

BRIAN M. BARNARD USB # 0215  
UTAH LEGAL CLINIC  
Cooperating Attorney for  
Utah Civil Rights & Liberties  
Foundation, Inc.  
214 East Fifth South Street  
Salt Lake City, Utah 84111-3204  
Telephone: (801) 328-9531  
[ulcr2d2c3po@utahlegalclinic.com](mailto:ulcr2d2c3po@utahlegalclinic.com)

**ATTORNEY FOR PLAINTIFFS**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

**AMERICAN ATHEISTS, INC.**, a Texas  
non-profit corporation; **R. ANDREWS**,  
**S. CLARK** and **M. RIVERS**,

Plaintiffs,

vs.

**COLONEL SCOTT T. DUNCAN**,  
Superintendent, Utah Highway Patrol;  
**JOHN NJORD**, Executive Director,  
Utah Department of Transportation;  
**D'ARCY PIGNANELLI**, Executive Director,  
Department of Administrative Services; and,  
**F. KEITH STEPAN**, Director  
Division of Facilities Construction and Management  
Department of Administrative Services,

Defendants.

**UTAH HIGHWAY PATROL ASSOCIATION**,

Defendant/Intervener

Case No. 02:05-CV-00994 DS

**REPLY MEMO RE: UHPA -  
INTERVENER'S OPPOSITION  
TO MOTION FOR PARTIAL  
SUMMARY JUDGMENT  
RE: CHRISTIAN CROSS AS  
RELIGIOUS SYMBOL**

(Doc. # 27)

(Judge David Sam)

PLAINTIFFS, by and through counsel, moved (Doc. # 27) this Court to grant a partial summary judgment pursuant to Rule 56(a), (c) & (d), Fed. R. Civ. Pro. The motion is based upon the facts and record in this case and is supported by a memorandum of points and authorities. Doc. # 28. The State Defendants responded. Doc. # 50. Plaintiffs replied to the State Defendants' Response. Doc. # 71. Defendant/Intervener UHPA responded. Doc. # 46. Plaintiffs here reply in further support of their motion.

### **UNDISPUTED FACTS**

Plaintiffs submitted a Statement of Undisputed Facts in support of their motion. Doc. # 28, p. 6. Defendant/Intervener has failed to respond to those facts in conformance with Rule 56, Fed.R.Civ.Pro. and DUCivR 56-1 (b). *See* Doc. # 46. All facts submitted by plaintiffs are deemed admitted. Doc. # 28, p. 6.

UHPA purports to dispute two (2) facts: that the Christian Crosses<sup>1</sup> are stand alone and that they are "exclusively religious" symbols. Doc. # 46, p. 3. However, Defendant/Intervener cites nothing in the record to contradict those facts. *See id.* For UHPA's lack of citation to the record, those facts as set out by plaintiffs are deemed admitted. DUCivR 56-1 (b).

---

<sup>1</sup> A Christian Cross, also known as the Roman or Latin Cross, (*crux ordinaria*) is generally composed of three (3) equal upper arms and with a longer descending arm approximately twice the length of the other arms. Exhibits "A" - "C" to Doc. # 1; Aff. of Lombard, Doc. # 52, Exhibit 10, p. 95; p. 115.

The Christian Cross is also sometimes referred to as the Protestant Cross, because it is a plain cross without a *corpus*, an image or figurine representing the body of Christ, attached. Therefore, it represents and emphasizes the resurrection, and is mostly used in Protestant churches.

Defendant/Intervener submitted a statement of facts in opposition to plaintiffs' motion. Doc. # 46, pp. 1, *et seq.* Such a statement of fact is not provided for in Rule 56 nor the comparable local rule. UHPA asserts that "the cross is viewed as an international, secular, memorial symbol" but the only support for that claim is an inadmissible declaration<sup>2</sup> of UHPA's attorney. Doc. #46, p. 3. The Christian Cross represents Christianity.<sup>3</sup> Doc. # 28.

### **ISSUE PRESENTED**

Plaintiffs' motion for partial summary judgment, (Doc. # 27) seeks a determination and declaratory judgment that:

**THE STAND ALONE CHRISTIAN CROSSES THAT ARE, IN PART, THE SUBJECT MATTER OF THIS ACTION ARE, AS A MATTER OF LAW, EXCLUSIVELY RELIGIOUS SYMBOLS.**

### **ARGUMENT**

#### **Inter-Relationship of Motions**

Plaintiffs have moved for judgment on the pleadings and a preliminary determination (Doc. # 30; # 35) with regard to certain defenses asserted by State Defendants and by Defendant/Intervener UHPA. Those defenses include that the Christian Crosses, (the

---

<sup>2</sup> Plaintiffs have moved to strike the Declaration of Loenen. Doc. # 62.

