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.

REPLY 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:
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Appellees

Salt Lake City Corporation & Salt Lake City

Represented by:
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Introduction

SLC makes several assertions that are not supported by the plain language of Section 401 of the LLLA, case law or statutory intent. SLC argues that the elements of Section 401 are met in the instant case. SLC ignores the plain language of the statute as well as relevant case law interpreting the term "inherent risks," including this Court's recent opinion in *Rutherford v. Talisker Canyons Fin., Co., LLC,* 2019 UT 27, 445 P.3d 474. The dangerous current in the manmade pool and culvert which caused Liudmila's death is not an inherent risk because the danger is caused by manmade developments and it is not the type of risk that anyone would expect to encounter when wading in a shallow pool. SLC provides creek access for dogs and people at the area where Liudmila drowned. Invitees who access the manmade pool with their dogs certainly do not expect to be trapped into a dangerous deadly current in seemingly shallow waters where dogs and humans alike regularly enter.

SLC also argues that because no cause of action for wrongful death existed at statehood, the LLLA does not violate the Constitution. However, this argument relies on the Governmental Immunity Act, which was not a basis for dismissal by SLC in its motion to dismiss. Moreover, a review of early case law reveals that negligence and wrongful death cases against municipalities, and SLC specifically, were alive and well at statehood. SLC's liability here stems not from any governmental function but from its ownership of the land at issue, for which no governmental immunity exists.

SLC ignores this Court's history of striking down statutes that abrogate the wrongful death cause of action, and instead relies on a single case in which this Court held that the Good Samaritan statute provided a reasonable defense to the wrongful death case in limited situations involving emergency and voluntary medical aide. *Hirpa v. IHC Hospitals, Inc.,* 948 P.2d 785, 794 (Utah 1997). *Hirpa's* application is extremely narrow and it only applies to licensed medical professionals, who provide voluntary and emergency aide, and are under no obligation to do so. On the other hand, prohibiting all lawsuits by recreational users against landowners for dangerous conditions on their lands in this state is extremely broad and is a clear abrogation of the wrongful death cause of action.

SLC also argues that personal injury as used in Section 401 includes the personal tort of wrongful death, and argues that tort law only recognizes personal injury and property damage claims. This flies in the face of Utah case law that makes clear that a wrongful death claim is an independent cause of action, not linked to personal injury or property damage claims. *See Riggs v. Georgia-Pac. LLC,* 2015 UT 17, ¶¶ 11-12, 345 P.3d 1219.

The LLLA itself distinguishes between injury and wrongful death claims by referring to "death" and "wrongful death" claims in different sections of the LLLA, yet does not make mention of "death" or "wrongful death" claims in Section 401. The Legislature knows, or should know, that abrogating wrongful death claims in Section 401 would run afoul of Article XVI, section 5 of the Utah Constitution.

Finally, SLC argues that the Appellants' proposed amendments for willful and malicious conduct were futile. This argument is irrelevant as Appellants are only appealing that determination to the extent this Court believes that Section 201 limits Appellants' claims. Section 201 does not apply to the case at hand, and any prior case law that interpreted Section 201, such as *Golding v. Ashley Cent. Irr. Co. ("Golding II")*, is irrelevant to the Section 401 analysis. Appellants do take issue with the trial court's conclusion that the open and obvious doctrine bars Appellants' claims. In so doing, the trial court relied on *Golding II,* which never analyzed Section 401, and which does not take into account this Court's seminal opinion in *Hale v. Beckstead,* clarifying that the open and obvious doctrine does not eliminate liability. The trial court also improperly relied on documents outside of the pleadings and the trial court's own experiences at the creek at issue, which is improper at the motion to dismiss stage.

Argument

I. Section 401 does not apply because the hazard at issue was not an "inherent risk".

Section 401 precludes personal injury claims caused by the "inherent risks" of an activity. Utah Code Ann. 57-14-401 (2017). SLC argues that inherent risks include manmade improvements because section 401 applies to land that is developed or improved. Land that is generally developed or improved can still have naturally created risks for which immunity would apply. For instance, a tree that falls over in a public park without fault of the landowner would likely qualify as an inherent risk. If a mountain biker encounters a rock on the path and crashes, through no fault of the landowner, it

would be an inherent risk of mountain biking. The definition of "inherent risk" in the LLLA is "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(3) (2017) (emphasis supplied). SLC's argument that "inherent risk" applies to manmade developments ignores the definition's use of the word "natural."

SLC relies on *Golding II,* a case decided before Section 401 was drafted and which did not interpret the term "inherent risks." *Golding v. Ashley Cent. Irr. Co.*, 902 P.2d 142, 145 (Utah 1995). *Golding II* interpreted Section 201 as it relates to duties owed to trespassers. *Id.* SLC's motion to dismiss was not based on previous sections of the LLLA because this Court has held that the prior sections of the LLLA, such as Section 201, do not apply to improved urban or suburban municipal parks. *De Baritault v. Salt Lake City Corp.,* 913 P.2d 743, 748 (Utah 1996).

