obtain a judicial determination."

This is precisely the case now before the Court. The parties plaintiff agreed to secure a judicial determination solely for the purpose of imposing liability on Salt Lake County. Apart from the issue of liability, the factual question of damages was

[3] Neu v. Neu, 297 Mich. 654, 298 N.W. 318, 320 (1941).

substantial but remained uncontested. Dismissing Salt Lake County was merely a ploy to avoid opposition in the lawsuit. The judgment rendered ($150,000.00) is several times the highest wrongful death verdict for an unmarried minor child previously rendered in the State of Utah. This in itself is an indication that the parties based their claim of damages upon a false or assumed state of facts. The result itself fails to sustain good faith.

The fact that there had been a previous compromise settlement agreement between Kelly and the plaintiffs Foster and Ewing under the circumstances is evidence of collusion. This evidence is strengthened by the fact that the County was not informed of the secret stipulation while the County was still a party to the lawsuit, nor was it informed of the special non-jury trial date. The County was led to believe that plaintiffs' intention was to pursue uninsured motorist coverage. The players were merely being positioned to use the court process to establish an uncontested judgment for the sole purpose of imposing it upon the County. There can be no doubt that the facts and circumstances surrounding the December 12, 1978, compromise settlement agreement, the January 1979, stipulation for voluntary dismissal and the January 5, 1979, uncontested non-jury trial and resulting judgment evidence "collusion" as previously defined.

B. Non-disclosure as against public policy.

Even were this Court to hold as a matter of law that the December 12, 1978, compromise settlement agreement was not collus-

or unethical conduct,[4] the modern trend of cases hold that pre-trial covenants not to execute made between a plaintiff and one of several co-defendants without the knowledge of all the parties to the lawsuit render the judgment obtained in such action unenforceable.

The Arizona Supreme Court in Mustang Equipment, Inc. v. Welch v. Mountain States Telephone and Telegraph Co., 564 P.2d 895 (Ariz. 1977) reasoned that public policy requires immediate disclosure of any agreement not to execute between a plaintiff and a co-defendant in order "to avoid the inherent tendency to work a fraud on the court and to avoid 'collusion' between the plaintiff and some of the defendants". (at p.899).

In the Mustang case, the unanimous court, in reversing a judgment against Mustang, found that even though the non-agreeing defendant was not prejudiced at trial by the non-disclosure nor would the defense have been conducted differently had the pre-trial agreement been disclosed, nevertheless, it held:

> "It has always been the policy of the law to favor and encourage the resolution of controversies through compromise and settlement rather than through litigation. Dansby v. Buck, 92 Ariz. 1, 373 P.2d 1 (1962). In the instant case, the disclosure of the Welch-Mountain States agreement may have well fostered or encouraged a pre-trial settlement between Welch and Mustang. At least, we cannot say that Mustang's counsel would not have taken a more positive attitude into settlement negotiations had he been aware of the agreement . . ."
>
> . . .

[4] Rule 11. Revised Rules of Professional Conduct of the Utah State Bar. Section 2. An attorney or counselor shall not: (5) Take part in deceit or collusion, or consent thereto with intent to deceive a court or judge or a party to an action or proceeding.

"Finally, we think this is a matter of public policy. While we recognize that under the particular fact situation of this case there was neither fraud, collusion or unethical conduct involved, we cannot condone secret agreements between a plaintiff and defendant which by their very secretiveness, may tend to encourage wrongdoing and which, at the least, may tend to lessen the public's confidence in our adversary system." (at p.900). (emphasis added).