<sup>3</sup> The Christian Cross does not represent a denomination, that is, a group of religious congregations having its own organization and a distinctive faith. That Cross represents Christianity, that is, the collective body of Christians, adherents to a monotheistic system of beliefs and practices based on the Old Testament and the teachings of Jesus emphasizing the role of Jesus as savior.

predominate feature of the UHPA roadside memorials), are secular and not religious in nature. Plaintiffs' Motion for Partial Summary Judgment regarding the nature of the Christian Cross (Doc. # 27) was made and should be considered in tandem with those other motions.

Plaintiffs seek a partial summary judgment on one (1) issue: the nature of the Christian Cross. Doc. # 27. Plaintiffs' motions for judgment on the pleadings deal with certain defenses related to the nature of the Christian Cross. A motion for partial summary judgment is authorized pursuant to Fed.R.Civ.Pro. 56(d) to determine facts not in controversy and to establish matters that need not be resolved at trial.

#### **Lemon v. Kurtzman To be Applied Later**

Defendant/Intervener acknowledges that "Whether the crosses are 'stand-alone Christian crosses' functioning 'exclusively as religious symbols' may affect the outcome of the Establishment Clause analysis."<sup>4</sup> Doc. # 46, p. 6. UHPA then asserts there is a substantial dispute with regard to Plaintiffs' claim.<sup>5</sup> Id. UHPA's memo fails to establish such a dispute.

---

<sup>4</sup> UHPA's mis-states the determination sought in Plaintiffs' pending motion for partial summary judgment. In the current motion, plaintiffs seeks only a determination as to the nature of Christian Cross.

<sup>5</sup> Under Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), now is the time for UHPA to present evidence, not just argument, to establish their position. Under Celotex, UHPA must now prove their position, they can not simply say, "We dispute plaintiffs' claims."

The Tenth Circuit Court in Adler v. Wal-Mart Stores, Inc., used the analysis of Celotex. That court explained first, "[t]he movant bears the initial burden of making a *prima facie* demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law." 144 F.3d 664, 670-71 (10<sup>th</sup> Cir. 1998) (applying Celotex); *see also* Palladium Music, Inc. v. EatSleepMusic, Inc., 398 F.3d 1193, 1196 (10<sup>th</sup> Cir. 2005) (movant has initial burden of showing a lack of evidence for an essential element). Second, after a *prima facie*

With no factual support in the record, UHPA asserts what a reasonable observers would conclude as to a purpose for the Christian Crosses, what their primary effect is and that the state's entanglement is not excessive. *Id.* That litany tracks the analysis of Establishment Clause claims developed in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); *see* Bauchman v. West. High Sch., 132 F.3d 542, 552-53 (10<sup>th</sup> Cir.1997). The pending summary judgment motion seeks only one determination: the nature of the Christian Crosses. The pending motion does not directly address any element of the Lemon test. UHPA's discussion of the Lemon analysis is irrelevant at this time.

### **The Christian Crosses Stand Alone**

UHPA disputes that the Christian Crosses are "stand alone." Doc. # 46, p. 6; pp. 8 *et seq.* The Crosses are "stand alone" in that there are no other comparable displays, symbols, memorials, etc. near by. The Crosses literally are standing alone and are not part of a broader display or presentation. Their solitary displays are depicted in the photographs attached to the Complaint herein. Exhibits "A" - "C" to Doc. # 1. Photographs submitted by UHPA also establish the Crosses have nothing else near by. Doc. # 47, Exhibit "A" - "G".<sup>6</sup> UHPA's

---

demonstration has been made, the burden shifts to the nonmoving party who "would bear the burden of persuasion at trial." Adler at 670. The nonmoving party's responsibility is to "come forward with sufficient evidence on an essential element of its *prima facie* case" and "may not simply rest upon its pleadings." *Id.* at 671; *see also* Matsushita Electric Industrial Co. v. Zenith Radio Corporation, 475 U.S. 574, 586 (1986). Celotex applies to elements of a defense as well as to claims and causes of actions.

<sup>6</sup> Doc. # 47, Exhibit "A" is a photo of the memorial for Trooper Daniel Harris located in Parley's Canyon in Salt Lake County. Exhibit "A" to Doc. # 1 (similar photo). Next to that

argument is the monumental size (12' tall) stark white crosses are not “stand alone” because they bear the trooper’s name, badge number, rank, year of death, the Utah Highway Patrol logo and a small plaque containing a short biography.<sup>7</sup> Doc. # 46, pp. 8 et seq.; Doc. # 47, ¶¶ 14 - 21. Merely having information displayed on the crosses does not alter the fact that they stand alone.