SLC argues that Section 401 was enacted to clarify which type of land should be granted immunity by the Legislature and to nullify the effects of any decision to the contrary. Appellees' Br. at 10. There is nothing in the legislative history or the way in which the section was written to support this conclusion. Where "a legislature amends a portion of a statute but leaves other portions unamended, or re-enacts them without change, the legislature is presumed to have been satisfied with prior judicial constructions of the unchanged portions of the statute and to have adopted them as consistent with its own intent." *Rutherford,* 2019 UT 27, ¶ 65 (internal citations and quotations omitted). Section 401 was enacted by the Legislature in March 2013. *See* H.B. 347, 60th Leg.,

2013 Leg. Sess. (Utah 2013). It is a standalone section. SLC even agrees that Section 201 and Section 401 are separate standalone provisions in separate parts of the LLLA. Appellees' Br. At 31-32. There is no indication, express or implied, that Section 401 nullifies prior case law of *De Baritault.* Indeed, the Legislature has amended the LLLA numerous times since *De Baritault* was decided in 1996, and at no point in time did it add clarifying language to Utah Code Ann. 57-14-201 (renumbered from 57-14-3 in 2013), or any other provision in Section 2 to specify that it applies to urban or suburban parks or that *De Baritault* was overruled. *See* H.B. 11, 52nd Leg., 1997 Gen. Sess. (Utah 1997); S.B. 32, 56th Leg., 2005 Gen. Sess. (Utah 2005); H.B. 208, 59th Leg., 2012 Gen. Sess. (Utah 2012); H.B. 347, 60th Leg., 2013 Leg. Sess. (Utah 2013).

Thus, the only relevant provision in the LLLA that applies to the urban park at issue here is Section 401. But Appellants' claims are not subject to the limitations of Section 401. Thus, SLC's reliance on case law interpreting older sections of the LLLA, including *Golding II* are inapplicable to the interpretation of the meaning of "inherent risks" as used in Section 401. Prior to the enactment of Section 401, the phrase "inherent risks" did not even exist within the LLLA. *See* Utah Code Ann. 57-14-1 *et seq.* (2012), *renumbered* as 57-14-102 *et seq.* by Laws 2013, c. 212, § 3, eff. May 14, 2013. The most relevant analysis then is to analyze case law that actually interpreted Section 401's use of the phrase "inherent risks" and other statutes that limit liability for "inherent risks."

At least one Utah state court has interpreted inherent risks under Section 401 to not include manmade features. In *Pollock v. Heber Valley Railroad Foundation*, the plaintiff's decedent was killed while kayaking down Provo River when he became

trapped and submerged in a support beam of an old railroad bridge that crosses over the river. The defendant moved to dismiss pursuant to the LLLA, and plaintiff argued that the decedent's death was caused by a manmade bridge, which is not an inherent risk of kayaking. *Pollock v. Heber Valley Railroad Foundation,* Case No. 190903003 (Third District Ct., Salt Lake County July 30, 2019). The trial court agreed, stating:

> [i]f Mr. Pollock's injury had been caused by some natural feature – a rock, tree or other natural objection that created an unanticipated flow of water – there is little doubt his accident would be caused by an inherent risk of participating in a recreational activity. Here, however, the accident was not caused by a natural feature, but by a man-made feature – the bridge or its supporting structure.

Id.

The court went on to state that based on the complaint alone, it "cannot say as a matter of law that the changes in the flow of water flow caused by encountering the bridge and supporting structures was an inherent risk of kayaking." *Id.* Here, it cannot be said as a matter of law that changes in the flow of water caused by the culvert in the manmade pool was an inherent risk of entering the water, much less going for a walk.

SLC argues that Appellants are ignoring the LLLA's definition of "inherent risks" by relying on case law that interprets other acts. This Court routinely looks to other statutes relating to a similar subject matter to interpret legislative intent of a statute or wording used. For instance, in *State v. Ireland,* this Court analyzed at least eight other statutes to interpret legislative intent of the statute at issue in that case. 2006 UT 17, ¶¶ 17-18, 133 P.3d 396.

The case law cited by Appellants including *Clover*, and the Inherent Risks of Skiing Act similarly defines inherent risks as those "dangers or conditions which are an

integral part of the sport of skiing." *Clover v. Snowbird Ski Resort,* 808 P.2d 1037, 1044 (Utah 1991) (citation omitted). The only difference in the definition of inherent risks in the LLLA and the Inherent Risks of Skiing Act is that the LLLA also uses the word "natural." *Compare* Utah Code Ann. 57-14-102(3) (2017) and Utah Code Ann. 78B-4-402. Thus, it is entirely proper for this Court to rely on the interpretation of a statute that uses almost identical language to the LLLA to determine whether a certain danger "is integral" to the recreational activity at issue.