C. Covenant not to sue released the county.

The sipulation between Kelly and plaintiffs Foster and Ewing in this case, which they termed a "compromise settlement agreement", provided:

5. Plaintiffs agree and covenant that they will not execute against the defendant upon such judgment in any manner or proceeding other than against Salt Lake County or any insurance company affording liability coverage to the defendant at the time and place alleged in plaintiffs' first cause of action. The judgment will be released and satisfied by the plaintiffs upon the conclusion or compromise of all actions and proceedings against any insurance companies and/or Salt Lake County; however, said release and satisfaction of said judgment is to occur at the end of two years from the date of entry of judgment herein, unless at that time there is pending in any court of law an action by plaintiff against any insurance company or Salt Lake County wherein plaintiff alleges that said company or Salt Lake County owed a duty to indemnify defendant or that it afforded liability coverage to the defendant at the time and place alleged in the first cause of action of plaintiffs' complaint herein, in that event said judgment will be released and satisfied upon the conclusion or compromise of said pending action or actions. (emphasis added) (Record p.14)

Obviously, in this case, the plaintiffs have no legal right to recover damages against Kelly. Consequently, an ordinary insurance carrier under a standard policy or under an approved policy under the Safety Responsibility Act would not be obligated to the plaintiffs. (See Huffman v. Peerless Ins. Co., 193 S.E.2d 773 (N.C. 1973).

The Supreme Court of this state has held that a similar covenant not to sue entered into between a plaintiff and a negligent employee operates as a total release of the employer. Holmstead v. Diesel, Inc., 493 P.2d 625 (Utah 1972).

In Holmstead, the plaintiff initiated an action against the corporate defendant alleging that its employee, while operating his motor vehicle within the scope of his employment, negligently caused plaintiff injuries. The employee's insurance carrier obtained a covenant not to sue for a consideration of $10,000, the maximum coverage under the employee's policy. The trial court's holding that the covenant not to sue operated as a matter of law to release the master or principal from liability was affirmed by this Court citing the case of Simpson v. Townsley, (CA 10th, 1960), 283 F.2d 743, with approval, indicating that the "covenant not to sue constituted a complete exoneration of the employee and removed any foundation upon which to impute negligence to the employer." (at p.628).

Similarly, in this case, former Deputy Kelly is not legally obligated to pay damages to the plaintiffs Foster and Ewing. An ordinary insurer would, under the rationale of the Huffman and Holmstead cases, therefore, not be obligated to plaintiffs.

The purpose of requiring an indemnitor to pay only damages that the indemnitee would be legally obligated to pay is to prevent this very kind of thing: a collusive agreement between the employee and a third party that is made solely for the purpose of imposing liability on the employer.

D. The assignment of indemnification rights in this context is void due to public policy.

A stipulated judgment is a contract, not a judicial determination. Owen v. Burn Constr. Co., 563 P.2d 91 (N.M. 1977); 49 CJS Judgments §173. Contracts which are injurious to the publ good are void because of public policy. See Spaulding v. Maillet, 188 P.377 (Mont. 1920). The test of public policy was stated in Goldberg v. Sanglier, 616 P.2d 1239 (Wash. App. 1980) as:

> "The test of public policy is not what the parties did or contemplated doing in order to carry out their agreement, or even the result of its performance; it is whether the contract as made has a "tendency to evil", to be against the public good, or to be injurious to the public. At 1247.

Under the original action of the plaintiffs against Kell and the County, the defendants were not joint tort feasors. The County was joined under a theory of respondeat superior which gave a unity of identity to the two defendants. The relationship of a deputy sheriff to the County is more than that of servant and master because of the nature of the office. A deputy sheriff is not just an employee but a public officer. Pfister v. Niobrara C 557 P.2d 735 (Wyo. 1976).

The contract leading to a judgment against Kelly without a defense being required and assigning indemnification rights suff from the same policy objections as buying a witness. The promise to relieve one of a $150,000 judgment lends itself to encouraging perjury and the perversion of justice. See Western Cab Co. v. Ke 523 P.2d 842 (Nev. 1974). Any public officer defending a suit wo be open to personal pressure to waive contesting liability in exc for cooperation against the indemnifying municipality because of

potential to escape personal liability. This clearly is an incentive for an employee to commit perjury or at least shade facts.

