IN THE UTAH SUPREME COURT

LEONARD FELDMAN, personally and as personal representative of the ESTATE OF LIUDMILA FELDMAN; MARINA DONNELLY; and ANTON KHOKHLOV, Plaintiffs/Appellants, v. SALT LAKE CITY; SALT LAKE CITY CORPORATION; Defendants/Appellees.	**BRIEF OF APPELLEES** Appeal No. 2019-0238-SC District Court No. 180901840

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INTRODUCTION

On the evening of April 23, 2013, Luidmila and Leonard Feldman visited the Parley's Historic Nature Park with their dogs.[1] Luidmilla and Leonard's dogs entered the creek at the East Creek Access Area and apparently had trouble exiting because of a current in the creek.[2] Leonard entered the creek in an attempt to assist the dogs, but was unsuccessful in his efforts and was pushed downstream.[3] Luidmila then entered the creek to assist the dogs and was caught in a current and tragically drowned.[4] The dogs exited the creek unhurt.[5] Luidmila's husband and adult children filed claims against Salt Lake City.[6]

Just over forty years ago Utah enacted the first version of the Landowners Limited Liability Act[7] for the specific purpose of encouraging landowners to open their land to the public for recreational use.[8] Because of its stated purpose, it is often colloquially referred to as the "Recreational Use Statute" and will be referred to as such hereinafter. To encourage landowners to open their lands, the Recreational Use Statute operates to remove the common law duties that would otherwise apply and provides a broad immunity to

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[1] (R. 00002, ¶ 10.)
[2] (R. 00003, ¶¶ 14-15; R. 00083, ¶¶ 14 & 16.)
[3] (R. 00003, ¶¶ 15-16; R. 00083, ¶¶ 17-18.)
[4] (R. 00003, ¶¶ 17-18; R. 00083, ¶¶ 19-20.)
[5] (R. 00142.)
[6] (R. 00001-7.)
[7] L. 1979, Ch. 129, § 7, enacting UTAH CODE § 57-14-1 through 7.
[8] *See, e.g.*, UTAH CODE § 57-14-101(2) ("[T]he purpose of this chapter is to limit the liability of public and private land owners toward a person entering the owner's land . . . for recreational purposes . . ..); *Golding v. Ashley Ctr. Irrigation Co.*, 902 P.2d 142, 145 (Utah 1995) ("The Act encourages landowners to allow the public to use their land for recreational purposes by limiting landowners' liability to persons who use the land.").

landowners, including government entity landowners, for injuries that occur on lands opened to the public free of charge for recreational use.[9] The Recreational Use Statute has been amended over the years to clarify and broaden the protections it confers, with the most recent amendments being made in the 2019 legislative session. The version in effect at the time of Ms. Feldman's drowning is set forth in 2013 version of the Act, Utah Code §§ 57-14-101 through 401, and applies to render the City immune from all claims asserted.[10]

STATEMENT OF ISSUES

ISSUE ONE: Did the district court correctly conclude Utah's Recreational Use Statute precludes all Plaintiffs' claims?

PRESERVATION: This issue was argued at length in the parties' memoranda supporting and opposing the City's Motion to Dismiss and before Judge Faust at the May 31, 2018 hearing on this motion.[11] The Memorandum Decision granting the City's motion demonstrates this issue was raised and was the basis for the dismissal of Plaintiffs' claims.[12]

STANDARD OF REVIEW: A district court's interpretation of relevant statutory provisions is reviewed for correctness, giving no deference to the district court's decision.[13]

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[9] *See generally* UTAH CODE § 57-14-101 *et seq*.

[10] All references hereinafter to UTAH CODE §§ 57-14-101 through 401 are to the 2013 version of the Act, unless stated otherwise. *See* Appellees' Addendum attached hereto for a copy of all provisions of the Act in effect at the time of Ms. Feldman's drowning.

[11] (R. 00036-40, R. 00091-124; R. 00127-42; R. 00469-510.)

[12] (R. 00200-207.)

[13] *2 Ton Plumbing, LLC v. Thorgaard*, 2015 UT 29, ¶ 17, 345 P.3d 675.

ISSUE TWO: Did the district court correctly conclude the Plaintiffs' proposed amendments to the Complaint were futile?

PRESERVATION: This issue was argued at length in the parties' memoranda supporting and opposing the Plaintiffs' Motion for Leave to Amend and before Judge Faust at the May 31, 2018 hearing on that motion.[14] The Memorandum Decision denying the Plaintiffs' motion demonstrates this issue was raised and was the basis for the denial of that motion.[15]

STANDARD OF REVIEW: A district court's denial of a motion for leave to amend a complaint that is based on futility is a legal conclusion that is reviewed for correctness.[16]

STATEMENT OF CASE

Leonard Feldman, personally and as the representative of the Estate of Luidmilla Feldman, and Marina Donnelly and Anton Khokhlov, Ms. Feldman's adult children,[17] filed a Complaint asserting claims against Salt Lake City, Forsgren Associates, Inc. and Bio-West, Inc. for negligence, premises liability, negligent infliction of emotional distress, vicarious liability and wrongful death.[18] The Complaint alleges that the City owns, controls and developed the East Creek Access Area,[19] the area where Ms. Feldman

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[14] (R. 00078-88; R. 000143-44; R. 00136-42; R. 00157-64; R. 00469-510.)

[15] (R. 00200-07.)

[16] *Powder Run at Deer Valley Owner Ass'n v. Black Diamond Lodge at Deer Valley Ass'n of Unit Owners*, 2014 UT App 43, ¶ 6, 320 P.3d 1076; *Shah v. Intermountain Healthcare, Inc.*, 2013 UT App 261, ¶ 6, 314 P.3d 1079.

[17] Referred to hereinafter collectively as "Plaintiffs."

[18] (R. 00001-7.)

[19] (R. 00002, ¶ 11.)

drowned, and that Salt Lake City hired Forsgren and Bio-West to "design and develop" that area.[20] The Complaint also alleges that after the dogs entered the creek to play, encountered a current, and Leonard failed in his attempt to assist them; "Liudmilla entered the creek . . . was caught in a dangerous current . . . and drowned."[21] The Complaint further alleges the "dangerous current . . . resulted from manmade developments at the East Creek Access."[22]

The City moved to dismiss because all claims are precluded by the immunity protections afforded landowners, including public entities, under Utah's Recreational Use Statute.[23] Plaintiffs opposed the motion arguing the Recreational Use Statute does not apply because the Feldmans did not "enter the creek" for a recreational purpose and Ms. Feldman did not drown as the result of an "inherent risk" of entering the creek.[24] Plaintiffs also argued the Recreational Use Statute does not apply to wrongful death claims and claimed it would violate the Utah Constitution to find otherwise.[25] Finally, Plaintiffs argued an express exception to the immunity provided by the Recreational Use Statute applies because the City "willfully or maliciously fail[ed] to guard or warn against a

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[20] (R. 00002, ¶¶ 12-13.)
[21] (R. 00003, ¶¶ 14-18.)
[22] (R. 00003, ¶ 21.)
[23] (R. 00036-40.)
[24] (R. 00091-97.) The Plaintiffs also argued that the statute did not apply to the wrongful death claim brought by Ms. Feldman's adult children because they were never in the Parley's Historic Nature Park, which argument appropriately is not pursued on appeal. *Id.*
[25] (R. 00095; R. 00098-99.)

dangerous condition, use, structure, or activity."[26]

Concurrent with their opposition, Plaintiffs filed a motion for leave to amend the Complaint,[27] which added allegations that Luidmila and Leonard had no intention of entering the creek when they visited the park and that they entered the creek for the "sole purpose" of helping their dogs exit the creek when they were unable to do so "because of the current."[28] The proposed amendments also included the conclusory allegation that the City's "conduct was willful or malicious, in that Defendants acted and failed to act even though they knew of the hazard and knew that serious injury was a probable result of contact with the hazard."[29]

The City responded demonstrating the Recreation Use Statute applies because the Feldmans visited the Parley's Historic Park for the purpose of recreating with their dogs and encountering a dangerous current is an "inherent risk" whenever one enters a body of water.[30] The City also showed that the Recreational Use Statute applies to wrongful death claims and such application does not violate the Utah constitution.[31] Finally, the City demonstrated that granting leave to amend the complaint was futile because the statute precludes all claims, even if the proposed amendments were allowed.[32]

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[26] (R. 00099-100.)
[27] (R. 00078-88.)
[28] (R. 00083, ¶¶ 15-19.)
[29] (R. 00085, ¶ 34; R. 00086, ¶¶ 43 & 50.)
[30] (R. 00127-42.)
[31] (R. 00127-42.)
[32] (R. 00136-44.)

