No. 20190238-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

LEONID FELDMAN, PERSONALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LIUDMILA FELDMAN, MARINA DONNELLY, AND ANTON KHOKHLOV,

Appellants,

v.

SALT LAKE CITY CORPORATION, SALT LAKE CITY

Appellees.

BRIEF OF APPELLANTS

On appeal from the Third Judicial District Court, Salt Lake County,
Honorable Robert Faust, District Court No. 180901840

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Current and Former Parties

Appellants

Leonid Feldman, Personally and as Personal Representative of the Estate of Liudmila Feldman, Marina Donnelly, and Anton Khokhlov

Represented by:
Eric Olson and Lena Daggs
Eisenberg Cutt Kendell & Olson

Appellees

Salt Lake City Corporation & Salt Lake City

Represented by:
Samantha Slark
Salt Lake City Attorney's Office

Parties Below Not Parties to the Appeal

Forsgren Associates, Inc

Represented by:
Craig Coburn
Samantha Wilcox
Richards Brandt Miller Nelson

BIO-WEST, Inc.

Represented by:
Mark Nickel
Joseph Alisa
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Introduction

The Court should reverse the District Court for dismissing this wrongful death case on a Rule 12(b)(6) motion. This case arises from an incident in which Liudmila Feldman drowned in a manmade pool at the East Creek Access Area of Parleys Historic Nature Park.[1] Liudmila entered the pool to get her dogs out, who had been playing in the pool. She was sucked under the water by a dangerous current that resulted from manmade improvements at the pool.

Liudmila's husband and kids ("Appellants") filed this wrongful death case against Appellee Salt Lake City Corporation ("SLC"). SLC filed a Rule 12(b)(6) motion to dismiss based on Section 57-14-401 of the Limitations on Landowner Liability Act ("the LLLA"). The Honorable Robert Faust ("the District Court") granted SLC's motion based on Section 57-14-401 and the open and obvious danger rule.

[1] The park is bordered by I-215, I-80 and homes. The pool in the creek is right below I-215, where water comes out from a culvert that goes under I-215.

The Court should reverse the District Court for multiple reasons. First, Section 57-14-401 expressly only applies to personal injury and property damages claims. It does not apply to wrongful death claims.

Second, Section 57-14-401 is unconstitutional as applied to the case at hand. Article XVI, Section 5 of the Utah Constitution prohibits the Legislature from abrogating wrongful death claims.

Third, Section 57-14-401 expressly only applies to "inherent risks" of the recreational activity engaged in. *See* Utah Code § 57-14-401. The dangerous manmade current in this case was not an "inherent risk" of entering a pool or creek.

Finally, the open and obvious danger rule does not eliminate a duty of care. *See Hale v. Beckstead*, 2005 UT 24, ¶25, 116 P.3d 263. Even if it did, the District Court had no basis for determining the condition at issue was open and obvious as a matter of law based on the Complaint. As a result, Appellants respectfully ask this Court to reverse the District Court for dismissing this case.

Statement of the Issues

Issue 1 – Did the District Court err when it ruled that Section 57-14-401 of the LLLA bars wrongful death claims and granted SLC's motion to dismiss?

Preservation: This issue was preserved. [R.95,200,203.]

Standard of Review: A trial court's decision granting a rule 12(b)(6) motion to dismiss a complaint is a question of law that is reviewed for correctness, giving no deference to the trial court's ruling. *See Oakwood Vill. LLC v. Albertsons, Inc.,* 2004 UT

101, ¶¶ 8-9, 104 P.3d 1226. A trial court's interpretation of a statute is a question of law, reviewed for correctness. *Harvey v. Cedar Hills City*, 2010 UT 12, ¶ 10, 227 P.3d 256.

Issue 2 – Does Section 57-14-401, as applied to wrongful death claims, violate Article XVI, Section 5 of the Utah Constitution, which prohibits statutes that abrogate the right to recover for wrongful death?

Preservation: This issue was preserved. [R.98-99,200,204-205.]

Standard of Review: Whether a statute is constitutional presents a question of law that this Court reviews for correctness. *See State v. Drej*, 2010 UT 35, ¶ 9, 233 P.3d 476.

Issue 3 – Did the District Court err when it ruled that Liudmila's death was caused by an inherent risk of getting in the creek, precluding recovery under Section 57-14-401?

Preservation: This issue was preserved. [R.95-97,200,203-204.]

Standard of Review: A trial court's decision granting a rule 12(b)(6) motion to dismiss is a question of law that is reviewed for correctness, giving no deference to the trial court's ruling. *See Oakwood Vill. LLC,* 2004 UT 101, ¶¶ 8-9. A trial court's interpretation of a statute is a question of law, reviewed for correctness. *Harvey*, 2010 UT 12, ¶ 10.

Issue 4 – Did the District Court err when it ruled that Appellants' claims are barred by the open and obvious danger rule and dismissed the Complaint?

Preservation: This issue was preserved. [R.137-138,160-162,200,205.]

Standard of Review: A trial court's decision granting a rule 12(b)(6) motion to dismiss is a question of law that is reviewed for correctness, giving no deference to the trial court's ruling. *See Oakwood Vill. LLC,* 2004 UT 101, ¶¶ 8-9.

Statement of the Case

Liudmila Feldman and her husband, Leonid Feldman, took their two dogs to Parleys Historic Nature Park in Salt Lake City on April 23, 2017. [R.2.] The dogs jumped into a manmade pool at the East Creek Access Area of the park. [R.3,491-493.] Leonid entered the pool to get the dogs out of the water. [R.3,492-493.] Leonid was unsuccessful in getting the dogs out and was pushed downstream. [R.3,492-493.] Liudmila then entered the water to get the dogs out. [R.3,492-493.] She was caught in a dangerous current in the pool and drowned. [R.3,492-493.] The dangerous current resulted from manmade improvements at the East Creek Access. [R.3,492-493.]

Appellants filed a wrongful death suit against SLC and against two other entities, BIO-WEST, Inc. and Forsgren Associates, Inc. who were believed to be involved in the development and design of improvements to the pool. [R.2.] Appellants alleged in the Complaint that SLC was negligent in owning, operating, maintaining, designing, developing, repairing and warning of dangers in the pool. [R.3-6.] They alleged that SLC was a possessor of the pool, knew the pool presented an unreasonable risk of harm, should have expected that Liudmila would not discover the dangerous condition, and failed to exercise reasonable care to protect or warn her from the danger. [R.2-6.]

SLC moved to dismiss pursuant to Rule 12(b)(6), arguing that it was immune from suit pursuant to Utah Code Ann. §57-14-401. [R.36-40.] Appellants argued that the statute did not apply to their claims and would be unconstitutional if it did. [R.91-100.] In reply, SLC added that the Complaint should be dismissed because the danger in the pool was open and obvious. [R.137-138.]