### **Christian Crosses Are Not Secular**

The only cross at issue herein is the Christian Cross.<sup>1</sup> The Christian Cross is the religious symbol which is the predominate feature of the memorials challenged in this action.

UHPA contends that the Christian Cross is not a religious symbol. They suggest that subjective interpretation by a speaker or a viewer can nullify or defeat the clear, unequivocal and long standing meaning of the Christian Cross. Doc. # 46, p. 10. UHPA cites no authority for either proposition.

UHPA faults plaintiffs for taking “an absolutist view of the [Christian] crosses.” Doc. # 46, p. 7. UHPA faults plaintiffs for arguing that a Christian Cross “can convey nothing but an exclusively religious message.” *Id.* Those positions are solidly supported in the holdings cited in plaintiffs’ memorandum support their motion for partial summary judgment. Doc. # 28. Courts that have considered the issue have unfailingly found that the Christian Cross is an exclusive symbol of Christianity and its presence on government property conveys endorsement of

---

Christian Cross is a flag pole with an American flag displayed. Such a flag display would a fitting and secular memorial for all Utah Highway Patrol troopers killed in the line of duty.

<sup>7</sup> UHPA describes these additions as “ample ‘secular trappings’” indicating the crosses are “secular memorials.” Doc. # 46, p. 9. UHPA cites no authority for that claim.

Christianity. Doc. # 28. The Christian Cross is unmistakably a religious symbol, synonymous with a belief in Christianity or in Jesus Christ as savior. Id. For instance,

. . . the Latin cross (a cross whose base stem is longer than the other three arms) is a readily identifiable symbol of Christianity. . . . it conveys a message of endorsement of Christianity.

Jewish War Veterans of U.S. v. U.S., 695 F. Supp. 3, 12-13 (D.D.C. 1988);

. . . the Latin cross is an unmistakable symbol of Christianity as practiced in this country today.

Gonzales v. North Tp. of Lake County, Ind. 4 F.3d 1412, 1418 (7<sup>th</sup> Cir. 1993);

. . . the religious significance and meaning of the Latin or Christian cross are unmistakable.

Robinson v. City of Edmond, 68 F.3d 1226, 1232 (10<sup>th</sup> Cir. 1995); and,

The Latin cross is unmistakably a universal symbol of Christianity. Each witness at trial, including a Catholic Priest and a Jewish Rabbi, testified that they could perceive of no secular purpose for a Latin cross. Such a cross has always been a symbol of Christianity, and it has never had any secular purpose. In fact, no federal case has ever found the display of a Latin cross on public land by a state or state subdivision to be constitutional.

Mendelson v. City of St. Cloud, 719 F. Supp. 1065, 1069 (M.D. Fla. 1989).

### **Context is Irrelevant at This Time**

UHPA contends that the Christian Crosses “in their full factual context” are “not sectarian symbols” but “solely as secular memorial symbols.” Doc. # 46, pp. 7 *et seq.* However, examination of context is not called for at this time. After this Court has determined the exclusively religious nature of the Christian Cross, UHPA may well argue that some how the

strong religious message of the Christian Cross is diluted by the context.<sup>8</sup> See Doc. # 46, pp. 7 *et seq.* However, that argument is premature. The pending motion asks the Court only to examine and determine the nature of the Christian Cross. Doc. # 27.

### **UHPA'S Failure to Cite Case or Respond to Cases Cited by Plaintiffs**

UHPA generally asserts that in context the Christian Crosses in the cases cited by plaintiffs (Doc. # 28) "are materially different from the present case." Doc. # 46, p. 8. UHPA does not explain how.

---

<sup>8</sup> That argument is also of questionable merit. The trooper memorials consist of a monumental size (12' tall) stark white cross, adored with a trooper's name, badge number, rank, year of death, the official Utah Highway Patrol logo (12" x 16") and a plaque (8" x 5") containing a short biography. Doc. # 47, ¶¶ 14 - 21. The name, badge number, rank and date of death and the UHP logo perhaps can be easily seen and perhaps quickly read by a driver speeding by at 65+ miles per hour. However, that motorist can not distinguish nor read the plaque on the cross.

The context argument comes, in large part, from the creche cases, where other near by secular displays of the holiday season countered, nullified and diluted the strong religious message of the creche. For instance, the total display in Lynch v. Donnelly, 465 U.S. 668, 671 (1984) included a Santa Clause house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing a clown, an elephant, and a teddy bear, a "SEASONS GREETINGS" banner, and a nativity scene or creche.