The district court issued a ruling agreeing with the City and finding the Recreational Use Statute applies to preclude all claims and that the proposed amendments were futile.[33] The City's Motion to Dismiss was granted and the Plaintiffs' Motion for Leave to Amend the Complaint was denied.[34] All claims against the City were dismissed with prejudice.[35]

Shortly thereafter, Co-Defendants Fosgren and Bio-west filed summary judgment motions.[36] Fosgren argued entitlement to judgment because Fosgren did not "recommend or design any improvements pertaining to the East Creek Access" and any "improvements that were designed by Forsgren for another locale in the Park were never constructed."[37] Bio-west argued entitlement to judgment because none of its designs for "improvements" to the East Creek Access were implemented.[38] Plaintiffs did not oppose theses motions[39] and judgments were entered dismissing all claims against these Defendants with prejudice.[40] Plaintiffs then pursued this appeal.[41]

SUMMARY OF ARGUMENT

Plaintiffs' claims are precluded by the plain language of section 401 of the Recreational Use Statute. Section 401 provides wide immunity from suit to landowners

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[33] (R. 00200-07.)
[34] (R. 00200-07.)
[35] (R. 00200-07.)
[36] (R. 00327-66; R. 00369-425.)
[37] (R. 00328.)
[38] (R. 00373-75.)
[39] (R. 00433-36.)
[40] (R. 00445-46; R. 00452-53; R. 00459-61.)
[41] (R. 00464-66.)

that open land to the public free of charge for recreational use. The immunity applies to "developed" and "improved" land in urban or semi-rural areas, extends to public entity landowners, and provides immunity from suit for claims that result from the "inherent risks" of participating in an activity with a recreational purpose. Plaintiffs allege that Ms. Feldman drowned as the result of a "dangerous current" in a creek while recreating with her dogs in the Parley's Historic Nature Park.[42] A dangerous current is an "inherent risk" of entering any body of water and the statutory immunity clearly applies. It is of no consequence that Plaintiffs allege the current at issue was the result of "manmade improvements" because the plain language and expressly stated purpose of the Act makes clear the immunity conferred is not limited to purely natural conditions or conditions that cannot be eliminated by the exercise of reasonable care. It is also apparent that the immunity conferred applies to wrongful death claims because they are personal torts and fall within the statute's preclusion of all claims for personal injury. This interpretation does not result in a violation of Utah's constitutional protection of wrongful death claims for two reasons. First, the immunity provided by the Act is a legislative enactment of a reasonable defense to a wrongful death claim, which this Court has found permissible and constitutional. Second, Plaintiffs could not have recovered on their wrongful death claim against the City at statehood, which means it is not a claim that is protected by the constitutional provision. Plaintiffs' claims are precluded by section 401 and the district

[42] (R. 00003, ¶ 18.)

court did not err in reaching that conclusion.

The district court was also correct in finding Plaintiffs' attempt to amend the Complaint to avoid dismissal was futile. Specifically, Plaintiffs sought leave to amend the Complaint in an attempt to show section 204, a limited exception to the immunities provided by the Recreational Use Statute, applied to their claims. The proposed amendments were futile because the immunity conferred in section 401 is not made subject to the exceptions set forth in section 204. The amendments were futile for the additional reasons that they were conclusory and because the Complaint and the proposed amendments allege facts that show the current was open, obvious and inherent, precluding application of the section 204 exception. No error is shown and this Court should affirm the finding that Plaintiffs' claims are precluded by the Recreational Use Statute and that the proposed amendments were futile.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED UTAH'S RECREATIONAL USE STATUTE PRECLUDES PLAINTIFFS' CLAIMS.

A. The Recreational Use Statute Renders the City Immune from Suit.

1. The History and Purpose of the Statute.

Utah's Recreational Use Statute was adopted in 1979[43] for the specific purpose of encouraging landowners to open their land to the public for recreational use.[44] The Act

[43] L. 1979, Ch. 129, § 7, enacting UTAH CODE § 57-14-1 through 7.

[44] UTAH CODE § 57-14-101(2) ("the purpose of this chapter is to limit the liability of public and private land owners toward a person entering the owner's land . . . for

accomplishes this purpose by eliminating or removing the common law duties that ordinarily apply when a landowner permits access to land.[45] Specifically, the common law has identified three categories of person when it comes to injuries occurring on land: invitees, licensees, and trespassers.[46] Invitees are owed the highest duty of care and trespassers are owed the lowest duty of care.[47] The Utah Recreational Use Statute accomplishes its purpose of encouraging landowners to open their land to the public for recreational use by removing the common law duties that would otherwise be owed in such circumstances, *i.e.*, the duty owed to invitees or licensees, and replacing them with a much lower duty that is akin to the duty owed to unknown trespassers.[48]

Since its enactment, much of the litigation regarding the applicability of the provisions of the Recreational Use Statute turned on whether the land fell within the purview of the statute, with the analysis often turning on whether the land was sufficiently rural or undeveloped to fall within the parameters of the Act.[49] This resulted in two cases

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recreational purposes . . ..); *Golding,* 902 P.2d at 145 ("The Act encourages landowners to allow the public to use their land for recreational purposes by limiting landowners' liability to persons who use the land.").

[45] *Id.; see also* UTAH CODE § 57-14-101 *et seq.* (2013) (the version in effect at the time of Ms. Feldman's tragic drowning).

[46] *See, e.g.*, *Stevens v. Salt Lake Cty.*, 478 P.2d 496, 498-99 (1970) (discussing invitees and licensees and the duties owed at common law); *Golding*, 902 P.2d at 145-46 (discussing common law duty to trespassers).

[47] *Id.*

[48] UTAH CODE § 57-14-101 *et seq.*; *Golding*, 902 P.2d at 145-46 (citing *Golding v. Ashley Centr. Irrigation Co.,* 793 P.2d 897, 901 (Utah 1990) (finding duty under Recreational Use Statute is analogous to that owed trespassers under the common law)).

[49] *See, e.g., Sulzen ex rel. Holton v. United States*, 54 F. Supp. 2d 1212, 1215-16 (D. Utah 1999); *Figueroa v. United States*, 64 F. Supp. 2d 1125, 1135-40 (D. Utah 1999); *De*

reaching inconsistent opinions about whether the protections of the statute applied to the Hanging Rock Picnic Area in American Fork Canyon[50] and two decisions from this Court finding the protections of the statute did not extend to "urban or suburban municipal parks."[51] After issue of those decisions, the legislature enacted section 401, which specifically precludes claims for "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."[52] This provision clarifies the types of land the legislature intended to fall within the immunities provided by the statute and nullifies the effects of any decision to the contrary.