This Court in *Rutherford* affirmed *Clover* and stated that even if a statute enumerates inherent risks, recovery is only barred when those risks are encountered in such a way that the risk is an integral part of the sport of skiing. *Rutherford*, 2019 UT 27 at ¶ 35. The court emphasized that the appropriate inquiry is whether a skier would reasonably expect to encounter that risk while skiing. For example, did the skier reasonably expect to encounter a properly functioning or constructed lift tower, as opposed to one that is malfunctioning or was improperly designed or constructed or was camouflaged to be invisible to skiers. *Id.* at ¶ 38-39. Because the LLLA also uses the world "natural" in its definition, unlike the Inherent Risks of Skiing Act, this even further supports Appellants' position that the legislature did not intend inherent risks to include risks resulting from manmade structures, especially those that a recreational user would not expect to encounter. If the Legislature did not intend the risks to include those caused by manmade structures, it could have omitted the word "natural" from the definition. By adding the word "natural," inherent risks in Section 401 of the LLLA encompasses a narrower set of risks than even the Inherent Risks of Skiing Act.

Here, Liudmila's death was caused by a risk created by a manmade culvert and pool. Liudmila did not reasonably expect to encounter a manmade current while taking her dogs for a walk, nor did she expect to encounter that risk when her dogs jumped in the shallow pool where access was clearly permitted. The inquiry is not whether entering a body of water can cause someone to drown, just as the inquiry in *Rutherford* was not whether skiing can cause someone to fall. Instead, the inquiry is *what* can cause a skier to fall or become injured, or what can cause someone to drown in a manmade pool. Appellants properly pled that Liudmila drowned as a result of hazards of "manmade developments" that SLC created, and failed to remedy. At the motion to dismiss stage, the trial court simply had no basis to conclude that those hazards were "inherent risks."

SLC attempts to distinguish *Clover* from the case at hand by arguing that the Inherent Risks of Skiing Act was to "clarify the law, not to radically alter ski resort liability," whereas the LLLA was created to eliminate duties of landowners to keep their lands safe. Appellees' Br. at 16-17. However, the LLLA's provision which addresses duty is limited to Section 201, which as discussed, would not apply to SLC's urban park. There is no reference to duties in section 401. Instead, section 401 states that "a person may not make a claim against or recover from an owner of land…for personal injury or property damage caused by the inherent risks of participating in an activity…" Utah Code 57-14-401. If Section 401 does not apply to the particular facts of a case and the activity at issue took place in a suburban or urban park, then a landowner would still owe a duty to the recreational user and would not be immune from liability under the LLLA.

Although the Legislature removed the phrase "inherent risk" from Section 401 in 2019, this does not mean that the legislative intent in 2013 was something different. The Legislature in 2013 intended "inherent risk" to mean exactly what it was defined to mean, which includes those risks that are "integral and natural." Utah Code Ann. 57-14-102(3). If the Legislature had intended "integral and natural" to mean any and all risks, they would have written the statute that way in 2013. The fact that they subsequently amended the statute to do expressly that in 2019 bolsters that assumption. *See State v. Ireland,* 2006 UT 17, ¶ 17-18, 133 P.3d 396. Removing the words "inherent risk" in the 2019 amendment simply indicates that the Legislature concedes that the term inherent risk, as defined, is very narrow. As a result, the Legislature amended Section 401 in 2019 to widen its applicability.

SLC argues that the LLLA "radically" changes existing law. Any statute that radically limits liability or changes common law needs to be closely analyzed for constitutional violations. In fact, this Court in *Rutherford*, stated that if the Inherent Risks of Skiing Act was interpreted to prohibit all negligence claims arising from injuries caused by one of the Act's enumerated inherent risks, the statute would effectively abolish the negligence cause of action against ski area operators, which could violate Utah's constitution, requiring the Court to strike down the Act entirely. *Rutherford*, 2019 UT 27 at ¶ 55- 58. Similarly here, the LLLA's attempts to radically change common law fly in the face of Utah's constitutional prohibition against abrogating wrongful death claims.