The District Court granted SLC's motion to dismiss and issued a memorandum decision, finding that Section 57-14-401 barred the Heirs' claims and the danger was open and obvious. [R.200-206.] After the District Court granted SLC's motion to dismiss, Appellants commenced discovery against the remaining two defendants, BIO-WEST, Inc. and Forsgren Associates, Inc. and determined that they had no significant involvement in the improvements at the pool. [R.327-338,369-376,433,435.] As a result, BIO-WEST and Forsgren Associates were dismissed from the case on the merits. [R.445-446,452-453,459-460.] Appellants commenced this appeal as to SLC only. [R.464-465.]

Summary of the Argument

Section 57-14-401 of the LLLA does not bar Appellants' claims under its plain language. First, Section 57-14-401 expressly applies to "personal injury" claims, but Appellants' claims are wrongful death claims. Utah case law is clear that personal injury and wrongful death claims are different claims. *See Riggs v. Georgia-Pac. LLC,* 2015 UT 17, ¶16, 345 P.3d 1219. Wrongful death claims are not derivative of personal injury claims. *Id.* at ¶12. The right to recover for wrongful death is statutory, whereas the right

to recover for personal injury is based on the common law. *See* Utah Code Ann. § 78B-3-106(1). And, wrongful death claims have special constitutional protections that personal injury claims do not. Apparently recognizing all this, the Legislature has differentiated between claims for personal injury and wrongful death in the LLLA itself. *See* Utah Code Ann. § 57-14-501 (2019).

Second, Section 57-14-401 is unconstitutional if it applies to wrongful death claims. Utah's Constitution prevents the Legislature from abrogating wrongful death claims in whole or in part. *See* Utah Const. art. XVI, § 5. Section 57-14-401 has wholly abrogated Appellants' claim, as applied by the District Court.

Third, Section 57-14-401 expressly applies only to "inherent risks" of an activity and the manmade dangerous condition at issue is not an "inherent risk" of entering a creek or pool. The LLLA defines "inherent risk" as a "natural" and "integral" part of an activity. *See* Utah Code Ann. § 57-14-102 (2017). The manmade condition is not a natural or integral part of entering a pool or creek.

Further, case law from a different recreational statute that uses the term "inherent risks" has interpreted the term to mean those risks that a recreator would want to confront or that cannot be removed by the exercise of reasonable care. *See Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1047 (Utah 1991). Applying this definition, the dangerous manmade current does not qualify as an "inherent risk" based on the Complaint. [R.3.]

Finally, Appellants' claims are not barred by the open and obvious danger rule. In the seminal case of *Hale v. Beckstead*, this Court clarified confusion surrounding the open and obvious danger rule. 2005 UT 24, ¶15, 116 P.3d 263. The rule does not

"eliminate any duty to protect or warn his invitees of obvious dangers." *Id.* at ¶25. It simply "defines the duty of care a landowner owes an invitee" with respect to known and obvious dangers. *Id.* at ¶14. The Complaint properly pleads a claim for SLC's liability, whether the dangerous condition was open and obvious or not.

Hale aside, it was improper for the District Court to determine as a matter of law that the dangerous condition at issue was an open and obvious danger. The Complaint does not support this. And the District Court relied on information that is obviously outside the Complaint for its determination. In light of the foregoing, the District Court's ruling on SLC's motion to dismiss should be reversed.

Argument

The District Court erred when it granted SLC's 12(b)(6) motion to dismiss. "Rule 12(b)(6) dismissals are appropriate only where the court concludes that the plaintiff has failed to state a claim upon which relief can be granted, after accepting all the factual allegations made in the complaint as true and drawing all reasonable inferences in a light most favorable to the plaintiff." *Tuttle v. Olds*, 2007 UT App 10, ¶6, 155 P.3d 893 (citation omitted).

> "A Rule 12(b)(6) dismissal is merely a recognition by a trial court that a plaintiff's claim for relief is formally deficient; therefore, a motion to dismiss is appropriate only where it clearly appears that the plaintiff or plaintiffs would not be entitled to relief under the facts alleged or under any state of facts they could prove to support their claim."

Sony Electronics, Inc. v. Reber, 2004 UT App 420, ¶10, 103 P.3d 186 (citations and quotations omitted).

"A dismissal is a severe measure and should be granted by the trial court only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim." *Mackey v. Cannon*, 2000 UT App 36, ¶9, 996 P.2d 1081 (citations and quotations omitted). "The courts are a forum for settling controversies, and if there is any doubt about whether a claim should be dismissed for the lack of a factual basis, the issue should be resolved in favor of giving the party an opportunity to present its proof." *Id.* at ¶12.

"If a court considers material outside the pleadings in deciding a Rule 12(b)(6) motion to dismiss, the court must convert the motion into one for summary judgment." *Tuttle*, 2007 UT App 10 at ¶8 (citation omitted). "It is error to consider a motion to dismiss as a motion for summary judgment, without giving the adverse party an opportunity to present pertinent material." *Strand v. Associated Students of University of Utah,* 561 P.2d 191, 193. (Utah 1977).

The District Court erred in granting SLC's motion to dismiss for several reasons. First, Section 57-14-401 expressly does not apply to wrongful death claims and the case at hand is a wrongful death case. Second, applying Section 57-14-401 to Appellants' claims would violate Article XVI, Section 5 of the Utah Constitution. Third, Section 57-14-401 only applies to "inherent risks" and the dangerous manmade condition in the pool is not an "inherent risk" under the statutory definition. Fourth, the open and obvious danger rule does not bar Appellant's claims, especially on a Rule 12(b)(6) motion.

I. Under the plain language of Section 57-14-401, it does not apply to wrongful death claims.

The Court has stated the rules of statutory construction as follows:

> The primary objective of statutory interpretation is to ascertain the intent of the legislature. Since the best evidence of the legislature's intent is the plain language of the statute itself, we look first to the plain language of the statute. In so doing, we presume that the legislature used each word advisedly. We also presume that the expression of one term should be interpreted as the exclusion of another, ... thereby presuming all omissions to be purposeful. When we can ascertain the intent of the legislature from the statutory terms alone, no other interpretive tools are needed, and our task of statutory construction is typically at an end.

Bagley v. Bagley, 2016 UT 48, ¶10, 387 P.3d 1000 (citations, quotations and brackets omitted). When these rules are applied to Section 57-14-401, it is clear that Section 57-14-401 does not apply to wrongful death claims.

Section 57-14-401 only states that it bars "personal injury or property damage" claims. Indeed, Section 57-14-401 provides that "a person may not make a claim against or recover from an owner of any land … for **personal injury** or property damage caused by the inherent risks of participating in an activity with a recreational purpose on the land." Utah Code Ann. § 57-14-401 (2017) (emphasis supplied). However, the Complaint alleges wrong death claims. [R.6.] A wrongful death claim is different and separate from a personal injury claim.