2. The Elements of the Statute are Easily Met.

Section 401 of the Recreational Use Statute provides the City immunity from suit and the district court did not err in reaching that conclusion. Section 401 states:

> [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.[53]

Baritault v. Salt Lake City Corp., 913 P.2d 743, 744-48 (Utah 1996).

[50] *Sulzen*, 54 F. Supp. 2d at 1215-16 (finding "the Hanging Rock Picnic Area is the type of rural recreation area intended to be covered by the Act"); *Figueroa*, 64 F. Supp. 2d at 1135-40 (stating the court could not find as a matter of law that Hanging Rock Picnic Area was sufficiently rural or undeveloped to fall within the parameters of the Act).

[51] *De Baritault*, 913 P.2d at 744-48; *Nelson By & Through Stuckman v. Salt Lake City*, 919 P.2d 568, 572 (Utah 1996).

[52] UTAH CODE § 57-14-401.

[53] *Id.*

As such, it precludes claims against landowners where the injury occurred on land that has been open to the public free of charge and the injury was caused by the inherent risks of participating in an activity with a recreational purpose.

Plaintiffs' claims fit squarely within the immunity set forth in section 401. First, the provision applies to owners of land "within the state boundaries" and it specifically includes "park[s]", "water" and "waterways."[54] Plaintiffs' Complaint alleges the City is the owner of Parley's Creek Historic Park and the East Creek Access where Ms. Feldman drowned.[55] Second, the provision applies to "areas opened to the general public without charge, such as a lake, pond, park, trail, waterway, or other recreation site."[56] The Complaint describes an incident that occurred at the East Creek Access, an area within the Parley's Creek Historic Park, a park that is open to the public without charge.[57] Third, the provision applies to "personal injury or property damage caused by the inherent risks of participating in an activity with a recreational purpose on the land."[58] The statute sets forth a non-exhaustive list of activities that are examples of a "recreational purpose," which include hiking, swimming, and studying nature or any combination thereof.[59] The list also expressly includes several water-based activities, including fishing, waterskiing, using

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[54] UTAH CODE §§ 57-14-102(4)(a)-(b) & 401.
[55] (R. 00002, ¶¶ 10-11.)
[56] UTAH CODE § 57-14-401.
[57] (R. 00001-7.)
[58] UTAH CODE § 57-14-401.
[59] UTAH CODE § 57-14-102(3).

boats and engaging in water sports.[60] The Complaint alleges Ms. Feldman was in the Parley's Creek Historic Park for the recreational purpose of walking and exercising her dogs and drowned as a result of her decision to enter the creek at the East Creek Access in the course of engaging in that activity.[61] The elements of section 401 are easily shown.

B. The Immunity Conferred by the Recreational Use Statute is Not Limited to Natural Conditions or Those That Cannot be Eliminated.

1. The Immunity Set Forth in Section 401 Applies to Manmade Conditions on Land.

Plaintiffs contend the immunity set forth in section 401 is limited to harm that is the result of a purely natural condition on land and does not apply to the claims at issue because Plaintiffs allege the current was the result of unspecified manmade improvements.[62] There is no support for this conclusion. First, the plain language of section 401 compels the result that the immunity applies to manmade improvements because it applies to land that is "developed or improved."[63] To find the scope of the Recreational Use Statute is limited to only natural conditions on this developed and improved land asks the Court to read language out of the statute and to add limiting language that does not currently exist, which the court cannot do.[64] Second, the Act defines "inherent risks" in terms of the risks

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[60] *Id.*

[61] (R. 00002-7.)

[62] Appellants' Br. at 20-24.

[63] UTAH CODE § 57-14-401.

[64] *Outfront Media, LLC v. Salt Lake City Corp.*, 2017 UT 74, ¶ 27, 416 P.3d 389 (declining invitation of counsel to write out words of a statute because it violates a core principle of statutory interpretation); *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863 (stating courts must "presum[e] all omissions to be purposeful").

associated with participating in a recreational activity, not in terms of whether the injury was caused by a natural or manmade condition on the land: "inherent risk 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."[65]

Third, rejecting the contention that the protections of the Act are limited to injuries caused by purely natural conditions on the land is consistent with precedent of this Court. In *Golding v. Ashley*, this Court was tasked with determining if a prior version of the Recreational Use Statute applied to provide a landowner immunity for "dangerous conditions" that were the result of manmade improvements on the land: namely, backwash from a canal spillway.[66] In analyzing whether the statute's general immunity from liability for "dangerous conditions" applied to the "dangerous condition" of the spillway, the court found the proper inquiry was whether the danger at issue was common to the use to which the land is put, not whether the condition was manmade or the result of a manmade improvement.[67] The Court ultimately concluded all conditions at issue were common to canals and the owner was immune from suit.[68] This case is particularly applicable here, where Plaintiffs allege a "dangerous current" in the creek at the East Creek Access was the

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[65] UTAH CODE § 57-14-102(3) (emphasis added).

[66] 902 P.2d at 146-148.

[67] *Id.* at 147 (finding no liability with respect to claims of certain claimed hidden perils: a large accumulation of debris; a large depression and the spillway; and a hydraulic jump, because they are common in the operation of canals).

[68] *Id.* at 147-48.

result of manmade improvements,[69] presumably from the culvert that redirects the creek under I-80 into the Parley's Historic Park.[70]

Plaintiffs' attempt to distinguish *Golding* on the grounds it was decided before section 401 was adopted and found the defendant canal owner immune from suit "due to a special immunity given to canal owners for public policy reasons."[71] It is unclear how Plaintiffs reached this conclusion, when the Court's discussion of its ruling in *Golding* is exclusively dedicated to the duty owed under Utah's Recreational Use Statute and whether the dangerous conditions at issue fell within the parameters of the Act because they were inherent in all canals and should have been known to anyone swimming in a canal.[72] The fact the decision was issued before section 401 was adopted and concerns a different provision of the Recreational Use Statute is also of little import. As the only decision to expressly discuss the dangerous conditions covered by the general immunity provided by the Recreational Use Statute, it has significant precedential value and provides valuable guidance that the conditions for which immunity is conferred under section 401 are not limited to purely natural conditions, as Plaintiffs contend.

2. The Immunity Set Forth in Section 401 is not Limited to Conditions that Cannot be Eliminated.

In an attempt to limit the immunity conferred by section 401, Plaintiffs urge the

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[69] (R. 00001-7.)
[70] *See* Appellants Br. at 1, n.1.
[71] Appellants' Br. 24.
[72] *Golding*, 902 P.2d at 145-148.

Court to ignore the plain language of the definition of "inherent risks" provided in the Recreational Use Statute and adopt the definition of "inherent risks" provided in a completely different statute, which limits immunity to conditions that cannot be eliminated.[73] When a statute provides no definition of a term, a court may look to other similar statutes for guidance.[74] But where, as here, the statute provides a definition of the term, it is wholly improper for a court to simply ignore that definition and adopt a definition set forth in a completely different statute, as Plaintiffs suggest. Moreover, to the extent the language used to define "inherent risks" in the Recreational Use Statute differs from the language used to define "inherent risks" in other statutes, those differences must be understood as purposeful.[75] Here, the Recreational Use Statute defines "inherent risks" as "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."[76] The Limitation of Liability for Agricultural Tourism Act, which definition the Plaintiffs contend the Court should adopt, defines "inherent risks" as "a danger, hazard or condition, which is an integral part of an agricultural tourism activity and *that cannot be eliminated*

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[73] Appellants' Br. at 23.

[74] *Williams v. Hyrum Gibbobs & Sons Co.*, 602 P.2d 684, 686 (Utah 1979) (finding it appropriate to look to the definition of "telephone line" set forth in statutes regulating public utilities and adopting it for the definition of "telephone line" in the eminent domain statute where the term was not defined).