II. Applying Section 401 would violate Utah's wrongful death constitutional provision.

SLC asserts that that it would have been immune from wrongful death lawsuits at the time the Utah constitution was adopted, and thus the LLLA does not violate the constitution's wrongful death provision. First, SLC did not base its motion to dismiss on the Governmental Immunity Act ("GIA") or sovereign immunity. This is because the GIA expressly waives governmental 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). The GIA waiver of immunity conflicts with Section 401 of the LLLA. In *De Baritault*, this Court held that because the Governmental Immunity Act already waives immunity for injuries sustained on public improvements, and the LLLA makes no mention of public improvements, the GIA is the law most specific to the facts at hand in that case. *De Baritault*, 913 P.2d at 747-48. The Court held that the GIA governed and therefore plaintiff's claims were not barred because "well-established principles of statutory construction require that a more specific statute governs instead of a more general statute." *Id.* Here, SLC did not assert immunity pursuant to the GIA because it knows that the GIA waives immunity for Appellants' claims, and the GIA's waiver of immunity to culverts and other public improvements is more specific than Section 401 of the LLLA. As a result, any conflict between the statutes must be read in favor of waiver of immunity, as the GIA is the statute more specific to the facts at issue here.

Even if the Court considers it as part of the constitutional analysis, governmental immunity does not change the fact that the LLLA violates the wrongful death provision of the Utah constitution. This Court has stated that at "statehood, Utah case law was liberal in allowing actions against governmental agencies, but the case law was sparse and did not deal with actions against the state." *DeBry v. Noble,* 889 P.2d 428, 440 (Utah 1995). It was not until later that case law narrowed governmental liability. *Id.*

In fact, in 1898 the Legislature acknowledged and ratified the judicially created doctrine of municipal liability. *Id.* at 438. The statute stated:

> all claims against a city or town for damages or injury alleged to have arisen from the defective, unsafe, dangerous or obstructed condition of any…culvert… of such city or town or from the negligence of the city or town authorities in respect to any such…culvert…shall…be presented to the city council…and no action shall be maintained against any city or town…unless it appears that the claim for which the action was brought was presented to the council as aforesaid….

Utah Rev. Stat. § 312 (1898). This statute only established a procedural requirement for claims against the city for negligence prior to filing an action. *DeBry,* 889 P.2d at 438. Courts misconstrued this statute for the proposition that a suit against a governmental entity could be maintained only if there was a statutory waiver of immunity, when indeed the statute required no such thing. *Id.* Even more significant, wrongful death claims and claims against cities in their capacity as landowners were never subject to this procedural requirement, and such causes of action were expressly permitted.

In *Brown v. Salt Lake City*, a mother brought a wrongful death negligence cause of action against Salt Lake City for the death of her minor son who drowned in a waterway conduit constructed and maintained by the city. 93 P. 570, 571 (Utah 1908), *abrogated*

in part on different grounds by Kessler v. Mortenson, 16 P.3d 1225 (Utah 2000). SLC moved for a directed verdict pursuant to Utah Rev. Stat. § 312, arguing that the plaintiff had failed to comply with the 90-day notice requirement. *Id.* at 572. The Utah Supreme Court held that the statute does not pertain to claims arising "out of the defective condition of the city's property, which is owned and maintained in its corporate capacity merely, and over which it had dominion the same as any property owner." *Id.* at 573. The Court went on to state that the city "acquired, owned, and conducted its water system and the property connected therewith…as any other private corporation or owner would, and is liable in like manner and to the same extent as such owners would be." *Id.* at 574.

The *Brown* case demonstrates that at the time of statehood, municipalities such as SLC could be sued for negligence and wrongful death. No statutory waiver of immunity was needed. More importantly however, the case stands for the proposition that wrongful death claims could be pursued against SLC, and claims against the city in its capacity as a landowner or owner and operator of waterways did not implicate governmental immunity procedural requirements. Similarly, the government's ownership or operation of public parks for recreation, such as the park at issue here, was not considered a governmental function to which immunity would have historically applied prior to 1987. *See Johnson v. Salt Lake City Corp.*, 629 P.2d 432, 434 (Utah 1981) (holding that Salt Lake City's ownership or operation of a park that was free of charge for winter recreation does not qualify for governmental immunity); *Standiford v. Salt Lake City Corp.*, 605 P.2d 1230, 1237 (Utah 1980) *superseded by* Utah Code Ann. § 63-30-2(4)(a) (1987) (holding that the operation of a public golf course is not essential to governing and thus no immunity

existed for Salt Lake City). Thus, a cause of action against SLC for the ownership and operation of its waterways, property, or parks would have existed at the time of statehood, and any attempts to abrogate such a cause of action violate Article XVI, section 5 of the Utah Constitution.

SLC argues that Section 401 is a permissive legislative enactment of a reasonable defense to a wrongful death claim, and as such does not violate the Constitution. Appellees' Br. at 23. However, abrogating an entire cause of action cannot be viewed as a reasonable defense. This Court in *Rutherford* stated that if the Inherent Risks of Skiing Act was interpreted to prohibit all negligence claims arising from injuries caused by one of the Act's enumerated inherent risks, the statute would effectively abolish the negligence cause of action against ski area operators, which could violate Utah's constitution, requiring the Court to strike down the Act entirely. 2019 UT 27 at ¶ 55- 58. Thus, arguing that Section 401 is simply a reasonable defense to a claim, when in reality it is a complete abrogation of a cause of action, is inconsistent with Article XVI, section 5.