This Court has made clear that "causes of action for personal injury and wrongful death are different…." *Riggs*, 2015 UT 17, ¶16. A wrongful death claim is not "a derivative action" from a personal injury claim. *Id.* at ¶12. Rather, "a wrongful death action is independent" from a personal injury claim. *Id.* In *Riggs,* this

Court held that a judgment obtained by decedent on her personal injury claim did not bar decedent's heirs from asserting wrongful death claims after her death, since the claims were separate. *Id.*

Further, a wrongful death claim is a statutory claim rather than a common law personal injury claim. Indeed, a wrongful death claim is codified in Utah: "[W]hen the death of a person is caused by the wrongful act of another, his heirs…may maintain an action for damages against the person causing the death…" Utah Code Ann. § 78B-3-106(1). This Court, when analyzing Section 78B-3-106, stated that "[t]his language unambiguously, and without caveat, grants a person's heirs the right to maintain an action for damages" and there is "nothing in the statute to suggest that the cause of action is tied to the decedent's underlying personal injury claim." *Riggs,* 2015 UT 17, ¶11. "Utah chose to make wrongful death an independent action accruing in the heirs of the decedent – a choice reflected in its inclusion in the constitution as well as the language of the wrongful death statute." *Id.* at ¶14; *see also Hull v. Silver,* 577 P.2d 103, 104 (Utah 1978) (holding that wrongful death action is not derivative and thus is not subject to the defense of interspousal tort immunity.); *Matter of Estate of Sims,* 918 P.2d 132, 135–36 (Utah Ct. App. 1996) (holding that a wrongful death case is not a personal injury case.)

The Legislature knows there is a difference between personal injury and wrongful death claims. That is why it recently distinguished between injury claims and wrongful death claims when it enacted Section 57-14-501 of the LLLA. Section 501 provides:

> In an action arising on or after May 14, 2019, against an owner of land **for an injury to a person** or damage to property, if a plaintiff is awarded

> noneconomic losses, the amount of the award for noneconomic losses may not exceed $450,000.
>
> The limit described in Subsection (1) **does not apply to … a claim for wrongful death**[.]

Utah Code Ann. § 57-14-501 (2019) (emphasis supplied). The Legislature clearly differentiated between an action for "an injury to a person" and a "claim for wrongful death." *Id.* If the Legislature intended Section 57-14-401 to apply to wrongful death claims, it would have added the language "wrongful death." Thus, Section 57-14-401 applies to personal injury claims and not wrongful death claims.

Apart from being the plain language interpretation, Appellants' interpretation is necessary to avoid a blatant violation of Article XVI, Section 5 of the Constitution of Utah, which provides: "The right of action to recover damages for injuries resulting in death, shall never be abrogated and the amount recoverable shall not be subject to any statutory limitation[.]" Applying Section 57-14-401 to wrongful death claims would violate this provision because it would abrogate the right of action entirely.

This Court has made clear that when "construing statutes, we are obligated to avoid interpretations that conflict with relevant constitutional mandates." *State v. Mooney*, 2004 UT 49, ¶12, 98 P.3d 420 (quotations omitted). Because applying Section 57-14-401 to a wrongful death claim would violate the Utah Constitution, the term "personal injury" should not be construed to include a "wrongful death" claim. Presumably, it was to avoid this constitutional problem that the Legislature exempted wrongful death claims from being capped on damages by Section 57-14-501 of the LLLA. This Court has already held in another context that a cap on non-economic

damages is unconstitutional in a wrongful death case. *See Smith v. U.S.,* 2015 UT 68, ¶2, 356 P.3d (holding Utah medical malpractice act's cap on non-economic damages was unconstitutional in wrongful death case.)

The District Court declined Appellants' argument, stating that "it is 'well establish … that a statutory reference to 'personal injury' claims includes all personal torts. *See e.g., Gressman v. State*, 2013 UT 63, ¶ 26, 323 P.3d 998." [R.203]. Discussion of the facts and legal issues in *Gressman* shows that the sentence relied on by the District Court is taken out of context and inapplicable to the issues at hand.

Gressman was convicted of rape, imprisoned and later exonerated by new evidence. *Id.* at ¶¶3-5. He sued under the Post-Conviction Remedies Act ("PCRA") for financial assistance, but died while his case was pending. *Id.* at ¶5. Gressman's widow pursued the case and prevailed. *Id.* The State appealed the issue of whether Gressman's PCRA claim survived his death. *Id.*

On appeal, the Court analyzed Utah's survival statute, which provides: "[a] cause of action arising out of personal injury to a person ... does not abate upon the death of the wrongdoer or the injured person." *Id.* at ¶24. (quoting Utah Code Ann. § 78B-3-107). To decide whether the statutory PCRA survived Gressman's death, the Court assessed whether the PCRA claim constituted a "personal injury to a person." *Id.* The Court noted that the claim was similar to a claim "false imprisonment and malicious prosecution." *Id.* at ¶24. The Court noted that: "Under the common law, both false imprisonment and the malicious prosecution of a criminal action are categorized as torts against the person (as opposed to torts against property) because these torts infringe upon

an individual's personal liberty interests." *Id.* at ¶25. Accordingly, the Court held that Gressman's PCRA claim survived his death. *Id.* at ¶28. For support, the Court noted that the statutory history behind the survival statute, including a 1991 amendment, supported its conclusion. *Id.* at ¶30. In so holding, the Court included the following sentence in its opinion: "In light of the well-established principle that a statutory reference to 'personal injury' claims includes all personal torts (as opposed to property torts), the legislature's 1991 amendment evidences an intent to expand the types of actions that would survive." *Id.* at ¶31. This is the sentence that the District Court relied on to hold that Section 57-14-401's reference to "personal injury" claims includes "wrongful death" claims. [R.203.]

As is plain from the foregoing discussion of *Gressman*, the sentence relied on by the District Court is taken out of context from a case that has no application in this case, either factually or from a legal issues standpoint. The *Gressman* Court did not address, even in dicta, whether a statutory reference to "personal injury" claims would include "wrongful death" claims. Thus, the District Court erred by applying Section 57-14-401 to Appellants' wrongful death claims.

II. Applying Section 57-14-401 to this case would violate the Utah Constitution.

Utah's Constitution prohibits the legislature from abrogating wrongful death claims. The Constitution provides:

> The right of action to recover damages for injuries resulting in death, *shall never be abrogated*, and the amount recoverable shall not be subject to any statutory limitation[.]

Utah Const. art. XVI, § 5 (emphasis added). This provision was directed at preventing the Legislature from abolishing a wrongful death claim "in a wholesale or piecemeal fashion." *Berry By and Through Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 684 (Utah 1985). The constitutional provision "confers special status on the cause of action for wrongful death." *Bybee v. Abdulla*, 2008 UT 35, ¶ 17, 189 P.3d 40. This Court has "attributed the incorporation of the wrongful death cause of action into our constitution to the perceived importance of the right and to a desire to remove any uncertainty in our state about its viability." *Id.* ¶ 18. Article XVI is not subject to the same kind of balancing analysis required by other constitutional provisions, such as the open courts doctrine. *See Berry,* 717 P.2d at 683. The provision is mandatory and "not susceptible to legislative encroachment." *Bybee*, 2008 UT 35, ¶ 19.