The Court in Lynch acknowledged the exclusive religious and sectarian nature of the creche. The creche as a "recreation of an event that lies at the heart of Christian faith," a reminder of the origins of Christmas. Lynch, at 686. The creche has special meaning to those whose faith includes the celebration of religious Christmas. No one who senses the origins of the Christmas celebration would fail to be aware of the creche's religious implications. Id. The creche is identified exclusively with one religious faith. Id. The final holding in Lynch was "We hold that, notwithstanding the religious significance of the creche, the city of Pawtucket has not violated the Establishment Clause of the First Amendment." Lynch, at 687.



UHPA tells the Court the Christian Crosses “do not display any peculiar religious inscription.” Doc. # 46, p. 9. No inscription or proclamation is needed, the Christian Cross inherently represents Christianity. Doc. # 28.

UHPA tells the court, based upon a conclusory and inadmissible declaration<sup>9</sup> signed by counsel for UHPA, that it “is common knowledge: that the cross is not exclusively a symbol of the Christian religion, but it is viewed as an international, secular, memorial symbol.” Doc. # 46, p. 9. UHPA cites no authority in support of that claim.

UHPA says the Crosses “honor[] the particular service of the fallen trooper, not an event sacred to any religion.” Doc. # 46, p. 9. However, the memorials “mark[] the death of a Highway Patrolman.” *Id.* Death is a sacred passage in most religions; the location of a death and a person’s grave site are significant or sacred to most religious practitioners.<sup>10</sup> The Roman Catholic Church and the Church Jesus Christ of Latter-day Saints conduct funeral Masses or services and consecrate grave sites acknowledging death and the commitment of the body to the earth.

UHPA cites no case which holds that a Christian Cross inherently may have differing meanings or that its solitary display may have various differing non-religious purposes.

UHPA cites no case which holds that a Christian Cross standing alone on government property is not a religious symbol.

---

<sup>9</sup> A motion to strike the declaration of D. Van Loenen is pending. Doc. # 62.

<sup>10</sup> *Infra.*, pp. 9 - 10.

UHPA cites no case, legal authority or scholarship to the effect that a Christian Cross is today a secular symbol.

Without citation to legal or theological authority, UHPA asserts the crosses are “to symbolize death and not any religious denomination. It is used to mark the memorial site because it is a commonly recognized symbol memorializing the deceased.” Doc. # 6, Stradinger, ¶ 18. To the extent such conclusory claims are simply based upon averments of interested parties, no meaningful support is provided.

Even if subjective intent were pertinent, the Christian Cross is the foremost and virtually exclusive symbol of Christianity. Doc. # 28. That symbolism is not negated by the fact that some people see such a cross and think of a death; nor it is negated because the image may have been used for other purposes. For time immemorial, the Christian Cross has represented the death of Jesus Christ and thus Christianity. *Id.* The Christian Cross represents the place of burial of a Christian. UHPA cites no authority to defeat that history and those overarching precepts.

Plaintiffs cite numerous court decisions which have found the Christian Cross to be such a religious symbol that government use constitutes endorsement and violates the Establishment Clause. Doc. # 28. UHPA cites no case where government use of that symbol was allowed.

### **Historical Nature of Roadside Crosses**

UHPA cites no historical or legal authority to refute the religious nature of the roadside display of Christian Crosses. In contemporary roadside memorials, “[t]he cross as an indication of death is connected with the biblical account of Jesus Christ’s death and resurrection as told in

the gospels of Matthew, Mark, Luke, and John.” HOLLY EVERETT, *ROADSIDE CROSSES IN CONTEMPORARY MEMORIAL CULTURE* 23 (Univ. of N. Tex. Press 2002).

The Catholic culture came with the Spanish colonizing of the western United States. Customary among Catholic priests and settlers was that “fellow believers must be buried in hallowed, or *camposanto*.” *Id.* at 26. When travelers died between settlements, they had to be buried *in situ*. At these sites, a cross was used to “mark the spot,” but also “to informally consecrate it.” *Id.* Besides marking the place of a religiously consecrated grave, crosses also were used to mark spots where, in walking to the cemetery, “pallbearers stopped to rest,” a sort of “ritual pausing” where they would “recite the rosary or a requiem prayer.” *Id.* Today the religious nature of roadside memorial crosses has been maintained, marking the spot of the death as “an indication of death . . . connected with the biblical account of Jesus Christ’s death and resurrection.” *Id.* at 23.

### **CONCLUSION & RELIEF**

WHEREFORE, this court should grant a partial summary judgment determining that the stand alone Christian Crosses which are, in part, the subject matter of this action are, as a matter of law, exclusively religious symbols.

Dated this 19<sup>th</sup> day of MAY 2006.

UTAH LEGAL CLINIC  
Attorney for PLAINTIFFS

s/ BRIAN M. BARNARD