The entering of an unopposed judgment is not the same as settling a lawsuit with one tort-feasor in this context because of the relationship of the public employee to the County. The County may only act through its agents. The relationship with a public officer is to be always strained if the officer is encouraged to turn on the County when its potential liability is only derived from that officer. Additionally, if County employees are allowed, as a matter of judicial policy, to simply "roll over" to avoid liability, there is no practical end to the County's liability exposure. A defendant employee could consent to a $10 million judgment as easily as one for $150,000. However, if these types of contracts are voided, the Indemnification Act would protect the cooperating employee ultimately and limit his exposure to that which the law intended.

Another basis for avoiding the assignment of indemnification rights is the appearance of collusion which could corrupt the process of justice. Kelly's current counsel is the same one that represents the judgment creditors. The switching of sides is complete. The assignments encourage, and make easy, an extreme perversion of justice. A public employee has everything to gain by making a deal either formally or informally to enter a consent judgment, assign indemnification rights, and take a percentage of the recovery. That way, the employee not only avoids liability but even profits from his tort. This tendency to evil should be stopped now as a matter of public policy.

In summary, the assignment by Kelly to the original plaintiffs should be voided on public policy grounds because (1) it breaches the public trust by injuring the relationship between the County and its officers, (2) perjury and perversion of justice are encouraged, and (3) the appearance of collusion encourages arrangements which work against the very policy of tort law.

POINT IV

THE TRIAL COURT ERRED BY GRANTING JUDGMENT WHICH PROVIDES FOR ACCUMULATED INTEREST ON A $150,000 JUDGMENT ENTERED AGAINST PLAINTIFF KELLY IN THE ORIGINAL TORT ACTION (CIVIL NO. C-78-1377) AND COSTS OF DEFENSE, ETC.

The trial court's Amended Finding of Fact No. 2 states:

"2. That as a self-insurer the County was obligated to provide indemnity in accordance with the financial responsibility limit provided by statute in the sum of $15,000.00 and to furnish the usual related coverage and benefits customary in the insurance industry, including paying costs of defense for David Mac Kelly and paying interest on the entire judgment amount of $150,000.00, plus costs, until the indemnity limit of $15,000.00 was paid; (emphasis added).

A. "Usual Related Coverage and Benefits".

The County formally objected to similar language set forth in the original findings of fact based upon the trial court's finding that no contract of insurance existed. To hold self-insurers to some amorphous "usual related coverage and benefits customary in the insurance industry" standard is inconceivable and totally without authority, statutory or decisional.

B. Attorneys Fees.

The law in Utah is well-settled that no obligation generally exists for a party to pay another party's attorney's fees in litigation unless such obligation is created by contract or statute. Stubbs v. Hemmert, 567 P.2d 168 (Utah 1977); Walker v. Sandwick, 548 P.2d 1273 (Utah 1976).

The duty of an insurance company to defend its insured arises out of the policy of insurance - not out of the Safety Responsibility Act. Since there was a finding that no insurance policy existed in this case, and there is no statutory requirement to defend an insured, the Court's finding of fact is in error.

C. Costs and Fees.

The awarding of costs and fees in a declaratory judgment action is governed by Section 78-33-10. That section authorizes the court to award costs as is equitable. In Western Cas. & Sur. Co. v. Marchant, 615 P.2d 423 (Utah 1980), this court indicated the standard to be applied is that each party is to assume their own costs unless incurred pursuant to litigation conducted in bad faith. The mere existence of a justifiable controversy is insufficient to assess costs.

D. Interest.

Judgment in this action was made and entered against Salt Lake County on January 31, 1983, for the sum of $15,000.00. Interest on subject judgment is accruing at the rate of 12% per annum (Section 15-1-4.)

Plaintiffs were successful in persuading the trial court to grant judgment against Salt Lake County to (1) provide indemnity

in the amount of $15,000.00; (2) reimburse costs of defense and court costs incurred in Civil Case No. C-78-1377; and (3) pay interest at the statutory rate on $150,000.00 until subject judgment is satisfied.