Utah courts have repeatedly held that legislative encroachments into wrongful death claims are unconstitutional. For instance, in *Berry*, this Court held that the statute of repose in the Product Liability Act violated the wrongful death provision because it barred a claim before it arose. 717 P.2d at 684-85. In *Malan v Lewis*, this Court held that the automobile Guest Statute violated the wrongful death provision. 693 P.2d 661, 667 (Utah 1984). The Court stated that "[t]he plain language of Article XVI, [section] 5 seems to compel the conclusion that the Guest Statute is unconstitutional insofar as it purports to bar the heirs of a guest killed as a result of a driver's negligence from bringing a wrongful death action against the host driver." *Id.*

In *Lindsay v. Royal Boon Edam International*, the Fourth District Court found that a statute of repose that barred claims against contractors a certain number of years after

construction was completed was unconstitutional in wrongful death cases under Section 5. Case No. 140400261 (Utah 4th Dist. Ct., June 24, 2015), [R.121-122]. In *Bybee v. Abdulla*, this Court stated that it "harbor[ed] serious doubts that a statute purporting to empower a person to bind an heir to arbitrate a wrongful death claim could coexist with article XVI, section 5." 2008 UT 35, ¶ 20. In *Smith v. U.S.*, this Court held that the cap on noneconomic damages in the Utah Medical Malpractice Act violated the wrongful death provision because it limited the damages available in wrongful death malpractice cases. 2015 UT 68, ¶ 28.

In all of these cases, this Court found that the Legislature encroached too far into the plaintiffs' constitutional right to pursue wrongful death claims. Yet, in the majority of these cases, the plaintiffs still had the ability to pursue a claim in court; they were only limited as to damages or the time within which they could file suit. Here, Section 57-14-401's effect is significantly more troubling (as applied by the District Court) because it completely prevents Appellants from pursing their claims against landowners. Section 57-14-401 is most analogous to the automobile Guest Statute in *Malan*, which prevented non-paying passengers from suing drivers for negligence. There, the Court summarily stated that the plain language of the Constitution "compels" the conclusion that the statute is unconstitutional. The Constitution compels the same conclusion here. *See Jim Butler*, Outdoor Sports and Torts: An Analysis of Utah's Recreational Use Act, 1988 Utah L. Rev. 47, 109 (1988) (arguing LLLA "cannot withstand constitutional scrutiny" in

wrongful death case under Section 5 because the LLLA would completely extinguish "the right to bring a wrongful death action against a negligent landowner").[2]

The District Court declined Appellants' constitutional argument because of *Tiede v. State*, 915 P.2d 500 (Utah 1996). [R.204.] The Court in *Tiede* held that the limitations imposed by the Governmental Immunity Act ("GIA") did not violate the wrongful death constitutional provision because "there was no express constitutional or statutory authority allowing suits for wrongful death against the State" at the time the constitution was adopted in 1895. *Id.* at 504.

Tiede is inapplicable for at least two reasons. First, Appellants do not challenge the constitutionality of the GIA. State sovereign immunity was indeed a settled feature of the common law when Utah became a state. *Id.* However, no such immunity existed for recreational landowners at that time. Instead, common law premises liability placed a duty on landowners and possessors to protect invitees and licensees who came on their property. *See Smalley v. Rio Grande Western Ry. Co.* 98 P. 311, 319 (Utah 1908) (It is "the general rule" that "when one induces or invites another upon his premises, he must use ordinary care to avoid injuring him"); and *Robert Driscoll,* The Law of Premises Liability in America: Its Past, Present, and Some Considerations for Its Future, 82 Notre Dame L. Rev. 881, 883 (2006). Thus, invitees or licensees who died as a result of negligence of a landowner or possessor had a right of action at the time the Utah

[2] The Utah Supreme Court has cited to *Butler* in construing the LLLA. *See Golding v. Ashley Cent. Irr. Co.*, 793 P.2d 897, 900 (Utah 1990); *Crawford v. Tilley*, 780 P.2d 1248, 1251, FN2 (Utah 1989); and *Loosli v. Kennecott Copper Corp.*, 849 P.2d 624, 626, FN 1 (Utah Ct. App. 1993).

Constitution was adopted in 1895. *See Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1179, 1184 (Utah 1983) ("The Utah wrongful death act was originally passed by the Territorial Legislature in 1874 to remedy the harsh effects of the common law rule which did not recognize wrongful death actions at all.") In fact, it was because the right existed to sue a landowner or other tortfeasor for wrongful death that Article XVI, section 5 was made part of the Constitution. *See Bybee v. Abdulla,* 2008 UT 35, ¶18 ("The wrongful death cause of action entered Utah territorial law in 1874 and was incorporated into the Utah Constitution when Utah entered the Union.")

That said, *Tiede* and its reasoning are inapplicable. SLC has not raised the GIA or sovereign immunity. That is because the Legislature already decided in the GIA to expressly waive immunity for "any injury caused by (i)…a defective, unsafe, or dangerous condition of any…culvert, tunnel, bridge, viaduct, or other structure located on them; or (ii) any defective or dangerous condition of a public building, structure, dam, reservoir, or other public improvement." Utah Code Ann. § 63G-7-301(h).

Instead, SLC has raised Section 57-14-401 solely based on its ownership of land. Utah Const. article XVI, section 5 prohibits the Legislature from abrogating the liability of landowners for wrongful death. SLC should not get special treatment just because it happens to be a government landowner, when the Legislature has waived sovereign immunity for dangerous improvements on public land.

Appellants pled in their Complaint that the condition that killed Liudmila "resulted from manmade developments." [R.3.] Thus, there is no sovereign immunity in this case. Section 63G-7-301(h) of the GIA makes this clear. *Tiede*'s ruling regarding sovereign

immunity and the constitutionality of the GIA is therefore inapplicable. And Article XVI, section 5 prohibits application of Section 57-14-401 to the wrongful death claims at hand.

The second reason *Tiede* is inapplicable is because, although the State had sovereign immunity at the time the Constitution was created, municipalities did not have sovereign immunity. Indeed, at statehood, municipalities were held liable in negligence for breach of a duty of due care. For instance, in *Levy v. Salt Lake City*, SLC was held liable for flooding of the plaintiff's property as a result of negligently managing the flow and distribution of water in public channels and water courses. 1 P. 160, 161 (Utah 1881). In *Scoville v. Salt Lake City*, the Court upheld a jury verdict that found SLC liable for injury that resulted from the plaintiff slipping on ice, stating: "to require the municipalities to keep their walks free of ice and snow, especially in particular localities, is by no means unreasonable." 39 P. 481, 483 (Utah 1895). In *Brown v. Salt Lake City*, the Court upheld a jury verdict that found SLC liable for wrongful death, holding:

> But if it [the city] undertakes to open, improve, or grade the highway, street, or sidewalk, dig the sewer or drain, build the bridge, construct the culvert, open the park, plant the shade trees, light the street or bridge, erect the public building, or waterworks, or wharf, or pier, or dock, and its officers and agents do the work negligently or unskillfully, or negligently suffer it to get out of repair, and in consequence of such negligence or unskillfulness and not in consequence of the mere fact that the work was done, damage accrues to a private person, he may maintain an action against the city therefor.

