

H.B. 28

IMMUNITY FROM LIABILITY IN CHILD WELFARE INVESTIGATIONS

SENATE FLOOR AMENDMENTS

AMENDMENT 3

FEBRUARY 25, 2002 10:13 AM

Senator **David H. Steele** proposes the following amendments:

1. Page 1, Line 1-2: Delete lines 1 through 2 and insert "**GOVERNMENTAL IMMUNITY AMENDMENTS**"
2. Page 1, Line 6: After "**Code**" insert "**and the Utah Governmental Immunity Act**"
3. Page 1, Line 8: After "**perjury.**" insert "**The act clarifies provisions regarding the exception to employee immunity for driving under the influence of alcohol. The act provides an exception to the immunity of a governmental employee for perjury.**"
4. Page 1, Line 11: After line 11 insert:
"**63-30-4**, as last amended by Chapter 76, Laws of Utah 1991
63-30-36, as last amended by Chapter 76, Laws of Utah 1991"
5. Page 1, Line 20: After "employee" delete the remainder of line 20 and lines 20a through 25. At the end of line 25, insert "except as provided in Title 63, Chapter 30, Utah Governmental Immunity Act."
6. Page 1, Line 25: After line 25 insert:
"Section 2. Section **63-30-36** is amended to read:
63-30-4. Act provisions not construed as admission or denial of liability -- Effect of waiver of immunity -- Exclusive remedy -- Joinder of employee -- Limitations on personal liability.
(1) (a) Nothing contained in this chapter, unless specifically provided, may be construed as an admission or denial of liability or responsibility by or for governmental entities or their employees.
(b) If immunity from suit is waived by this chapter, consent to be sued is granted, and liability of the entity shall be determined as if the entity were a private person.
(c) No cause of action or basis of liability is created by any waiver of immunity in this chapter, nor may any provision of this chapter

be construed as imposing strict liability or absolute liability.

(2) Nothing in this chapter may be construed as adversely affecting any immunity from suit that a governmental entity or employee may otherwise assert under state or federal law.

(3) (a) Except as provided in Subsection (3)(b), an action under this chapter against a governmental entity or its employee for an injury caused by an act or omission that occurs during the performance of the employee's duties, within the scope of employment, or under color of authority is a plaintiff's exclusive remedy.

(b) A plaintiff may not bring or pursue any other civil action or proceeding based upon the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless:

(i) the employee acted or failed to act through fraud or malice; ~~or~~

(ii) the injury or damage resulted from the conditions set forth in Subsection 63-30-36 (3)(c)~~[-]; or~~

(iii) in a judicial or administrative proceeding the employee intentionally or knowingly gave, upon a lawful oath or in any form allowed by law as a substitute for an oath, false testimony material to the issue or matter of inquiry under this section.

(4) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, unless it is established that:

(a) the employee acted or failed to act due to fraud or malice[-];

(b) the injury or damage resulted from the conditions set forth in Subsection 63-30-36(3)(c); or

(c) in a judicial or administrative proceeding the employee intentionally or knowingly gave, upon a lawful oath or in any form allowed by law as a substitute for an oath, false testimony material to the issue or matter of inquiry under this section.

Section 3. Section **63-30-36** is amended to read:

63-30-36. Defending government employee -- Request -- Cooperation -- Payment of judgment.

(1) Except as provided in Subsections (2) and (3), a governmental

entity shall defend any action brought against its employee arising from an act or omission occurring:

- (a) during the performance of the employee's duties;
- (b) within the scope of the employee's employment; or
- (c) under color of authority.

(2) (a) Before a governmental entity may defend its employee against a claim, the employee shall make a written request to the governmental entity to defend him:

- (i) within ten days after service of process upon him; or
- (ii) within a longer period that would not prejudice the governmental entity in maintaining a defense on his behalf; or
- (iii) within a period that would not conflict with notice requirements imposed on the entity in connection with insurance carried by the entity relating to the risk involved.

(b) If the employee fails to make a request, or fails to reasonably cooperate in the defense, the governmental entity need not defend or continue to defend the employee, nor pay any judgment, compromise, or settlement against the employee in respect to the claim.

(3) The governmental entity may decline to defend, or subject to any court rule or order, decline to continue to defend, an action against an employee if it determines:

(a) that the act or omission in question did not occur:

- (i) during the performance of the employee's duties;
- (ii) within the scope of his employment; or
- (iii) under color of authority;

(b) that the injury or damage resulted from the fraud or malice of the employee; or

(c) that the injury or damage on which the claim was based resulted from:

(i) the employee driving a vehicle, or being in actual physical control of a vehicle:

(A) with a blood alcohol content equal to or greater by weight than the established legal limit;

(B) while under the influence of alcohol or any drug to a degree that rendered the person incapable of safely driving the vehicle; or

(C) while under the combined influence of alcohol and any drug to a degree that rendered the person incapable of safely driving the vehicle; or

(ii) the employee being physically or mentally impaired so as to be unable to reasonably perform his job function because of the use of

alcohol, because of the nonprescribed use of a controlled substance as defined in Section 58-37-4, or because of the combined influence of alcohol and a nonprescribed controlled substance as defined by Section 58-37-4[-]; or

(d) that in a judicial or administrative proceeding the employee intentionally or knowingly gave, upon a lawful oath or in any form allowed by law as a substitute for an oath, false testimony to the issue or matter of inquiry under this section.

(4) (a) Within ten days of receiving a written request to defend an employee, the governmental entity shall inform the employee whether or not it shall provide a defense, and, if it refuses to provide a defense, the basis for its refusal.

(b) A refusal by the entity to provide a defense is not admissible for any purpose in the action in which the employee is a defendant.

(5) Except as provided in Subsection (6), if a governmental entity conducts the defense of an employee, the governmental entity shall pay any judgment based upon the claim.

(6) A governmental entity may conduct the defense of an employee under a reservation of rights under which the governmental entity reserves the right not to pay a judgment, if the conditions set forth in Subsection (3) are established.

(7) (a) Nothing in this section or Section 63-30-37 affects the obligation of a governmental entity to provide insurance coverage according to the requirements of Subsection 41-12a-301 (3) and Section 63-30-29.5.

(b) When a governmental entity declines to defend, or declines to continue to defend, an action against its employee under the conditions set forth in Subsection (3), it shall still provide coverage up to the amount specified in Sections 31A-22-304 and 63-30-29.5."