

1977

Thelma Madsen and Diana Lynn Madsen v. State of Utah et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

----- :
THELMA MADSEN, and DIANA LYNN :
MADSEN, an infant, by Thelma :
Madsen, her parent and natural :
guardian, :

Plaintiffs-Appellants, :

-vs- :

STATE OF UTAH, UTAH STATE :
BOARD OF CORRECTIONS, SAMUEL :
W. SMITH, LEON HATCH, TAGE :
SPONBECK and DOE I through :
DOE V, :

Defendants-Respondents. :

BRIEF OF RESPONDENT STATE OF UTAH

APPEAL FROM THE JUDGMENT OF THE COURT OF THE
THIRD JUDICIAL DISTRICT IN THE CASE OF
FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE DEAN E. CONDON, JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

THELMA MADSEN, and DIANA LYNN
MADSEN, an infant, by Thelma
Madsen, her parent and natural
guardian,

Plaintiffs-Appellants,

-vs-

STATE OF UTAH, UTAH STATE
BOARD OF CORRECTIONS, SAMUEL
W. SMITH, LEON HATCH, TAGE
SPONBECK and DOE I through
DOE V,

Defendants-Respondents.

Case No.
15215

BRIEF OF RESPONDENT STATE OF UTAH

APPEAL FROM THE JUDGMENT OF DISMISSAL BY
THE THIRD JUDICIAL DISTRICT COURT, IN AND
FOR SALT LAKE COUNTY, STATE OF UTAH, THE
HONORABLE DEAN E. CONDOR, JUDGE, PRESIDING

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IN THE SUPREME COURT OF THE
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THELMA MADSEN and
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STATE BOARD OF CORREC-
TIONS, SAMUEL W. SMITH,
LEON HATCH, TAGE SPONBECK
and DOE I through DOE V.

Respondents.

Case No.

15215

BRIEF OF RESPONDENT STATE OF UTAH

STATEMENT OF THE NATURE OF THE CASE

This is an action for wrongful death brought by Appel-
lants, the wife and daughter of Thomas Madsen. Thomas Madsen was
an inmate at the Utah State Prison at the time of his death
and appellants allege that respondents' negligence caused
Madsen's death.

DEPOSITION IN THE LOWER COURT

The trial Court, the Honorable Dean E. Conder, District
Judge, presiding, granted respondents' Motion to Dismiss on
the grounds that appellants' claim was barred by the Utah Gov-
ernmental Immunity Act.

RELI SOUGHT ON APPEAL

Respondents seek to have the order granting their motion to dismiss affirmed and appellants' appeal denied.

STATEMENT OF THE FACTS

Plaintiff's deceased husband, Thomas Madsen, was committed to the Utah State Prison in July of 1972, on the charge of selling dangerous drugs. The Decedent's medical history at the Utah State Prison showed that he had a drug addiction problem of long standing and made frequent complaints to people and doctors in and out of the prison concerning aches and pains of his back and joints. As a consequence the decedent made several visits to the Veterans Administration Hospital to have these complaints evaluated. Each time the institution concluded that his complaints were merely emotional in origin and recommended treatment of joint pains with arthritic type medication. The decedent had a history of making frequent requests for drugs to ease his various ills. Notwithstanding, this prior history of medical complaints and problems the decedent had not reported to sick call the week prior to his death nor was there any other record of his complaining of chest pains. On February 22, 1974, the decedent came to the prison dispensary requesting plastic surgery on his nose and wrinkles on his face. After thinking it over and getting

permission from the prison psychiatrist, the decedent returned on March 1 for his desired surgery. In answering the usual questions before surgery the decedent denied any unusual aches or pains, shortness of breath, or other symptoms of illness. Doctor Teal, the attending physician, found on physical examination that the decedent was alert and rational. He further found there was no evidence of any serious physical problem.

The decedent underwent this facial surgery under local anesthetic without complication. He received only the medications normally given in the prison operating facility.