93 P. 570, 574 (Utah 1908) (abrogated on other grounds by *Kessler v. Mortenson*, 2000 UT 95, 16 P.3d 1225). There are numerous additional cases of Utah cities being held liable for negligence at the time of statehood. *See also Naylor v. Mountain Stone Co. et*

al, 35 P. 509, 510 (Utah 1894) (upholding verdict against city for injuries caused by obstruction in street); *Thomas v. Springville City,* 35 P. 503, 505 (Utah 1894) (upholding verdict against city for injuries caused by negligent maintenance of bridge); *Yearance v. Salt Lake City*, 24 P. 254, 256 (Utah 1890) (upholding verdict against city for injuries caused by bricks on sidewalk.)

In the case at hand, SLC is a municipality. Because municipalities were not immune from suit at statehood, *Tiede* and its reasoning do not apply. Wrongful death claims against municipalities are protected by Article XVI, § 5.

The District Court also declined Appellants' constitutional argument based on *Hirpa v. IHC Hospitals, Inc.*, where the Court upheld the Good Samaritan Act ("GSA") against a wrongful death constitutional challenge. 948 P.2d 785, 794 (Utah 1997). This case is clearly distinguishable. The GSA only provided "immunity to a physician rendering emergency medical care … **if the physician is under no preexisting duty to do so**." *Id.* (emphasis added). Thus, the Court held that the GSA was "not inconsistent with the fundamental nature of the wrongful death action itself." *Id.*

In the case at hand, Section 57-14-401 provides immunity to landowners who have always owed a common law duty of reasonable care to invitees on their property. Thus, Section 57-14-401 is totally inconsistent with the wrongful death action. To deem it otherwise "is an invitation to rewrite the Constitution." *Berry*, 717 P.2d at 685.

Further, the *Hirpa* court noted that the GSA was based on the important policy of "encourage[ing] licensed medical providers to render potentially life-saving medical care" when they have no duty to do so. *Hirpa*, 948 P.2d at 793. Section 57-14-401 on

the other hand would not encourage landowners to take life-saving measures to protect recreators when they had no preexisting duty to do so. Quite the opposite is true. Section 57-14-401 would discourage landowners from taking life-saving measures by making them immune, even though landowners have always been liable for negligence. Indeed, as applied by the District Court, Section 57-14-401 would make SLC immune for the death of a child at a SLC park playground even if SLC knew about the dangerous condition and did nothing about it. That would be an unconscionable result.

Last, the importance of encouraging landowners to open their land for recreation cannot seriously be compared to the importance of encouraging physicians to save lives. One involves saving lives. The other involves having fun.

III. Section 57-14-401 does not apply because Liudmila did not die from an "inherent risk" of the pool.

Section 57-14-401 only purports to bar injuries caused by the "inherent risks" of an activity. Utah Code Ann. § 57-14-401 (2017). The term "'Inherent risks' means those dangers, conditions, and potentials for personal injury or property damage that are an **integral** and **natural** part of participating in an activity for a recreational purpose." Utah Code Ann. § 57-14-102 (2017) (emphasis added). Liudmila's death was not caused by an "inherent risk" of entering the pool because it was not caused by a "natural" or "integral" part of the pool.

First, Liudmila's death was not caused by a "natural" part of entering the pool. Liudmila's death was caused by a manmade condition that resulted in the dangerous current. [R.3,491-493.] The dangerous manmade condition cannot be "natural" because

it is manmade. Second, Liudmila's death was not caused by an "integral" part of entering the pool. A dangerous manmade current is not an "integral" part of a pool. *See* Utah Code Ann. § 57-14-102 (2017).

This Court's interpretation of a similar statute, the "Inherent Risks of Skiing Act," illustrates the definition of inherent risks. *See Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1047 (Utah 1991). Prior to *Clover*, the legislature enacted the Inherent Risks of Skiing Act, which purported to bar claims against a ski resort "for injury resulting from any of the inherent risks of skiing." Utah Code Ann. § 78B-4-403. The statute defined "Inherent risks of skiing" as "those dangers or conditions which are an integral part of the sport of recreational, competitive, or professional skiing[.]" Utah Code Ann. § 78B-4-402. This Court held that "inherent risks of skiing" are "those risks that are essential characteristics of skiing—risks that are so integrally related to skiing that the sport cannot be undertaken without confronting these risks." *Clover*, 808 P.2d at 1047. The court determined that such risks "can be divided into two categories." *Id.* "The first category of risks consists of those risks … which skiers wish to confront as an essential characteristic of skiing." *Id.* "The second category of risks consists of those hazards which no one wishes to confront but cannot be alleviated by the use of reasonable care on the part of a ski resort." *Id.* Applying this holding, the Court reversed the trial court for granting summary judgment under the Inherent Risks of Skiing Act because there were disputed facts as to whether the condition at issue (a blind jump with a landing where skiers enter the run) was an "inherent risk of skiing," *i.e.*, whether the danger could have been eliminated "through the use of reasonable care." *Id.* at 48.

The District Court distinguished the *Clover* case in its memorandum decision because ski resorts owe duties of care to their paying customers, whereas landowners owe no duty to non-paying customers under the LLLA. [R.204]. The District Court relied on Section 57-14-201 of the LLLA, which states that landowners owe no duty of care. *Id.* However, SLC did not base its motion on Section 57-14-201; SLC based its motion only on Section 401, which was enacted decades after Section 57-14-201. SLC most likely based its motion only on Section 57-14-401 because Section 57-14-401 purports to apply to an "improved ... park," and SLC knows all too well that the other sections of the LLLA do "not apply to ... improved urban or suburban municipal parks." *De Baritault v. Salt Lake City Corp.*, 913 P.2d 743, 748 (Utah 1996). The park at hand is clearly an urban or suburban municipal park, and thus, Section 57-14-201's duty limitation would not apply here. Thus, the District Court's reliance on that provision was misplaced.[3]

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[3] If the applicability of Section 57-14-201 is raised as a separate basis for affirming the District Court's decision, Appellants also ask this Court to reverse the District Court's denial of Appellants' motion to amend. [R.205]. After SLC filed its motion to dismiss, Appellants moved to amend the Complaint to specifically plead an express exception to Section 57-14-201. [R.78-87.] Section 57-14-204 states: "Nothing in this part limits any liability that otherwise exists for ... willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity." Utah Code Ann. § 57-14-204. As interpreted by the Court, this exception only requires proof of the defendant's "(1) knowledge of a dangerous condition, (2) knowledge that serious injury is the probable result of contact with the condition, and (3) inaction in the face of such knowledge." *Loosli v. Kennecott Copper Corp.*, 849 P.2d 624, 627 (Utah Ct. App. 1993) (citing *Golding v. Ashley Cent. Irr. Co.*, 793 P.2d 897, 901 (Utah 1990)).