[75] *Marion Energy,* 2011 UT 50, ¶ 14 (stating a court must "presume that the legislature used each term advisedly [and] . . . that the expression of one term should be interpreted as the exclusion of another . . . [and] give effect to omissions in statutory language by presuming all omissions to be purposeful).

[76] UTAH CODE § 57-14-102(3).

by the exercise of reasonable care . . .."[77] Unlike the Agricultural Tourism Act, the Recreational Use Statute did not define "inherent risks" in terms of risks that cannot be eliminated by the exercise of reasonable care. This choice must be understood as purposeful and given the appropriate effect.[78]

Likewise, this Court's interpretation of the meaning of "inherent risks" in the Inherent Risks of Skiing Act does not illustrate the meaning of "inherent risks" in the Recreational Use Statute, as Plaintiffs contend.[79] In *Clover v. Snowbird Ski Resort* this Court was charged with determining the duties a ski resort owed *paying* customers under the Inherent Risks of Skiing Act.[80] Important to the Court's analysis was the fact that the expressly stated purpose of the Act was to "clarify the law, not to radically alter ski resort liability."[81] As such, the Court analyzed ski resort liability under the common law at the time the Act was adopted and concluded the term "inherent risks of skiing" did not include risks that could be eliminated by the exercise of ordinary care because a plaintiff could have recovered against a ski resort on those grounds at the time the Act was adopted.[82] In stark contrast, the expressly stated purpose of the Recreational Use Statute is to alter the liability that would otherwise apply if a landowner opened land to the public free of charge

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[77] UTAH CODE § 78B-4-512(1)(c) (emphasis added).

[78] *See Marion Energy,* 2011 UT 50, ¶ 14.

[79] Appellants' Br. at 21 (citing *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991)).

[80] *Clover*, 808 P.2d at 1043-1048.

[81] *Id.* at 1045.

[82] *Id.* at 1045-48.

for recreational use and to limit it to a duty analogous to that owed unknown trespassers.[83] To achieve this goal, the Recreational Use Statute enacted provisions that state the landowner has no duty "to keep the land safe,"[84] no duty to "warn[ ] of a dangerous condition, use, structure, or activity on the land"[85] and makes no representation and extends no assurance that the land is "safe for any purpose,"[86] radically changing otherwise applicable law. Of particular note is the provision disavowing the "legal status of an invitee or licensee to whom a duty of care is owed."[87] There is simply no basis to find the legislature intended to limit immunity under section 401 to risks that cannot be eliminated by the exercise of reasonable care and the Court should not find the immunity is so limited.

C. The Immunity Conferred by the Recreational Use Statute Applies to Wrongful Death Claims.

1. Wrongful Death Claims are Precluded by the Plain Language of Section 401.

A wrongful death claim is a personal tort and precluded by the plain language of section 401. Section 401 states claims for "personal injury or property damage" are precluded.[88] Personal injury is commonly understood to mean "an injury to one's body,

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[83] *See supra* § I, A,1; *see also, Golding*, 902 P.2d at 145 ("The Act encourages landowners to allow the public to use their land for recreational purposes by limiting landowners' liability to persons who use the land."); UTAH CODE § 57-14-101(2) ("[T]he purpose of this chapter is to limit the liability of public and private land owners toward a person entering the owner's land . . . for recreational purposes . . ..).

[84] UTAH CODE § 57-14-201.

[85] *Id.*.

[86] UTAH CODE § 57-14-202(1).

[87] UTAH CODE § 57-14-202(2).

[88] UTAH CODE § 57-14-401.

mind, or emotions . . . an injury that is not to one's property."[89] This definition is consistent with Utah law, which recognizes two types of tort actions: personal torts and property torts,[90] and is consistent with definitions provided in similar statutes[91] and precedent of this Court.[92] For example, Utah's Governmental Immunity Act defines "personal injury" as "an injury of any kind other than property,"[93] which this Court has found "demonstrate[es] that the legislature recognized [the term] 'personal injury' refer[s] to all personal torts as opposed to property torts."[94] Precedent of this Court also holds that it is "well established . . . that a statutory reference to 'personal injury' claims includes all personal torts (as opposed to property torts . . ..)"[95] Specifically, in *Gressman v. State* this Court was tasked with determining if the term "personal injury" in Utah's Survival Statute was intended to include all personal torts or was limited to torts that involve physical bodily injury to the plaintiff.[96] The Court conducted a detailed analysis of the use of the term "personal injury" in Utah and tort law generally before reaching the above conclusion and finding the term "personal injury" in the Survival Statute at issue included all personal torts and was not

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[89] MERRIAM WEBSTER, https://www.merriam-webster.com/legal/personal%20injury (last visited Aug. 15, 2019).

[90] *See, e.g.*, *Gressman v. State*, 2013 UT 63, ¶ 26, 323 P.3d 998.

[91] *See* UTAH CODE § 63G-7-102(7) (defining "personal injury" as "an injury of any kind other than property damage").

[92] *See, e.g.*, *Gressman*, 2013 UT 63, ¶ 31 (surveying tort law and finding it "well-established . . . that a statutory reference to 'personal injury' claims includes all personal torts (as opposed to property torts)").

[93] UTAH CODE § 63G-7-102(7).

[94] *Gressman*, 2013 UT 63, ¶ 32.

[95] *Id.* ¶ 31.

[96] *Id.* ¶¶ 23-35.

limited to torts that involve a physical injury.[97] Wrongful death is a personal tort[98] and, therefore, is precluded by the plain language of section 401.[99]

Defining "personal injury" to include all personal torts is also consistent with the expressly stated purpose of the Recreational Use Statute and avoids absurd results.[100] For example, if wrongful death claims were not covered by the immunities of section 401 as Plaintiffs contend, a landowner would be immune from suit if a person was mountain biking on their property and crashed their bike breaking a bone, but would not be immune from suit if the same person were mountain biking on the very same property, crashed their bike in the very same place, and for the very same reason, and suffered a traumatic head injury that was fatal. Since the purpose of the statute is to encourage landowners to open

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[97] *Id.*

[98] *See, e.g., Berrett v. Albertsons Inc.*, 2012 UT App 371, ¶ 53, 293 P.3d 1108 ("[W]rongful death statutes provide for the recovery of damages that the survivors suffered personally as a result of the decedent's death."); *Riggs v. Georgia-Pac.* LLC, 2015 UT 17, ¶ 16, 345 P.3d 1219 ("A wrongful death action compensates heirs for their personal losses — i.e., those losses that stem from losing the deceased person.").

[99] Plaintiffs' attempt to distinguish *Gressman* on the grounds it "did not address, even in dicta, whether a statutory reference to 'personal injury' would include 'wrongful death' claims." Appellants' Br. at 13. This distinction makes little sense. In *Gressman*, this Court conducted a thorough analysis to determine if the term "personal injury to a person" was limited to injuries that caused physical harm to the person and found it "well established" that a statutory reference to "personal injury" includes all personal torts, not just torts that result in a physical injury. Since wrongful death is a personal tort, *see infra* n.98, the applicability of this holding is clear.

[100] *See Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, ¶ 73, 210 P.3d 263 ("When statutory language plausibly presents the court with two alternative readings, we prefer the reading that avoids absurd results").

land to the public for recreational use,[101] this is an absurd result that is directly contrary to the clearly stated purpose of the Act.

Plaintiffs contend three cases support a conclusion that the term "personal injury" in section 401 does not include wrongful death claims.[102] A review of these cases reveals they stand for the following propositions: heirs may bring a claim for wrongful death, even if the decedent brought a claim for personal injury prior to her passing;[103] the common-law defense of interspousal tort immunity does not apply to a claim for wrongful death,[104] and a trial court did not err in finding settlement proceeds paid to a decedent after his death were the property of the estate.[105] Nothing in these decisions shows a statutory reference to "personal injury" should be understood to exclude the personal tort of wrongful death. If anything, these decisions make clear a wrongful death claim is a personal tort that seeks to recover damages for the personal injury suffered by heirs as a result of the decedent's passing.[106] As such, these decisions actually provide further support for the finding that wrongful death is a personal tort and precluded by the plain language of section 401.