Doctor Teal left the hospital at 3:00 p.m., and found the decedent to be resting comfortably and to be in good condition. At approximately 6:00 p.m., the decedent experienced a brief spell of rapid breathing but otherwise seemed to be doing fine. At 8:00 p.m., a prison employee working in the dispensary contacted a medical assistant and reported that the decedent was having some breathing problems. Upon arrival the medical assistant cleared the decedent's air passage and gave him mouth to mouth resuscitation which continued until an oxygen unit arrived. In the meantime the prison physician was called and an ambulance was summoned; oxygen continued to be administered. In addition to the oxygen the medical technician gave the decedent a shot of Epinephrine. The decedent was then transferred to the University Medical Center where he was pronounced dead on arrival.

A postmortem examination took place in which the examining doctor found that the cause of death was acute coronary insufficiency due to advance coronary atherosclerosis with obstruction of the right anterior descending coronary arteries (a major heart attack). There is nothing which indicates that the decedent would not have suffered a heart attack even if the simple surgery had not been performed.

Respondents moved to dismiss the complaint before the trial court. The trial court granted the motion to dismiss holding that the Governmental Immunity Act is constitutional and that it prohibits appellants' cause of action. The trial court did not reach the question of whether Diana Lynn Madsen was a proper plaintiff in light of her failure to comply with Utah Code Ann. 63-30-12 and 63-30-15 (1953). (T. 88-89; 45-84).

POINT I

THE UTAH GOVERNMENTAL IMMUNITY ACT IS CONSTITUTIONAL.

A. JUDICIAL STANDARDS FOR REVIEWING THE CONSTITUTIONALITY OF STATUTES.

In order to sustain the assertion that the Utah Governmental Immunity Act, Utah Code Ann. § 63-30-1 et seq. (1953), as amended, violates the Constitutions of the United States and of Utah, appellants must overcome the strong presumption

of constitutional validity that accompanies legislative enactments. This presumption of validity was clearly stated by this Court in Greaves v. State, Utah, 528 P. 2d 805 (1974), wherein the Court held:

"In regard to the judicial determination of the constitutionality of statutes there are certain principles relating to statutory construction, to be taken into consideration. Because the duty rests upon the court to determine the scope of the powers of all three branches of government, they have a special responsibility to exercise a high degree of caution and restraint to keep themselves within the limitations of the judicial power in order not to infringe upon the prerogatives of the executive or the legislative branches. In harmony with the policy it is the well-established rule that legislative enactments are endowed with a strong presumption of validity, and they should not be declared unconstitutional if there is any reasonable basis upon which they can be found to come within the constitutional framework; and that a statute will not be stricken down as being unconstitutional unless it appears to be so beyond a reasonable doubt. . . ." (Emphasis added.)

See also: State v. Tritt, 23 Utah 2d 365, 463 P. 2d 806 (1970).

Respondents submit that appellants failed to sustain the burden necessary to overcome the strong presumption of constitutional validity. Appellants have merely cited language and dicta to the effect that some judges and commentators have found disfavor with certain grants of immunity to certain state and local governments. This type of argument is not sufficient to satisfy the reasonable basic standard set forth in Greaves, supra.

Secondly, it is a fundamental principle of constitutional law that judicial ruling on the constitutional validity of statutes should be avoided where it is possible to decide the case on other grounds. This position was well stated in Johnson v. Robinson, 415 U.S. 361, 94 S.Ct. 1160 (1974):

" . . . ' it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the (constitutional) question(s) may be avoided.' " United States v. Thirty-Seven Photographs, 402 U.S. 363, 91 S.Ct. 1400 (1971).

This Court took the same position in Clinton City Patterson, 20 Utah 2d 70, 433 P. 2d 7 (1967), wherein it held:

" . . . when a matter may be determined on grounds other than the validity of a statute or ordinance, it should be so determined, and if we can sustain the trial court without declaring a statute or ordinance invalid, it is our duty to do so."