The proposed Amended Complaint alleged that SLC acted willfully or maliciously in that SLC failed to warn of the dangerous condition, failed to remedy the condition, failed to guard against the condition and failed to maintain the creek even though SLC knew of the dangers and knew that serious injury would probably result from contact

Regardless of what Section 57-14-201 says about duty, it does not make sense to distinguish *Clover* based on duty because the relevant issue in *Clover* was what constitutes an *inherent risk*, and not whether a duty was owed.

Further bolstering Appellants' interpretation of "inherent risks," the Legislature has also enacted Utah Code Ann. § 78B-4-512, which bars claims for damages caused by "an inherent risk of agritourism." Similar to *Clover*, the legislature defined "inherent risk of agritourism" as "a danger, hazard, or condition which is an integral part of an agricultural tourism activity **and that cannot be eliminated by the exercise of reasonable care**[.]" Utah Code Ann. § 78B-4-512 (emphasis supplied).

Consistent with the foregoing, a dangerous current caused by a manmade hazard is not "integral" to a pool. A dangerous current is not something anyone wishes to confront when entering a pool. Nor is it something that cannot be eliminated by the exercise of reasonable care. Indeed, Appellants alleged that SLC failed to exercise reasonable care to remedy the dangerous condition. [R.5.]

The Legislature knows that limiting the application of Section 57-14-401 to "inherent risks" is different than making Section 57-14-401 applicable to any and all

---

with the condition. [R.81-87.] Apart from *De Baritault*, 913 P.2d 743, and Utah Const., Article XVI, § 5, this amendment would be an additional basis for finding that Section 57-14-201 does not bar Appellants' case.

The District Court denied the motion to amend, concluding it was futile because the exception in Section 57-14-204 only applies to Part 2 and Section 57-14-401 is in Part 4. [R.205.] Appellants believe this conclusion further contradicts the District Court's reliance on Section 57-14-201 (which is in Part 2) to distinguish *Clover*.

potential risks. In May, 2019, the Legislature amended Section 57-14-401 and replaced "caused by the inherent risks of participating in an activity" with "caused directly or indirectly by participating in an activity[.]" Limitations on Landowner Liability Amendments, 2019 Utah Laws Ch. 345 (S.B. 180). This change broadens the applicability of Section 57-14-401. The amendment does not apply in the case at hand because it was not in force when Liudmila died and the statute does not say the amendment is retroactive.[4] But what the change does show is that "inherent risks" means something different than "anything possible."

The District Court relied on *Golding v. Ashley Cent. Irr. Co.,* 902 P.2d 142 (Utah 1995) to support its conclusion that Liudmila's death was caused by an inherent risk of the pool. However, *Golding* was decided about 18 years before the enactment of Section 57-14-401. The issue in *Golding* was not whether a dangerous current was an "inherent risk." The Court held that the defendant was immune based on the defendant being a canal owner, and due to special immunity given to canal owners for public policy reasons. *Id.* at 146-147. Parley's Creek is not a canal and SLC is not a canal owner.

IV. The open and obvious danger rule does not preclude liability

Lastly, the District Court erred when it ruled that the dangerous condition was open and obvious. [R.205]. In the seminal case of *Hale v. Beckstead,* this Court clarified

[4] It is well established that, "the courts of this state operate under a statutory bar against the retroactive application of newly codified laws and therefore parties' substantive rights and liabilities are determined by the law in place at the time when a cause of action arises." *Waddoups v. Noorda,* 2013 UT 64, ¶6, 321 P.3d 1108. "[A] provision of the Utah Code is not retroactive, unless the provision is expressly declared to be retroactive." *Id.*; *See also Harvey,* 2010 UT 12, ¶13.

confusion surrounding the open and obvious danger rule. 2005 UT 24, ¶15, 116 P.3d 263. The Court made clear that the rule does not "eliminate any duty to protect or warn his invitees of obvious dangers." *Id.* at ¶25. It simply "defines the duty of care a landowner owes an invitee" with respect to known and obvious dangers. *Id.* at ¶14. For example, "if a landowner should expect that an invitee will … fail to protect himself against a dangerous condition, the landowner must exercise reasonable care to protect him," even if the danger is open and obvious. *Id.* at ¶25. (internal quotations omitted.) Similarly, should a landowner expect that the invitee "will not discover or realize the danger," the landowner owes a duty even if the danger is obvious. *Restatement (Second Torts)* §343. Or, "if the possessor has reason to believe that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk," then the possessor must use reasonable care. *Hale*, 2005 UT 24, ¶26.

In the case at hand, the Complaint specifically alleges that SLC "should have expected that Liudmila would not discover or realize the dangerous condition of the hazard or would fail to protect herself against the hazard." [R.5.] Regardless of whether the danger was obvious or not, the Complaint alleges that SLC "failed to exercise reasonable care to protect or warn Liudmila from the hazard." *Id.* Taking these allegations as true, SLC had to exercise reasonable care under *Hale* even if the danger was open and obvious. *Hale*, 2005 UT 24, ¶25; and *Restatement (Second Torts)* §343A. Thus, dismissal was improper.

Although SLC can still be liable for open and obvious dangers under *Hale*, it was also improper for the District Court to determine that the danger was open and obvious. The allegations of the Complaint certainly do not show that the hazard was open and obvious, especially when reasonable inferences are drawn in Appellants' favor. The Complaint does not allege that (1) Liudmila knew there was a current that could suck her under the water; (2) the water appeared deep enough for an adult to drown in; or (3) the dogs were trapped under water at any point. [R.1-7.]

Instead, the Complaint alleges that (1) the dogs entered the creek; (2) Liudmila's husband entered to get the dogs out; (3) Leonid was swept downstream; (4) Liudmila entered to get the dogs out, was sucked under water and drowned; (5) Liudmila did not discover or realize the dangerous condition; and (6) SLC did not warn of the danger. *Id.* These facts do not make the condition open and obvious as a matter of law. If the allegations are actually accepted as true and viewed in Appellants' favor, Liudmila did not know about the dangerous condition because the water appeared too shallow for an adult to drown in, her dogs were not being sucked under the water, she had just seen Leonid get harmlessly pushed out of the pool by the current and there were no signs that indicated a danger. These facts would not support a conclusion, especially as a matter of law, that the dangerous condition was open and obvious.

Further, although the District Court noted at oral argument that it was familiar with the area in question, it would be improper for the District Court to substitute its own personal experience at the area, on a different day, on motion to dismiss. [R.474,490-493.]