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[101] *See* UTAH CODE § 57-14-101(2); *Golding*, 902 P.2d at 145.

[102] *See* Appellants' Br. at 10 (citing *Riggs*, 2015 UT 17; *Hull v. Silver*, 577 P.2d 103 (Utah 1978); *In re Estate of Sims*, 918 P.2d 132 (Utah Ct. App. 1996)).

[103] *Riggs*, 2015 UT 17, ¶¶ 3-19.

[104] *Hull*, 577 P.2d at 104.

[105] *In Re Estate of Sims*, 918 P.2d at 135-36.

[106] *Riggs*, 2015 UT 17, ¶ 16 ("A wrongful death action compensates heirs for their personal losses — *i.e.*, those losses that stem from losing the deceased person."); *Hull*, 577 P.2d at 103-104 (making clear a claim for wrongful death compensates heirs for their personal loss of the decedent); *In re Estate of Sims*, 918 P.2d at 135 ("In a wrongful death cause of action, the heirs of the decedent personally hold claims for lost support and other personal losses.").

2. The Newly Enacted Caps Provision does not show the Legislature Intended to Exclude Wrongful Death Claims from the Protections of Section 401.

The legislature's recent enactment of Utah Code § 57-14-501 does not show the legislature intended wrongful death claims to be excluded from the wide protections afforded landowners under Utah Code § 57-14-401. To the contrary, the newly passed provision shows it was the legislature's intent for section 401 to apply to wrongful death claims. Specifically, section 501 provides that to the extent a plaintiff successfully brings a claim against a landowner for injury on land and can recover non-economic damages, those damages are capped and may not exceed $450,000.[107] The provision then explains that this cap does not apply to certain types of action, including wrongful death claims.[108] "[A] core principle of statutory interpretation—[is a] distaste for superfluity."[109] "That is, [courts must] avoid reading statutes in a way that renders portions inoperative," rather they must "seek to read them in a way that gives effect to each word and phrase."[110] If wrongful death claims were not claims contemplated to be within the parameter of the Act, a provision stating a cap provision did not apply to such claims would be superfluous. As such, the new provision shows section 401 applies to wrongful death claims.

Admittedly, enacting a provision that provides damage caps for claims for which a landowner is immune creates some confusion: an issue that was raised and addressed by

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[107] UTAH CODE § 57-14-501 (2019).
[108] *Id.*
[109] *Outfront Media*, 2017 UT 74, ¶ 27.
[110] *Id.*

the bill sponsors when presenting the Bill, 2019 S.B. 180, to committee and then to the Senate and House floor.[111] Where the language or purpose of a provision presents some ambiguity, courts may "turn to a consideration of legislative history and relevant policy considerations."[112] In their presentations, the bill sponsors explained that the existing Utah Recreational Use Statute already provides wide protection to landowners, but two amendments were proposed to bolster or clarify the already existing protections.[113] First, S.B. 180 clarified the scope of harm the Recreational Use Statute was intended to cover by amending it to read "for personal injury or property damage directly or indirectly caused by participating in an activity with a recreational purpose."[114] The bill sponsors explained the purpose of the amendment was to protect against recent attempts to limit the protections currently afforded property owners by overly narrow interpretations of the term "inherent risks" that were not reflective of the legislature's intent when passing the Recreational Use Statute.[115] Second, S.B. 180 introduced a cap, in the event a plaintiff successfully argued the protections of the Act did not apply.[116] In response to questions from the plaintiffs' bar

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[111] S.B. 180 Limitations on Landowner Liability Amendments: Hearing before the S. Business & Labor Comm., 2019 Leg Sess., (Utah 2019) (statements of Senator Hemmert at mins 18:00-20:00 & 23:00-23:40); S.B. 180 Limitations on Landowner Liability Amendments: S. Floor Debates, Day 32, 2019 Leg Sess., (Utah 2019) (statements of Senator Hemmert at hour 1:16-1:18). Recordings of these proceedings can be found at: https://le.utah.gov/~2019/bills/static/SB0180.html.

[112] *Wilson v. Valley Mental Health*, 969 P.2d 416, 418 (Utah 1998).

[113] *See generally,* S.B. 180 Limitations on Landowner Liability Amendments: Comm. Hearings & Floor Debates, 2019 Leg. Sess., (Utah 2019).

[114] *Id.*

[115] *Id.*

[116] S.B. 180 Limitations on Landowner Liability Amendments: S. Floor Debates,

regarding the redundancy or potential confusion caused by a cap provision where broad immunity is provided, the bill sponsor explained that the intent of the provision was to provide "a belt and suspenders" approach.[117] To the extent the broad protections of the bill somehow failed, the caps provision acted as a "secondary moat" to provide a landowner some comfort in opening their lands to the public.[118] As such, nothing about the legislature's enactment of Utah Code § 57-14-501 shows the legislature intended to exclude wrongful death claims from the broad protections of section 401 or the Recreational Use Statute generally and such an interpretation is directly contrary to the expressly stated purpose of the Act.

3. Applying Section 401 to Preclude Wrongful Death Claims does not Violate Article XVI, section 5 of the Utah Constitution.

a. Section 401 is a permissive legislative enactment of a reasonable defense to a wrongful death claim.

Section 401 is a permissive legislative enactment of a reasonable defense to a wrongful death claim and does not violate Article XVI, section 5 of the Utah Constitution, as Plaintiffs contend. Article XVI, section 5 states "[t]he 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

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Day 32, 2019 Leg Sess., (Utah 2019) (statements of Senator Hemmert at hour 1:16:30-1:17:30).

[117] *Id.*

[118] *Id.; see also* S.B. 180 Limitations on Landowner Liability Amendments: Hearing before the S. Business & Labor Comm., 2019 Leg Sess., (Utah 2019) (statements of Senator Hemmert at mins 4:30-5:30).

resulting in death is provided for by law."[119] This Court has already found Article XVI, section 5 is inapplicable to and does not preclude legislative provisions like section 401 that seek to encourage action from an individual that has no pre-existing duty to perform by providing immunity from suit.[120] Specifically, in *Hirpa v. IHC Hospitals, Inc.*, plaintiffs alleged the Good Samaritan Act, which provides immunity to medical providers that offer emergency medical assistance where they have no pre-existing duty to do so, violated Article XVI, section 5 if applied to a wrongful death claim.[121] This Court rejected that claim finding Article XVI, section 5 permits the Legislature to provide for reasonable defenses that are not inconsistent with the fundamental nature of a wrongful death action:

> The plain meaning of the constitutional provision . . . is to prevent the abolition of the right of action for a wrongful death, whether in a wholesale or piecemeal fashion. Thus, the legislature may not repeal the wrongful death statute; neither may it nullify the wrongful death action by indirect means. However, the Legislature may enact reasonable procedures for the enforcement of wrongful death actions and may provide for reasonable defenses that are not inconsistent with the fundamental nature of the wrongful death action itself.[122]

This Court reasoned that "the Good Samaritan Act is intended to induce licensed medical practitioners to voluntarily render emergency aid by eliminating their liability" and that it made little sense to find a defense that is available if the plaintiff survives is unavailable if the plaintiff passes away:

> Utah law is clear that a plaintiff in a wrongful death action is subject to

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[119] UTAH CONST. ART. XVI, § 5.
[120] *See Hirpa v. IHC Hosps., Inc.*, 948 P.2d 785, 794 (Utah 1997).
[121] *Id.*
[122] *Id.* (quotation simplified).