See also: State v. Tritt, 23 Utah 2d 365, 463 P. 2d 806 (1970)

Appellants argue that the Utah Governmental Immunity Act is unconstitutional as a denial of equal protection. Appellants support this argument by contending that a prisoner treated at the prison hospital has more limited access to the courts in case of injury resulting from the treatment than a prisoner treated at another state hospital. This reasoning is flawed in several ways.

First, appellants' argument is purely hypothetical. It has not been established that Mr. Madsen suffered any

injury as the result of treatment at the prison hospital. The lower court, in fact, never reached the issue of whether Mr. Madsen was injured as a result of treatment received at the prison hospital. Therefore, this court is not properly presented with an issue concerning unequal medical treatment within the contexts of appeal.

Second, appellants conclude that a prisoner who received injuries as a result of treatment at another state hospital would have a cause of action, while a prisoner receiving injuries from treatment at the prison hospital would not. This conclusion is unsupported by case law or a careful analysis of Utah Code Ann. 63-30-10 (10). Respondents aver that the purpose of subsection (10) is to prevent lawsuits by inmates against the state when an injury arises out of the incarceration of any person. As respondents argue in Point II, *infra.*, when the prison has control of an inmate, injuries suffered by the inmate "arise out of incarceration." Therefore, whenever an inmate is injured in a state hospital regardless of its location, recovery is barred by the Governmental Immunity Act.

Third, appellants fail to present a compelling reason to abandon the traditional rational basis test for determining the constitutional validity of statutes based on the police power of the state. An analysis of the present case and applicable statute indicate that immunity from suit exists

Whenever an injury arises out of incarceration. Therefore, appellants' equal protection argument must fail.

B. THE UTAH GOVERNMENTAL IMMUNITY ACT IS CONSTITUTIONAL

The legislative and judicial acceptance of the doctrine of governmental immunity is overwhelming. While many jurisdictions, both state and federal, have waived governmental immunity for certain types of suits, few have completely abolished the doctrine.

The United States Supreme Court has continually reaffirmed acceptance of governmental immunity and has yet to hold that its effect on actions against the United States is unconstitutional. In Kwanakoa v. Polyblank, 205 U.S. 349, 27 S.Ct. 526 (1907), the Court held:

"A sovereign is exempt from suit, not because of any formal conception or absolute theory, but on the logical and practical grounds that there can be no legal right as against the authority that makes the law on which the right depends."

See also Minnesota v. United States, 305 U.S. 382 (1939), wherein the United States Supreme Court held that the exemption of the United States from being sued without its consent even extends to suits by the states, and stated that it rests with Congress to determine whether the United States may be sued. Id. at 387-388. See also, Manro v. United States, 203 U.S. 36 (1938).

Under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, the United States, like Utah, waives governmental immunity except in several specified areas (see §§ 2674, 2680). The United States Supreme Court, in dealing with the constitutionality, objectives, and effects of the Act, has always maintained the position that Congress does have the power to restrict the areas of possible governmental liability. In Dalehite v. United States, 346 U.S. 15, 73 S.Ct., 956 (1953), an action was brought against the United States for wrongful death under the Federal Tort Claims Act. Indicating its acceptance of and deference to the legislative purpose of Congress, the Court said of the Act:

"Turning to the interpretation of the Act, our reasoning as to its applicability to this disaster starts from the accepted jurisprudential principle that no action lies against the United States unless the legislature has authorized it. The language of the Act makes the United States liable 'respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.' 28 U.S.C. § 2674, 28 U.S.C.A. § 2674. This statute is another example of the progressive relaxation by legislative enactments of the rigor of the immunity rule. Through such statutes that change the law, organized government expresses the social purposes that motivate its legislation. Of course, these modifications are entitled to a construction that will accomplish their aim, that is, one that will carry out the legislative

purpose of allowing suits against the Government for negligence with due regard for the statutory exceptions to that policy. In interpreting the exceptions to the generality of the grant, courts include only those circumstances which are within the words and reason of the exception. They cannot do less since petitioners obtain their 'right to sue from Congress (and they) necessarily must take (that right) subject to such restrictions as have been imposed.' Federal Housing Administration v. Burr, 309 U.S. 242, 251, 60 S.Ct. 488, 493, 84 L.Ed. 724." (Emphasis added.)