The general rule is that a contract of indemnity implied by law in favor of one who is legally liable for the negligence of another covers loss or damage and not liability.[5] Therefore, as in the case of contracts of indemnity against damage, a cause of action for indemnity based on tort does not accrue until the indemnitee has suffered an actual loss.[6]

In this action, plaintiff Kelly has not experienced an actual loss. His attorney's fees incurred in defending the original tort action (Civil Case No. C-78-1377) were paid by Farmer's Insurance Exchange - the liability carrier for his privately-owned vehicle - and that action has since been resolved (Supreme Court Case No. 19052).

Since plaintiff Kelly has not suffered an actual loss, he would not be entitled to any rights of indemnification under the Indemnification Act[7] nor under an implied in law indemnification requirement.

Plaintiffs' counsel offered no statutory or decisional law that would support the trial court's judgment holding the appellant liable for paying interest on a judgment not entered against

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[5] 41 AmJur2d, INDEMNITY §32; Dunn v. Uralde Asphalt Paving Co., 175 NY 214, 67 NE 439

[6] Ibid.

[7] 42 CJS Indemnity §14 c; Cunningham v. Metropolitan Gov't, 476 S.W.2d 640 (Tenn. 1972).

the County and for an amount ten times the sum the appellant could reasonably be accountable for. Since the appellant cannot find any authority, whatsoever, that would support the judgment rendered herein, it will await the respondent's brief in order to respond to this aspect of the trial court's decision.

CONCLUSION

As the owner of the vehicle involved in the collision giving rise to this suit, the appellant admits liability under the No-Fault Act. The County has a certificate of self-insurance under the No-Fault Act and has in fact paid to plaintiffs Foster and Ewing all sums due under that act.

The appellant maintains that it is not subject to the provisions of the Safety Responsibility Act by specific reference (Section 63-48-33); that equivalent security under the No-Fault Act (Section 31-41-5) does not mean "identical" security, for there would then be no differentiation between the two methods of providing security, thus giving no meaning to that section; and that the Supreme Court's decision in Allstate v. USF&G applies only to insurance policies issued as security under the No-Fault Act.

This approach is entirely consistent with a public policy that still provides the taxpayers' governing entities limited immunity from suit; the public policy which grants governing entities the authority only to insure their employees against liability for injury resulting from a negligent act or omission in the scope of their employment (Section 63-30-33); and the long-standing public policy that a tort-feasor should be responsible for his own misconduct.

Plaintiffs take a novel approach to their claim for recovery. They attempt to avoid the limitations of the Indemnifica and Governmental Immunity Acts by maintaining Kelly was merely a permissive user of the County's car They claim that permission t drive the automobile is the only relevant factor, thus urging this Court to judicially invalidate those statutes in every personal injury case involving automobiles.

It is respectfully submitted that the trial court should be reversed as a result of the plaintiffs' compromise settlement agreement of December 12, 1978, for the reasons previously discuss Public policy would dictate a reversal in this case in order to di courage similar secret agreements being reached which would damage the public's confidence in our adversary system and inherently foster collusive lawsuits.

The trial court's judgment awarding accumulated interest on an amount tenfold the judgment rendered is an anomaly that must be reserved for analysis in appellant's reply brief.

Respectfully submitted this 14th day of July, 1983.

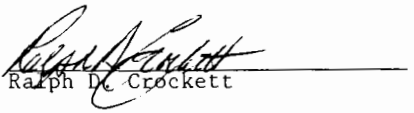
TED CANNON
Salt Lake County Attorney

By _____
RALPH D. CROCKETT
Deputy County Attorney
Attorneys for Defendant-Appel

CERTIFICATE OF DELIVERY

I certify that two copies of the foregoing Brief of Appellants were personally delivered to Carmen E. Kipp, KIPP & CHRISTI

Attorneys for Respondents, 600 Commercial Club Building, Salt Lake City, Utah, this 14th day of July, 1983.



Ralph D. Crockett