> defenses which could have been asserted against the decedent had he lived and prosecuted the suit. The Good Samaritan Act is intended to induce licensed medical providers to voluntarily render emergency medical aid by eliminating their liability. The Act provides that a defense can be asserted against a malpractice claim by a living plaintiff. That same defense should be allowable in a wrongful death action by the deceased patient's heirs. In view of this, we think the Good Samaritan Act to be a reasonable defense, not inconsistent with the fundamental nature of the wrongful death action nor an abrogation of the wrongful death action itself. Therefore, it does not violate article XVI, section 5.[123]

The same analysis applies here. Section 401 is intended to induce landowners to open land to the public for recreational use by virtually eliminating their liability for doing so. Just like the Good Samaritan Act, if a defense under the Act may be asserted against a plaintiff that sustains a non-fatal injury on the property that same defense must be allowed if a plaintiff sustains a fatal injury and the landowner is faced with a wrongful death claim by the deceased heirs.

Plaintiffs attempt to distinguish this case on the grounds that the Good Samaritan Act provides "immunity to a physician rendering emergency medical care . . . if the physician is under no pre-existing duty to do so," but section 401 "provides immunity to landowners who have always owed a common law duty of reasonable care to invitees' on their property."[124] Plaintiffs completely miss the point. Just like the physicians, a landowner has no pre-existing duty to permit "invitees" on their property and certainly has no duty to invite members of the public onto their property to recreate free of charge. To

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[123] *Id.* (quotation simplified).

[124] Appellants' Br. at 19.

encourage landowners to take this step, section 401 provides broad immunities that essentially remove the common law duties that would otherwise apply if a landowner voluntarily chose to permit such activity.[125] As such, section 401 is exactly like the Good Samaritan Act and precisely the type of provision this Court has previously found is a permissive legislative enactment of a reasonable defense to a wrongful death claim.[126] No violation of Article XVI, § 5 is shown.[127]

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[125] *See, e.g.*, Utah Code §§ 57-14-201, 202 & 401.

[126] *Berry By & Through Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 685 (Utah 1985) ("[c]learly, the Legislature may enact . . . reasonable defenses that are not inconsistent with the fundamental nature of the wrongful death action itself.).

[127] This conclusion does not create a conflict with this Court's holding in *Malan v. Lewis,* 693 P.2d 661 (Utah 1984). In *Malan*, the Court was charged with determining if Utah's Guest Statute violated the "Due Process Clause of Article I, § 7; the Open Courts Provision of Article I, § 11; and the Uniform Operation of the Laws Provision of Article I, § 24." *Id.* at 663. Article XVI, section 5 was not raised. *Id.* Moreover, the Court decided that case under Article I, § 24 and did not address the other constitutional arguments raised. *Id.*

Pursuant to its equal protection analysis, the Court identified numerous exceptions or potential exceptions to the Guest Statute and found that the Act violated the equal protection provision because it had so many exceptions it resulted in only a small number of persons being subject to the act. *Id.* at 665-68. In that analysis, the Court observed in dicta that Article XVI, section 5 also "seems to compel the conclusion" that the Guest Statute would be unconstitutional if applied to a wrongful death claim by heirs. *Id.* at 667. *See also, Berry*, 717 P.2d at 684 (recognizing the Court's Article XVI, section 5 analysis in *Malan* was "dictum."). The plaintiffs in that case did not challenge the Guest Statute under Article XVI, section 5 and the Court did not engage in any analysis to determine if the Guest Statute would qualify as a permissible legislative defense to a wrongful death claim because that finding was not necessary to find a law violates the equal protection provision. *Id.* at 662-77. As such, *Malan* presents no impediment to the Court finding the Recreational Use Statute is a permissive legislative defense to a wrongful death claim and does not violate Article XVI, section 5.

b. Section 401 does not preclude a claim available at statehood.

Plaintiffs devote a considerable portion of their brief to arguing the district court erred in finding no violation of Article XVI, section 5 could be shown for the additional reason that Plaintiffs had no right to bring a wrongful death claim against the City at the time the constitution was adopted.[128] The Court does not need to address this point because the constitutionality of the statute as a legitimate defense to a wrongful death claim is clear.[129] However, to the extent the Court reaches this point, precedent from this Court demonstrates the district court's conclusion was correct.

This Court has repeatedly recognized that the protections of Article XVI, section 5 only extend to the right to bring a wrongful death claim as it existed at the time the constitution was adopted.[130] As such, decisions of this Court considering challenges to statutes under this constitutional provision begin with a determination of the scope of the right to bring a wrongful death claim at statehood and turn on who enjoyed that right and against whom the right could be asserted.[131] In *Tiede v. State* this Court was charged with

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[128] Appellants' Br. at 16-19.

[129] *See supra* § I, C, 3 i.

[130] *See, e.g., Tiede v. State*, 915 P.2d 500, 504 (Utah 1996) ("the scope of protection afforded by the wrongful death provision is limited to rights of action that existed at the time the provision was adopted."); *Smith v. United States*, 2015 UT 68, ¶ 8, 356 P.3d 1249 (finding Article XVI, section 5 protects only those claims that were available at the time of its adoption).

[131] *See, e.g., Smith*, 2015 UT 68, ¶¶ 8-15 (finding Article XVI, section 5 protects only those claims that were available at the time of its adoption and describing in detail the history and nature of wrongful death claims in Utah at the time the constitution was adopted.); *Garfield Smelting Co. v. Indus. Comm'n*, 178 P. 57, 59 (Utah 1918) (recognizing that to determine if a statute abrogates the right to bring a wrongful death claim in violation

determining if application of the immunities conferred by the Governmental Immunity Act of Utah violated Article XVI, section 5, when applied to wrongful death claims. [132] The Court, recognizing the constitutional protection "is limited to rights of action that existed at the time the provision was adopted," found no violation because "there was no express constitutional or statutory authority allowing suits for wrongful death against the State" at the time the constitution was adopted.[133]

This Court has at least twice affirmed this holding. In *Parks v. Utah Transit Authority*, this Court applied the holding of *Tiede* to find the damage cap provision of the Governmental Immunity Act did not violate Article XVI, section 5 when applied to a wrongful death claim against a political subdivision.[134] Recognizing the claim was brought against a political subdivision, not the State, the court found the analysis extended to the political subdivision because it was performing a governmental function and would have been immune from suit at the time the constitution was adopted.[135] This Court applied the same reasoning in *Tindley v. Salt Lake City School District* to find the application of a damage cap provision to a wrongful death claim against a school district did not violate

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of Article XVI. Section 5 "it becomes necessary to inquire what that right was and who enjoyed it at the time the Constitution was adopted by the people of this state"); *Tiede*, 915 P.2d at 504 (finding no violation of the wrongful death provision because there was no right to bring a claim against the State for wrongful death at the time the constitution was adopted).

[132] 915 P.2d at 503-504.

[133] *Id.* at 504.

[134] *Parks v. Utah Transit Authority,* 2002 UT 55, ¶¶ 15-17, 53 P.3d 473.

[135] *Id.* at ¶¶ 15-16.

Article XVI, section 5.[136] Applying the holdings of *Tiede* and its progeny to this case,[137] the Court should easily find no violation of Article XVI, section 5 when applying the immunities of the Recreational Use Statute to a claim for wrongful death against the City because the City would have been immune from suit at statehood.[138]

Plaintiffs contend *Tiede* does not apply because the City is not asserting immunity under Utah's Governmental Immunity Act.[139] This displays Plaintiffs' misunderstanding of the holding in *Tiede* and its progeny. Those cases found no violation of Article XVI, section 5 when applying immunities or damage cap limitations to wrongful death claims that were brought against government entities because there was no right to bring a wrongful death claim against a government entity that was performing a governmental function at the time the constitutional provision was adopted.[140] As such, *Tiede* and its progeny are squarely on point and demonstrate the district court correctly found applying the Recreational Use Statute to the wrongful death claim against the City results in no violation of Article XVI, section 5.