See also: Brooks v. Tennessee, 406 U.S. 605, 92 S.Ct. 1891 (1972), and Indian Towing Company v. United States, 350 U.S. 61, 76 S.Ct. 122 (1955).

The Utah Governmental Immunity Act is very similar to the Federal Tort Claims Act because immunity is waived for negligent acts of employees except in those areas specifically exempted by statute, respondents submit, therefore, that the acceptance of this type of statutory approach to governmental immunity by the United States Supreme Court, supra, is controlling in the instant case.

Since Gillmor v. Salt Lake City, 32 Utah 180, 89 Pac. 714 (1907), this Court strongly supported the application of the governmental immunity doctrine to suits brought against the State of Utah. Citing Gillmor, supra, the Court in Alder v. Salt Lake City, 64 Utah 568, 231 Pac. 1102 (1924), stated:

"The principle of law controlling the liability of cities in such cases is laid down in *Gilmer v. Salt Lake City*, 32 Utah, 187, 89 P. 714, 12 L.R.A. (N.S.), 537, where this court cited with approval the following quotation from 20 A. & E. Enc. Law, 1193:

"The rule is generally that a municipal corporation is not liable for alleged tortious injuries to the persons or property of individuals, when engaged in the performance of public or governmental functions or duties. So far as municipal corporations exercise powers conferred on them for purposes essentially public, they stand, as does sovereignty whose agents they are, and are not liable to be sued for any act or omission occurring while in the exercise of such powers, unless by some statute the right of action be given. And, where the particular enterprise is purely a matter of public service for the general and common good, it makes no difference whether it is mandatory or whether only permitted and voluntarily undertaken."1 Id. at 1102-1103.

From the earlier cases to the present, this Court has consistently upheld the doctrine of governmental immunity, including its application in the Utah Governmental Immunity Act, as a viable defense to suit brought against the State.

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1. This language clearly implies absolute immunity for the sovereign state, and only addressed the governmental versus proprietary distinction because the named defendant was a city corporation. In any event, the instant case involved state prison officers who were clearly engaged in the purely governmental function of prison operation.

See: Fairclough v. Salt Lake County, 10 Utah 2d 417, 354 P. 2d 105 (1960)²; Emery v. State, 26 Utah 2d 1, 483 P. 2d 1296 (1971); Anderson Investment Corp. v. State, 28 Utah 2d 379, 503 P. 2d 1022 (1972); Rosendaal Construction and Mining Corp. v. Holman, 28 Utah 2d 396, 503 P. 2d 446 (1972); Holt v. Utah State Road Commission, 30 Utah 2d 4, 511 P. 2d 1286 (1973); State Road Commission v. Tanner, 30 Utah 2d 19, 512 P. 2d 1022 (1973); Rapp v. Salt Lake City, Utah, 527 P. 2d 651 (1974); Greenhalgh v. Payson City, Utah, 533 P. 2d 799 (1975)³; and Epting v. State, 546 P. 2d 242 (1976).

On several previous occasions, this Court was presented with the identical request presented by appellants in the instant case, a request to abolish the Utah Governmental Immunity Act and the doctrine of governmental immunity as being unconstitutional, archaic, and no longer viable. On each occasion, the Court rejected the position.