The only case cited by SLC to support its reasonable defense argument is *Hirpa v. IHC Hospitals, Inc.* *Hirpa* stated that because the Good Samaritan Act was a reasonable defense against a malpractice claim by a living plaintiff, the same defense should be allowed in a wrongful death action by the deceased patient's heirs. 948 P.2d 785, 794 (Utah 1997). *Hirpa* did not abrogate all medical malpractice wrongful death causes of action, only those in the limited circumstances where a medically trained person volunteers to render emergency aid without a duty to do so. *Id.* The LLLA on the other

hand, is not just a defense to a wrongful death claim against landowners, it is an entire abrogation of a cause of action. This Court's constitutional precedent is clear that *Hirpa* would not have been upheld if the statute at issue abrogated all medical malpractice claims. That is exactly what SLC argues the legislature has intended to do with landowners and recreational use under the LLLA, which affects significantly more rights than those rare circumstances where the Good Samaritan Act would apply. Such an abrogation is unconstitutional under Article XVI, Section 5.

III. Section 401 does not apply to wrongful death claims.

SLC asserts that personal injury claims include wrongful death claims, but the case law cited by SLC does not support that conclusion. *Gressman v. State,* for instance, analyzes Utah's Survival Statute which permits claims for personal injury of a decedent to continue following the decedent's death. 2013 UT 63, ¶ 12, 323 P.3d 998. In *Gressman,* there is no discussion whatsoever about wrongful death claims, which are claims to compensate heirs. *See Oxendine v. Overturf,* 1999 UT 4, ¶ 19, 973 P.2d 417. The appropriate analysis is that of *Riggs v. Georgia-Pacific LLC,* in which this Court held clearly and unequivocally that a wrongful death cause of action is independent from and not tied to a personal injury cause of action. 2015 UT 17, ¶¶ 11-12, 345 P.3d 1219. SLC argues that the use of the words "personal loss" of the heirs means a "personal injury," but fails to cite to any case law that actually includes the term "personal losses" as a personal injury of the heirs. Instead, losses of heirs are always discussed in the context of a wrongful death claim, not a personal injury claim. *See Riggs,* 2015 UT 17, ¶ 16; *Hull v.*

Silver, 577 P.2d 103 (Utah 1978); *In re Estate of Sims*, 918 P.2d 132, 135 (Utah Ct. App. 1996).

If the legislature intended Section 401 to apply to wrongful death claims, it would have used that language. The case of *Brown v. Salt Lake City* demonstrates that point in regards to the municipal liability statute which required certain claims against municipalities for "damages or injury" to be brought before the city council first. Utah Rev. Stat. § 312 (1898). *Brown* stated that the plain language of the statute applied to personal injury and damage to property claims, but not to wrongful death claims. 93 P. at 573. The court concluded that "[i]n an action to recover for damages for negligently causing the death of one a presentation of a claim [pursuant to the statute] is not required" because "the injury without death would not give a right of action such as we are now considering." *Id.* The court was "firmly of the opinion that it was not the intention of the Legislature to include within the statute secondary claims or damages arising out of death, which are suffered by third parties by reason of such death." *Id.* Thus, the plaintiff could proceed with an action without presenting her claim to the city council first. *Id.*

The Legislature in enacting and amending the LLLA understands the distinction between wrongful death and personal injury claims. When the Legislature expressly uses a word in other statutes, but omits the word from the statute at issue, this Court can assume that had the Legislature wanted the statute to include that word, it would have expressly used that word in the statute. For instance, in *State v. Ireland,* this Court analyzed whether the word "consumption" as used in a possession statute included the

existence of drugs or metabolites of the drug in the person's body. 2006 UT 17 at ¶ 17. The other statutes analyzed by the Court all had language the expressly referred to the existence of the drug or metabolites in the body. *Id.* Thus, the fact that the statute at issue did not make any such reference means that the Legislature did not intend for "consumption" to include the existence of drugs or metabolites in a person's body. *Id.* The Court was also persuaded by the fact that the statute at issue was later amended to expressly include the existence of drugs or metabolites in a person's body, bolstering the position that had the Legislature wanted to include the existence of drugs in the possession statute, it would have done so explicitly, just as it did when it amended the statute years later. *Id.*

Here, the Legislature has used the words "death" and "wrongful death" in multiple sections of the LLLA, but not in Section 401. For instance, Appellants have already pointed out the new section of the LLLA, Section 501, which limits awards of non-economic damages, but states that such limitation expressly does not apply to "a claim for wrongful death." Utah Code Ann. 57-14-501. Similarly, section 301 of the LLLA, enacted at the same time as Section 401, is titled "Owner liability to trespasser." Utah Code Ann. 57-14-301. Section 301 states that an "owner does not…incur liability for any injury to, the death of, or damage to property of, a trespasser…" *Id.* at 57-14-301(1)(c). Section 301 also states that "an owner may be subject to liability for serious physical injury or death to a trespasser…" under certain conditions. *Id.* at 301(2). The term "death" is used repeatedly in Section 301. If the Legislature intended death to apply to

Section 401, they would have used that language, especially since both sections were enacted at the same time.