Last, although the District Court stated in its Memorandum Decision that "there were warning signs posted at the location," the Complaint alleges that SLC "failed to … warn Liudmila[.]" [R.4,205.] Rather than accept this allegation as true, it appears the District Court relied on a photo that SLC attached to the reply brief of its motion, which showed signage at the area in question. [R.141.] Apart from not being allowed to consider the photo because it was outside the Complaint, the District Court did not fairly characterize the signage. The signage reads: "CREEK ACCESS … VISITORS & PETS ARE WELCOME TO ACCESS THE CREEK AT THIS DESIGNATED AREA … CAUTION/PRECAUTION HIGH AND SWIFT WATER." *Id.* Appellants believe this signage supports their failure to warn claim rather than undermines it. As a result, the District Court erred in concluding that the Complaint is barred by the open and obvious danger rule.

Claim for Attorney Fees

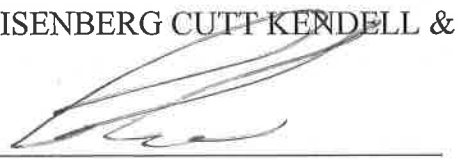
Appellants do not seek attorney fees for work performed on appeal.

Conclusion

For the foregoing reasons, the Court should reverse the dismissal of the Appellants' Complaint against Salt Lake City.

DATED this 24th day of June, 2019.

EISENBERG CUTT KENDELL & OLSON



Eric Olson
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Attorneys for Appelants Leonid Feldman, Personally and as Personal Representative of the Estate of Liudmila Feldman, Marina Donnelly, and Anton Khokhlov

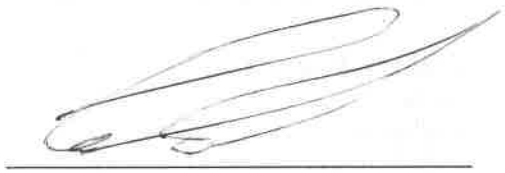
Certificate of Compliance

I hereby certify that:

1. This brief complies with the word limits set forth in Utah R. App. P. 24(g)(1) because this brief contains 8,042 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with Utah R. App. P. 21(g) regarding public and non-public filings.

DATED this 24th day of June, 2019.



Certificate of Service on the Parties

This is to certify that on the 24th day of June, 2019, I caused two true and correct copies of the Brief of Appellants to be served via first-class mail, postage prepaid, with a copy by email, on:

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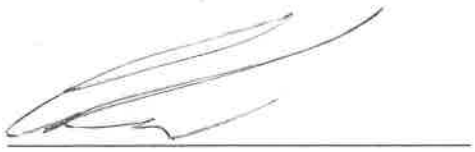

Certificate of Service on the Utah Attorney General

Pursuant to rule 25A of the Utah Rules of Appellate Procedure, I hereby certify that on the 24th day of June, 2019, I caused two true and correct copies of the Brief of Appellants to be served via first-class mail, postage prepaid, with a copy by email, on:

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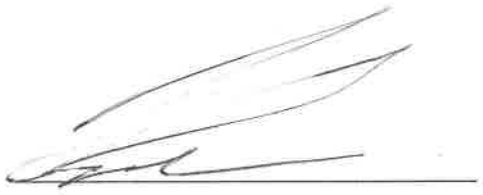

Addendum A

KeyCite Red Flag - Severe Negative Treatment
Enacted LegislationAmended by 2019 Utah Laws Ch. 345 (S.B. 180),

West's Utah Code Annotated
Title 57. Real Estate
Chapter 14. Limitations on Landowner Liability
Part 4. Inherent Risks of Certain Activities

U.C.A. 1953 § 57-14-401

§ 57-14-401. Inherent risks of activities with a recreational purpose on certain lands

Currentness

(1) Notwithstanding Section 57-14-202 to the contrary, a person may not make a claim against or recover from an owner of any land, as defined in this chapter, including land in developed or improved, urban or semi-rural areas opened to the general public without charge, such as a lake, pond, park, trail, waterway, or other recreation site, for personal injury or property damage caused by the inherent risks of participating in an activity with a recreational purpose on the land.

(2) Nothing in this section may be construed to relieve a person participating in a recreational purpose from an obligation that the person would have in the absence of this section to exercise due care or from the legal consequences of a failure to exercise due care.

Credits
Laws 2013, c. 212, § 10, eff. May 14, 2013.

U.C.A. 1953 § 57-14-401, UT ST § 57-14-401
Current with Chapters 1 to 100 of the 2019 First Regular Session. Some statutes sections may be more current, see credits for details.

End of Document

KeyCite Red Flag - Severe Negative Treatment
Enacted LegislationAmended by 2019 Utah Laws Ch. 345 (S.B. 180),

West's Utah Code Annotated
Title 57. Real Estate
Chapter 14. Limitations on Landowner Liability
Part 1. General Provisions

U.C.A. 1953 § 57-14-102
Formerly cited as UT ST § 57-14-2

§ 57-14-102. Definitions

Currentness

As used in this chapter:

(1) "Charge" means the admission price or fee asked in return for permission to enter or go upon the land.

(2) "Child" means an individual who is 16 years of age or younger.

(3) "Inherent risks" means those dangers, conditions, and potentials for personal injury or property damage that are an integral and natural part of participating in an activity for a recreational purpose.

(4)(a) "Land" means any land within the state boundaries.

(b) "Land" includes roads, railway corridors, water, water courses, private ways and buildings, structures, and machinery or equipment when attached to the realty.

(5) "Owner" means the possessor of any interest in the land, whether public or private land, including a tenant, a lessor, a lessee, an occupant, or person in control of the land.

(6) "Person" includes any person, regardless of age, maturity, or experience, who enters upon or uses land for recreational purposes.

(7) "Recreational purpose" includes, but is not limited to, any of the following or any combination thereof:

(a) hunting;

(b) fishing;

(c) swimming;

(d) skiing;

(e) snowshoeing;

(f) camping;

(g) picnicking;

(h) hiking;

(i) studying nature;

(j) waterskiing;

(k) engaging in water sports;

(l) engaging in equestrian activities;

(m) using boats;

(n) mountain biking;

(o) riding narrow gauge rail cars on a narrow gauge track that does not exceed 24 inch gauge;

(p) using off-highway vehicles or recreational vehicles;

(q) viewing or enjoying historical, archaeological, scenic, or scientific sites;

(r) aircraft operations; and

(s) equestrian activity, skateboarding, skydiving, paragliding, hang gliding, roller skating, ice skating, walking, running, jogging, bike riding, or in-line skating.

(8) "Serious physical injury" means any physical injury or set of physical injuries that:

(a) seriously impairs a person's health;

(b) was caused by use of a dangerous weapon as defined in Section 76-1-601;

(c) involves physical torture or causes serious emotional harm to a person; or

(d) creates a reasonable risk of death.