Plaintiffs contend *Tiede* does not apply for the additional reason that the City could

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[136] *Tindley v. Salt Lake City School District,* 2005 UT 30, ¶ 36, 116 P.3d 295.

[137] In *Smith,* 2015 UT 68, ¶ 16, n.40 this Court disavowed dicta in paragraph 17 of *Parks* and its application in *Tindley*, but affirmed the central holding in those cases, *i.e.*, the Act in question did not violate Article XVI, section 5 because of the defendants ability to assert governmental immunity at the time the constitution was adopted.

[138] *See, e.g., Brown v. Salt Lake City*, 93 P. 570, 573-74 (1908) (recognizing Salt Lake City is immune from suit for its governmental functions) (abrogated on other grounds by *Kessler v. Mortenson*, 2000 UT 95, 16 P.3d 1225).

[139] Appellants' Br. at 16-18.

[140] *Parks*, 2002 UT 55, ¶¶ 15-16; *Tindley*, 2005 UT 30, ¶ 36.

be sued for wrongful death at the time the constitution was adopted.[141] The only case Plaintiffs identify that concerns a wrongful death claim is *Brown v. Salt Lake City*,[142] which was decided thirteen years after adoption of the constitution and allowed a wrongful death claim against Salt Lake City to proceed on a finding that the function at issue was "proprietary" not "governmental" and governmental immunity, therefore, did not apply.[143] Plaintiffs' opening brief makes no attempt to discuss liability of governmental entities and their employees at statehood, which was dependent on a complicated analysis of whether the function at issue was "proprietary" or "governmental"[144] and whether the government employees' actions at issue were "discretionary" or "ministerial."[145] The City, as appellee, is not charged with guessing what the Plaintiffs' arguments on this point might be and Plaintiffs failure to argue this point in its opening brief results in a waiver of this issue on appeal.[146] Plaintiffs have not shown application of section 401 to Plaintiff's wrongful death claim violates Article XVI, section 5, and the district court's finding should be affirmed.

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[141] Appellants' Br. at 18-19.

[142] *See* Appellants' Br. at 18-19 (citing *Brown* and cases where plaintiffs asserted claims for damage from flooding of property, injuries from slipping and falling on ice, obstructions in a street, and maintenance of a bridge).

[143] *Brown*, 93 P. at 573-74.

[144] *See, e.g., id.*

[145] *See, e.g., Ross v. Schackel,* 920 P.2d 1159, 1162-66 (Utah 1996).

[146] *Kendall v. Olsen*, 2017 UT 38, ¶¶ 12-13, 424 P.3d 12 (stating "[o]ur rules of appellate procedure place the burden on the appellant to identify and brief any asserted grounds for reversal of the decision below" and making clear that such issues must be raised in the opening brief and cannot be reserved for the Reply because to allow otherwise leaves the Court "without a central tenet of our justice system—adversariness").

II. THE DISTRICT COURT CORRECTLY CONCLUDED PLAINTIFFS' PROPOSED AMENDMENTS WERE FUTILE.

A. The Exceptions to Immunity Set Forth in Section 204.

Section 204 sets forth limited circumstances under which the immunities of the Recreational Use Statute do not apply.[147] Specifically, it provides that "[n]othing 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 person or property, or (c) an injury suffered where the owner of land charges . . . to enter or go on the land."[148] In a desperate effort to show this exception applies and avoid dismissal of their claims, Plaintiffs moved for leave to amend their Complaint to add conclusory language stating the City's conduct was "willful or malicious."[149] Leave to amend was correctly denied as futile.[150]

B. The Immunity set forth in Section 401 is not Subject to the Exceptions set forth in Section 204.

The limited exceptions to immunity set forth in section 204 do not apply to the broad immunity set forth in section 401 rendering the proposed amendments futile. Specifically, the broad immunity conferred by section 401 states that "notwithstanding section 57-14-202 to the contrary, a person may not make a claim or recover from an owner . . .."[151] A

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147 UTAH CODE § 57-14-204.
148 *Id.*
149 (R. 00078-88.)
150 (R. 00205.)
151 UTAH CODE § 57-14-401.

review of section 202 reveals that the limitations on liability that it confers are made expressly subject to section 204, which allows claims in certain circumstances.[152] Since the plain language of section 401 states the immunity exists notwithstanding any provision in section 202 to the contrary, and section 202 sets forth a contrary provision — it permits the claims described in section 204 — the immunity conferred in section 401 should be understood to exist independent of and not subject to the exceptions set forth in section 204.

This conclusion is further supported by the plain language of section 204. It states that "nothing ***in this part*** limits any liability that otherwise exists . . .."[153] Section 204 is contained in part two of the statute, while section 401 is contained in part four.[154] Section 401 contains no language stating the broad immunity it confers is subject to any liability that would otherwise exist for willful, malicious or deliberate actions, nor does it include any language expressly incorporating the provisions of section 204 by reference.[155] Utah's rules of statutory construction require courts to "give effect to [such] omissions in statutory language by presuming all omissions [are] purposeful."[156] As such, the immunities of section 401 are not subject to the exceptions set forth in section 204 and Plaintiffs'

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[152] UTAH CODE § 57-14-202.
[153] UTAH CODE § 57-14-204 (emphasis added).
[154] *See* UTAH CODE §§ 57-14-204 & 401.
[155] UTAH CODE § 57-14-401.
[156] *Marion Energy*, 2011 UT 50, ¶ 14.

proposed amendments were futile. The district court did not err in reaching that conclusion.

C. The Amendments Proposed were Conclusory.

Even if the Court concludes the broad immunity conferred by section 401 is subject to the exceptions set forth in section 204, the Plaintiffs proposed amendments were still futile because they were conclusory.[157] A request for leave to amend a complaint is properly denied if the amendments proposed are futile because they will not withstand a motion to dismiss.[158] In considering a motion to dismiss a court need not "consider allegations which are conclusory, or that do not allege the factual basis for the claim"[159] and such allegations are insufficient and will not preclude dismissal.[160] Plaintiffs proposed saving their claims by adding conclusory allegations that the City's conduct was "willful or malicious" because it "acted and failed to act even though they knew of the hazard and knew that serious injury was a probable result of contact with the hazard."[161] No facts were

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[157] *Bailey v. Bayles*, 2002 UT 58, ¶ 13, 52 P.3d 1158 (recognizing an appellate court may affirm a judgment on alternate grounds that are apparent from the record); (R. 00136 (where the City argued the amendments were conclusory and were futile because they could not withstand a motion to dismiss).

[158] *Jensen v. IHC Hosp.*, Inc., 2003 UT 51, ¶ 142, 82 P.3d 1076 (denying plaintiffs leave to amend as futile because the proposed amendments would not withstand a motion to dismiss).

[159] *Commonwealth Prop. Advocates v. Mortgage Elec. Reg. Sys., Inc.*, 2011 UT App 232, ¶ 16, 263 P.3d 397 (quoting *Chapman ex rel. Chapman v. Primary Children's Hosp.*, 784 P.2d 1181, 1186 (Utah 1989)).

[160] *Id.*; *see also Chapman,* 784 P.2d at 1186 ("mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal or summary judgment.").

[161] (R. 00085, ¶ 34; R. 00086, ¶¶ 43 & 50.)

alleged to support this bare-boned conclusory allegation.[162] As such, the proposed amendments could not withstand a motion to dismiss and were futile.