SLC misses the point by asserting that including an express exception to wrongful death claims in the new non-economic damages cap of Section 501 is superfluous if the LLLA does not apply to wrongful death claims. Certain parts of the LLLA expressly permit claims for "injury or death," for instance, if the death is to a trespassing child from an artificial condition on the land of which the landowner is aware. Utah Code Ann. 57-14-301(2). Thus, adding a provision in Section 501 that places a cap on non-economic damages except in claims for wrongful death, is certainly not superfluous to the LLLA, and in no way suggests that Section 401 includes wrongful death claims. In fact, it shows just the opposite.

SLC argues that defining personal injury to include wrongful death would avoid absurd results, because a landowner would not be immune if a mountain biker crashed on their property and broke a bone but would be immune if he died as a result of the crash. Appellees' Br. at 19. However, that is exactly what the Legislature has intended because this Court has repeatedly held statutes unconstitutional when they abrogate wrongful death causes of action. *See e.g. Malan v. Lewis,* 693 P.2d 661, 667 (Utah 1984) (wrongful death provision of Constitution seems to "compel the conclusion that the [Utah] Guest Statue 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."); *Berry By and Through Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 684 (Utah 1985) ("the plain meaning of the constitutional provision cannot be

harmonized with the statute of repose in this case."); *Bybee v. Abdulla*, 2008 UT 35, ¶ 20, 189 P.3d 40 (the court harbored serious doubts that a statute purporting to bind an heir to arbitrate a wrongful death claim could coexist with Article XVI, section 5.); *Smith v. U.S.*, 2015 UT 68, ¶ 28, 356 P.3d 1249 (holding that the noneconomic damages cap in the Utah Medical Malpractice Act violated the wrongful death provision of the constitution.)

IV. The open and obvious principle does not bar Appellants' claims.

SLC did not file its motion to dismiss based on Section 201, because as held by this Court in *DeBaritault,* Section 201 does not apply to urban or suburban parks, such as the park at issue here. If this Court determines that Section 201 does apply to bar Appellants' claims, even though it was not raised by SLC, Appellants would ask this Court to reverse the trial court's denial of Appellants' motion to amend.

SLC argues that liability for willful or malicious conduct in Section 204 does not apply to Section 401, since these sections are in different parts of the LLLA: Part 2 and Part 4, respectively. Appellees' Br. at 31-32. If that is the case, then the trial court erred to the extent it relied on any sections of Part 2 to support its ruling. This includes the trial court's reliance on any case law that interprets Part 2, such as *Golding II,* or any argument that SLC owed no duty to Appellants. SLC's reliance on *Golding II* that inherent risks include manmade improvements and that the danger to Liudmila was open and obvious are equally flawed because SLC admitted that Section 401 and Section 201 are wholly separate.

To the extent that this Court does consider Section 201, Appellants' attempt to amend their complaint to allege that SLC's conduct was "willful and malicious" and thus not immune from liability under Section 201 was not futile. In *Pollock v. Heber Valley Railroad Foundation,* discussed *supra*, the trial court relied on *Golding I* in interpreting the pleading requirements for "willful or malicious" under Section 201 and found that the "complaint must allege the elements of knowledge of the dangerous condition and of the fact that serious injury is a probable result, and inaction in the fact of such knowledge." Case No. 190903003 (Third District Ct., July 30, 2019) (quoting *Golding v. Ashley Central Irrigation Co.,* 793 P.2d 897 (Utah 1990) ("*Golding I*"). The trial court found that the plaintiffs' complaint met those requirements, and thus dismissal on the basis of Section 201 was inappropriate. *Id.* Appellants' proposed amendments at issue here similarly meet those requirements, and the trial court erred in denying Appellants' motion to amend.

The trial court also erred when it undertook its own analysis of whether the dangers at the pool were open and obvious at the motion to dismiss stage. [R.474, 490-493]. As discussed in Appellants' principal brief, this Court clarified the scope of the open and obvious danger rule in *Hale v. Beckstead.* 2005 UT 24, ¶15, 116 P.3d 263, decided ten years after *Golding II.* The open and obvious rule does not eliminate any duties to protect or warn of obvious dangers, but actually imposes a duty on landowners to exercise reasonable care, even if a danger is open and obvious. *Id.* at ¶¶14, 25.