(9) "Trespasser" means a person who enters on the land of another without:

(a) express or implied permission; or

(b) invitation.

Credits
Laws 2013, c. 212, § 3, eff. May 14, 2013.

Notes of Decisions (6)

U.C.A. 1953 § 57-14-102, UT ST § 57-14-102
Current with Chapters 1 to 100 of the 2019 First Regular Session. Some statutes sections may be more current, see credits for details.

End of Document

2019 Utah Laws Ch. 345 (S.B. 180)

UTAH 2019 SESSION LAWS

63rd LEGISLATURE, 2019 GENERAL SESSION

Additions are indicated by **Text**; deletions by ~~Text~~ .
Vetoes are indicated by ~~Text~~ ;
stricken material by ~~Text~~ .

Ch. 345
S.B. 180
LIMITATIONS ON LANDOWNER LIABILITY AMENDMENTS

2019 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Daniel Hemmert

House Sponsor: Brady Brammer

LONG TITLE

General Description:

This bill amends and enacts provisions related to landowner liability in certain circumstances.

Highlighted Provisions:

This bill:

. amends definitions;

. amends the liability of landowners in certain circumstances involving an activity with a recreational purpose;

. limits the available noneconomic damages in a claim against a landowner; and

. makes technical and conforming changes.

Money Appropriated in this Bill:
None

Other Special Clauses:
None

Utah Code Sections Affected:

AMENDS:

57–14–102, as last amended by Laws of Utah 2013, Chapter 278
and renumbered and amended by Laws of Utah 2013, Chapter 212

57–14–401, as enacted by Laws of Utah 2013, Chapter 212

ENACTS:

57–14–501, Utah Code Annotated 1953

Be It enacted by the Legislature of the state of Utah:

Section 1. Section 57–14–102 is amended to read:

<< UT ST § 57–14–102 >>

§ 57–14–102. Definitions

As used in this chapter:

(1) "Charge" means the admission price or fee asked in return for permission to enter or go upon the land.

(2) "Child" means an individual who is 16 years of age or younger.

~~(3) "Inherent risks" means those dangers, conditions, and potentials for personal injury or property damage that are an integral and natural part of participating in an activity for a recreational purpose.~~

~~(4)~~ **(3)**(a) "Land" means any land within the state boundaries.

(b) "Land" includes roads, railway corridors, water, water courses, private ways and buildings, structures, and machinery or equipment when attached to the realty.

~~(5)~~ **(4)** "Owner" means the possessor of any interest in the land, whether public or private land, including a tenant, a lessor, a lessee, an occupant, or person in control of the land.

~~(6)~~ **(5)** "Person" includes any person, regardless of age, maturity, or experience, who enters upon or uses land for recreational purposes.

~~(7)~~ **(6)** "Recreational purpose" includes, but is not limited to, any of the following or any combination thereof:

(a) hunting;

(b) fishing;

(c) swimming;

(d) skiing;

(e) snowshoeing;

(f) camping;

(g) picnicking;

(h) hiking;

(i) studying nature;

(j) waterskiing;

(k) engaging in water sports;

(l) engaging in equestrian activities;

(m) using boats;

(n) mountain biking;

(o) riding narrow gauge rail cars on a narrow gauge track that does not exceed 24 inch gauge;

(p) using off-highway vehicles or recreational vehicles;

(q) viewing or enjoying historical, archaeological, scenic, or scientific sites;

(r) aircraft operations; and

(s) equestrian activity, skateboarding, skydiving, paragliding, hang gliding, roller skating, ice skating, walking, running, jogging, bike riding, or in-line skating.

~~(8)~~ **(7)** "Serious physical injury" means any physical injury or set of physical injuries that:

(a) seriously impairs a person's health;

(b) was caused by use of a dangerous weapon as defined in Section 76–1–601;

(c) involves physical torture or causes serious emotional harm to a person; or

(d) creates a reasonable risk of death.

~~(9)~~ **(8)** "Trespasser" means a person who enters on the land of another without:

(a) express or implied permission; or

(b) invitation.

Section 2. Section 57–14–401 is amended to read:

Part 4. Activities with a Recreational Purpose on Certain Lands

<< UT ST § 57–14–401 >>

§ 57–14–401. Activities with a recreational purpose on certain lands

(1) Notwithstanding Section 57–14–202 to the contrary, a person may not make a claim against or recover from an owner of any land, ~~as defined in this chapter,~~ including land in developed or improved, urban or semi-rural areas opened to the general public without charge, such as a lake, pond, park, trail, waterway, or other recreation site, for personal injury

or property damage caused ~~by the inherent risks of~~ **either directly or indirectly by** participating in an activity with a recreational purpose on the land.

(2) Nothing in this section may be construed to relieve a person participating in a recreational purpose from an obligation that the person would have in the absence of this section to exercise due care or from the legal consequences of a failure to exercise due care.

Section 3. Section 57–14–501 is enacted to read:

Part 5. Limitation on Award

<< UT ST § 57–14–501 >>

§ 57–14–501. Limitation of award of noneconomic damages

(1) In an action arising on or after May 14, 2019, against an owner of land for an injury to a person or damage to property, if a plaintiff is awarded noneconomic losses, the amount of the award for noneconomic losses may not exceed $450,000.

(2) The limit described in Subsection (1) does not apply to:

(a) an award of punitive damages;

(b) a claim for wrongful death; or

(c) a liability described in Subsection 57–14–204(1).

Effective May 14, 2019.

Approved March 26, 2019

End of Document

Addendum B

West's Utah Code Annotated
Constitution of Utah
Article XVI. Labor

U.C.A. 1953, Const. Art. 16, § 5

Sec. 5. [Injuries resulting in death--Damages]

Currentness

The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law.

Credits
Laws 1919, Sp.Sess., S.C.R. 1.

U.C.A. 1953, Const. Art. 16, § 5, UT CONST Art. 16, § 5
Current with Chapters 1 to 100 of the 2019 First Regular Session. Some statutes sections may be more current, see credits for details.

End of Document

Addendum C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEONID FELDMAN, personally and as personal representative of the ESTATE OF LIUDMILA FELDMAN; MARINA DONNELLY; and ANTON KHOKHLOV, Plaintiffs, v. SALT LAKE CITY; SALT LAKE CITY CORPORATION; FORSGREN ASSOCIATES, INC.; and BIO-WEST, INC. Defendants.	MEMORANDUM DECISION CASE NO. 180901840 Judge Robert P. Faust

BACKGROUND

This matter comes before the Court pursuant to Defendant Salt Lake City's (the "City") Motion to Dismiss all Claims against Salt Lake City. The Court heard oral argument with respect to the motion on May 31, 2018. Following the hearing, the matter was taken under advisement. The Court having considered the Motion and Memoranda, hereby enters the following ruling:

With this Motion, the City seeks dismissal of all claims with prejudice because Utah Code § 57-14-401 provides Salt Lake City immunity and is a complete bar to Plaintiffs' claims.