D. The Proposed Amendments Alleged Facts that Show the Exception Set forth in Section 204 does not Apply.

The proposed amendments were futile for the additional reason that this Court has already ruled the exceptions set forth in section 204 cannot be satisfied if the danger alleged is open, obvious and inherent to the use to which the land is put. In *Golding v. Ashley*, this Court examined the language of section 204[163] to determine if certain allegedly dangerous conditions in a canal could impose liability under section 204's exception for willfully or maliciously failing to guard or warn.[164] At issue was a large accumulation of debris at the bottom of a spillway, a large depression at the bottom of a spillway, and a hydraulic jump that created turbulence.[165] The Court began the analysis by determining that "a landowner's knowledge of a dangerous condition that is inherent in the use to which the land is put and is common, open, and obvious does not give rise to liability" under the Act.[166] It concluded that even if these hazards were not visible from the surface of the canal, they could not as a matter of law form the basis of a claim for willful or malicious

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[162] (R. 00081-88.)

[163] The Court was considering Utah Code § 57-14-6, a prior version of section 204 that contained almost verbatim the exceptions set forth in section 204. UTAH CODE § 58-14-6 (1979).

[164] 902 P.2d at 145-148.

[165] *Id.* at 147.

[166] *Id.* at 146.

failure to guard or warn because these are things that are common in the operation of canals.[167]

Similarly, in *City of Waco v. Kirwan*, a Texas court applied a substantially similar recreational use statute and found the plaintiffs could show no evidence of a willful or wanton failure to warn because the dangers of a cliff edge are open and obvious and the city had posted a sign warning visitors to stay away from the edge, even though the danger was open and obvious.[168] Likewise, in *Torf v. Commonwealth Edison*,[169] an Illinois court granted a motion to dismiss because the danger of drowning in water is open and obvious, even if the conditions are caused by manmade conditions.[170]

This Court has previously held "[a] district court may dismiss a cause of action under rule 12(b)(6) of the Utah Rules of Civil Procedure where, as here, the complaint shows on its face the existence of an affirmative defense."[171] Here, the Complaint alleges Ms. Feldman drowned as a result of a "dangerous current,"[172] which is "open, obvious, and inherent" in the very existence of a creek. The proposed amendments could not remedy this fact. The Complaint and proposed amendments also allege Ms. Feldman's dogs were

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[167] *Id.* at 147.

[168] *City of Waco v. Kirwan*, 298 S.W.3d 618, 624-28 (Tex. 2009).

[169] *Torf v. Commonwealth Edison*, 644 N.E.2d 467, 469 (Ill. App. 1994).

[170] *See also Roy v. State*, 139 A.3d 480, 488-490 (R.I. 2016) (finding no evidence of willful or malicious conduct in case where man dove into manmade pool in a state park because there was no history of prior accidents and diving is an open and obvious danger).

[171] *Bivens v. Salt Lake City Corp.*, 2017 UT 67, ¶ 54, n.6, 416 P.3d 338 (quoting *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶ 8, 53 P.3d 947).

[172] (R. 00003, ¶ 18.)

unable to get out of the creek because of the allegedly dangerous current and describe Mr. Feldman being washed downstream in his efforts to save the dogs.[173] In other words, Plaintiffs allege that upon seeing the dogs and her husband subjected to the current, Ms. Feldman nevertheless disregarded the open and obvious nature of the current and entered the creek.[174] The district court did not err in finding the allegations of the Complaint "expressly admit[] the dangers of the creek were open and obvious" and that amendment was futile.[175]

Plaintiffs contend this futility finding was incorrect because the City has a duty to exercise reasonable care to protect Ms. Feldman from open and obvious dangers.[176] Plaintiffs rely on this Court's decision in *Hale v. Beckstead* to support this assertion,[177] which discusses and clarifies the "duty of care a landowner owes an invitee" under the common law.[178] As discussed at length in this briefing, the Recreational Use Statute expressly supplants the duties otherwise owed at common law, leaving only a narrow exception for claims for a willful or malicious failure to guard or warn.[179] As such, *Hale* and this Court's discussion of the common law duties owed invitees is wholly inapplicable.

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[173] (R. 00003, ¶¶ 14-18; R. 00083, ¶¶ 14-20.)
[174] *Id.*
[175] (R. 00205.)
[176] Appellants' Br. at 24-25.
[177] *Id.* (citing *Hale v. Beckstead*, 2005 UT 24, 116 P.3d 263).
[178] *Hale*, 2005 UT 24, ¶¶ 7-31.
[179] *See, e.g., supra* § I.A.1 & B.2.

Plaintiffs also contend the futility finding was in error, claiming the court improperly considered evidence of the City's warning sign to reach that conclusion.[180] Notably, Plaintiffs do not dispute or contest the existence of the sign and, in fact, argue the existence of the sign weighs in their favor.[181] Regardless, "the submission of documents outside the pleadings by itself is not a basis for conversion to summary judgment; to effect a rule 12(b) conversion, the court must have relied on those documents for its decision."[182] Here, the district court's memorandum decision states it found amendment futile because the allegations of the Complaint expressly admit the dangers of the creek were open and obvious: "Plaintiffs allege Ms. Feldman's dogs were unable to get out of the creek because of the allegedly dangerous current, expressly admitting the dangers of the creek were open and obvious."[183] Dismissal of a complaint because the allegations of a Complaint show the existence of a defense is proper and no error is shown.[184]

The district court's additional observation that there were warning signs posted at the location does not compel a different result because consideration of the City's sign is not necessary to conclude the allegations of the Complaint and the proposed amendments expressly admit the dangers of the current were open and obvious. Rather, the existence

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[180] Appellants' Br. at 27.

[181] *Id.*

[182] *Oakwood Vill. LLC v. Albertsons, Inc.,* 2004 UT 101, ¶ 14, 104 P.3d 1226, 1231–32.

[183] (R. 00205.)

[184] *Bivens*, 2017 UT 67, ¶ 54, n.6 (finding a district court may dismiss a cause of action under rule 12(b)(6) of the Utah Rules of Civil Procedure when a complaint shows on its face the existence of the defense).

of the warning sign[185] combined with Plaintiffs' failure to offer any contradictory allegations regarding the existence of the sign, serves to further support the conclusion that further amendment was futile — the existence of the sign precludes a showing by Plaintiffs of any set of facts that would satisfy the high burden required to show a willful and malicious failure to guard or warn.[186] The district court properly concluded the proposed amendments were futile and no error is shown.

CONCLUSION

Although Ms. Feldman's drowning is certainly tragic, "[n]ot every accident that occurs gives rise to a cause of action upon which the party injured may recover damages from someone."[187] This is just such a case. Ms. Feldman drowned as the result of an inherent risk of entering the creek and the Recreational Use Statute provides immunity from suit. The district court's dismissal of all claims should be affirmed.

DATED this 21st day of August, 2019.

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[185] Notably, the existence of the sign at the time of Ms. Feldman's drowning was also evidenced by concurrent news footage showing the sign in place at the time of Ms. Feldman's drowning and the high and swift nature of the water in the creek. (R. 00142.)

[186] *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) ("A dismissal with prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6) and granting leave to amend would be futile.").

[187] *Wood v. Salt Lake City Corp.*, 2016 UT App 112, ¶ 12, 374 P.3d 1080.

CERTIFICATE OF COMPLIANCE

This brief, submitted under Utah Rule of Appellate Procedure 24(g)(1), complies with the type-volume limitation. The word processing system used to prepare this brief, states that it contains 11,243 words in Times New Roman type, which is a proportionally spaced font.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of August, 2019, a true and correct copy of the foregoing **BRIEF OF APPELLEES** was electronically filed with the Clerk of the Court, and further sent by email to:

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