As articulated by *Hale,* the potential applicability of the open and obvious danger rule depends on the danger at issue, its appearance, the knowledge of the defendant, the

knowledge of the plaintiff, the reason the danger was encountered, and other circumstances. This information is heavily factual and only limited information is before the trial court during the pleading stage. Thus, the trial court erred in determining, as a matter of law, that the danger was open and obvious.

Conclusion

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

DATED this 19th day of September, 2019.

EISENBERG CUTT KENDELL & OLSON

/s/ Eric S. Olson
Eric Olson
Lena Daggs
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 5,759 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 19th day of September, 2019.

/s/ Eric S. Olson

Certificate of Service on the Parties

This is to certify that on the 19th day of September, 2019, I caused two true and correct copies of the Reply 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 19th day of September, 2019, I caused two true and correct copies of the Reply Brief of Appellants to be served via first-class mail, postage prepaid, with a copy by email, on:

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/s/ Eric S. Olson

Addendum A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

KAREN POLLOCK, personally and on behalf of the heirs of and estate of Kenneth Pollock, et al., **Plaintiffs,** **vs.** **HEBER VALLEY RAILROAD FOUNDATION, et al.** **Defendants**	**RULING AND ORDER** **Case No. 190903003** **Judge Todd Shaughnessy**

Before the court is a motion to dismiss filed by the State of Utah defendants. The motion was fully briefed, argued on July 3, 2019, and taken under advisement.

The State Defendants argue that the claims against them should be dismissed under the Governmental Immunity Act ("GIA"), Utah Code Ann. §§63G-7-101, et seq., and under the Limitations on Landowner Liability Act ("LLLA"), Utah Code Ann. §§57-14-101, et seq.

With respect to the GIA, the State Defendants rely on section 63G-7-201(4)(m) and (t), which state:

> A governmental entity, its officers, and its employees are immune from suit, and immunity is not waived, for any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment, if the injury arises out of or in connection with, or results from:
>
> (m) an activity authorized by ... the Division of Forestry, Fire, and State Lands; ... or

(t) the exercise or performance of ... any function pursuant to Title 73, Chapter 10, Board of Water Resources -- Division of Water Resources.

Utah Code Ann. § 63G-7-201(4). The State argues that because plaintiffs have named the Division of Forestry and the Division of Water Resources, and immunity has been preserved for the functions of these entities, then all claims against all of the State Defendants are barred.

Plaintiffs argue that immunity has been waived by section 63G-7-301(2)(h) and (i), which state:

Immunity from suit of each governmental entity is waived:...

(h) except as provided in Subsection 63G-7-201(3), as to any injury caused by:

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

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

(i) subject to Subsections 63G-7-101(4) and 63G-7-201(4), as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment[.]

Utah Code Ann. § 63G-7-301(2).

Plaintiffs allege in this case that the bridge over the Provo River was dangerous, defective and/or unsafe, and the cause of Mr. Pollock's death. Plaintiff further alleges that this condition was not a latent defect, for which immunity is preserved under section 63G-7-201(3). And section 63G-7-301(2)(h) is limited only by subsection 63G-7-201(3), unlike 63G-7-201(3)(i), which is limited by 63G-7-201(4). So, accepting these allegations as true, as the court must on a motion to dismiss, the GIA does not bar plaintiff's claims as a matter of law.

As far as the State's argument that immunity is appropriate under sections 63G-7-201(4)(m) and (t), it is not clear to the court whether employees of these State entities had any role in the events giving rise to plaintiffs' claims. Stated differently, it is not obvious whether any of the activities by the State Defendants that gave rise to the claims in this case were undertaken by employees or agents of these particular State entities. For this reason the court cannot conclude that the GIA provisions applicable to employees of these entities bar all of plaintiffs' claims. The court declines to dismiss these entities at this time, but whether the claims against these State entities can go forward, or are barred by the GIA, will depend on plaintiffs

more clearly articulating in their amended complaint the nature of their connection to the claims in the case.

With respect to the LLLA, the State Defendants argue that plaintiffs' claims are barred by two separate provisions of the Act, section 57-14-201 ("Section 201") and section 57-14-401 ("Section 401"). Section 201 has been part of the LLLA since its original enactment in 1979; Section 401 was adopted in 2013. The court must, of course, read the LLLA as a whole, but will analyze each section below.

Section 201 states:

> Except as provided in Subsection 57-14-204(1) and (2), an owner of land owes no duty of care to keep the land safe for entry or use by any person entering or using the land for any recreational purpose or to give warning of a dangerous condition, use, structure, or activity on the land.

It cannot reasonably be disputed that Mr. Pollock entered or used the land -- in this case the Provo River -- for a recreational purpose. Thus, the State, as owner of the land, owed no duty of care to keep the land safe or to warn of the dangerous condition, "[e]xcept as provided in Subsection 57-14-201(1) and (2)...." Those parts state:

> (1) Nothing in this part limits any liability that otherwise exists for:
>
> > (a) willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity;
> >
> > (b) deliberate, willful, or malicious injury to persons or property; or
> >
> > (c) an injury suffered where the owner of land charges a person to enter or go on the land or use the land for any recreational purpose.
>
> (2) For purposes of Subsection (1)(c), if the land is leased to the state or a subdivision of the state, any consideration received by the owner for the lease is not a charge within the meaning of this section.

Utah Code Ann. § 57-14-201. It is undisputed that the State did not charge Mr. Pollock to enter or go on the land, so subparts (1)(c) and (2) do not apply. That leaves the exception for willful or malicious conduct. Plaintiffs' complaint alleges willful and malicious conduct. The State Defendants challenge those allegations as conclusory. In *Golding v. Ashley Central Irrigation Co.*, 793 P.2d 897 (Utah 1990), the supreme court held that to meet the minimum pleading requirements for the willful and malicious exception, the complaint must allege "the elements of knowledge of the dangerous condition and of the fact that serious injury is a probable result, and

inaction in the face of such knowledge...." *Id.* at 900. Plaintiffs' complaint meets these requirements. Dismissal on the basis of Section 201 is therefore inappropriate.[1]

Section 401 does not contain an exception for willful or malicious conduct. Section 401 states:

> Notwithstanding Section 57-14-202 to the contrary, a person may not make a claim against or recover from an owner of any land, 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.

Utah Code Ann. § 57-14-401. The prefatory clause to Section 401 makes clear that it is not subject to the willful and malicious or other exceptions or limitations applicable to Section 201. And, as noted above, Mr. Pollock was engaged in an activity with a recreational purpose -- kayaking -- and the State did not charge him for kayaking on the Provo River. Plaintiffs concede these issues, but argue that (1) Section 401 is limited to claims for personal injury, and wrongful death claims fall outside its reach, and (2) Mr. Pollock's death was not caused by an "inherent risk" of kayaking.

Section 401 is limited to damage caused "by the inherent risks of participating in an activity with a recreational purpose on the land." The statute defines "inherent risks" as "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(3). One of the dangers, conditions, or potentials for personal injury inherently associated with kayaking is the existence of features in the water or on the bed of the river that interrupt the flow and create currents, eddys, backflow and other similar movements. If Mr. Pollock's injury had been caused by some natural feature -- a rock, tree or other natural object that created an unanticipated flow of water -- there is little doubt his accident would be caused by an inherent risk of participating in a recreational activity. Here, however, the accident was not caused by a natural feature, but by a man-made feature -- the bridge or its supporting structure. The question, then, is whether a man-made feature, placed in the midst of natural features, is an integral and natural part of participating in the sport of kayaking. At this point, there is no factual record upon which the court could draw any conclusions in this regard. The complaint contains no meaningful allegations in this regard and the motion papers do not address this in any detail. Based on the record as it currently exists, the court cannot say as a matter of law that the

[1] Based on this, the court does not reach plaintiffs' alternative argument that the land at issue does not meet the rural requirements necessary to invoke the act.

changes in the flow of water flow caused by encountering the bridge and supporting structures was an inherent risk of kayaking.[2]

Because the court cannot determine at this time whether the damage was caused by an inherent risk of kayaking, the motion to dismiss must be denied. For this reason, the court does not reach at this time the questions of whether Section 401 applies to wrongful death claims and, if it does, whether it violates Article XVI, Section 5 of the Utah Constitution. If the court ultimately determines that the damages in the case were caused by an inherent risk of kayaking, it will then be necessary to address these issues.

The motion to dismiss is denied. No further order is necessary.

DATED this 30th day of July, 2019.

BY THE COURT

Todd Shaughnessy
District Court Judge

[2] The court notes that in 2019, the Legislature amended Section 401 to eliminate the reference to "inherent risks of participating in an activity with a recreational purpose", replacing it with "damage caused either directly or indirectly by participating in an activity with a recreational purpose on the land." The 2019 amendment, which doesn't apply to the claims in this case, broadened Section 401 such that it now applies to damage, however it may be caused, to a person engaging in an activity with a recreational purpose. Under these facts, Mr. Pollock was engaged in an activity with a recreational purpose – kayaking – and his damage was caused directly or indirectly by participating in that activity. The 2019 amendments, if they applied, would allow the court to make this determination at the pleading stage.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 190903003 by the method and on the date specified.

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Date: 07/30/2019

/s/ MANDY ACEVEDO

Deputy Court Clerk