In Davis v. Provo City Corporation, 1 Utah 2d 244, 265 P. 2d 415 (1953), the Court stated:

"The question of whether or not the doctrine of immunity from suit when the city is acting in its governmental capacity should be discarded entirely has been considered by this court several times with the majority concluding

2 The Fairclough opinion traces Utah case history up to 1900 on the issue of governmental immunity.

3 As a collateral matter, the Greenhalgh opinion discussed factors which are considered in determining the difference between a governmental and proprietary function and said that a primary factor is "whether the activity is something which is done for the general public good and which is generally regarded as a public responsibility" and "whether there is any special pecuniary benefit to the (city)." Clearly, under the above guidelines, the instant case involved a governmental rather than proprietary function.

that the matter was properly within the province of the legislature. There are valid reasons for protecting the municipality from vexations and groundless suits; the doctrine of immunity in absence of statute is ancient and well-established in our law; and limits of liability can be imposed by the legislature where we are powerless to do so. For these reasons we believe that the doctrine must be enforced until the time when the legislature takes action providing for the bringing of suits not encompassed in U.C.A. 1953, 10-7-77."

Likewise, in Ramirez v. Ogden City, 3 Utah 2d 102, 279 P. 2d 463 (1955), the Court held:

"From time to time certain judicial expressions have been uttered questioning the soundness of that rule as a matter of policy. Whatever its desirability or undesirability may be, it has long been firmly established in our law by rulings of the majority of this court. In deference to stare decisis, we do not now feel at liberty to consider its merits or demerits. Any change would be properly with the province of the Legislature."

In Campbell v. Pack, 15 Utah 2d 161, 389 P. 2d 464 (1964), in responding to a plaintiff's contention that the doctrine of governmental immunity should be changed, the Court held in a per curiam decision:

"With due deference to the authorities cited, and the reasoning set forth by them we are not persuaded of the propriety of judicially changing this rule, which is adhered to by a majority of our sister states. See Anno. 86 A.L.R. 2d 480, et seq. It has always been the law of this state and the activities, operations and contracts of the state government and other public

entities protected by it are based upon that understanding of the law. For the reasons set forth in the cases heretofore decided by this court referred to above, we believe that if there is to be a change which would have such an important effect upon public institutions and their operations, it should be left entirely to the legislature to determine whether the immunity should be removed; and as to what agencies; when effective, and to what extent, if any, limitations should be prescribed." Id. at 465.

Likewise, in Wilcox v. Salt Lake City Corp., 26 Utah 2d 78, 484 P. 2d 1200 (1971), a plaintiff asserted, as in the instant case, that the Utah Governmental Immunity Act should be abolished altogether". . . as being archaic and doing so judicially to legislate our Government Immunity Act out of existence." Justice Henriod, with Justices Callister, Tuckett, Ellett, and Crockett concurring, responded:

"This last contention we are not inclined to espouse, in spite of a claimed trend in that direction, noted by plaintiffs' adversions to scholarly papers written by eminent educators, and the judicial pronouncements of some sister states."

Counsel for appellants doing nothing new, and is doing nothing more than seeking judicial legislation, which the Utah Supreme Court has repeatedly refused to condone.

This Court has also cited sound policy reasons for supporting the doctrine of governmental immunity. In Blonquist v. Summit County, 25 Utah 2d 387, 481 P.2d 430 (1971), the Court noted:

"It is of great importance to public officials, to the governmental unit they act in behalf of, and even more important to the stability and efficiency of government, that public officials should not be held liable for damages for acts done in good faith in the performance of their duties where the exercise of any discretion is involved even though they may make a mistake in judgment. The general law is quite uniformly to that effect.

* * * It would be quite impractical and unfair to require them to act at their own risk. This would not only be disruptive of the proper functioning of public institutions, but undoubtedly would dissuade competent and responsible persons from accepting the responsibilities of public office. Accordingly, it is the settled policy of the law that when a public official acts in good faith, believing what he does to be within the scope of his authority and in the line of his duty, he is not liable for damages even if he makes a mistake in the exercise of his judgment." 483 P. 2d at 434, 436.

Likewise, in Sheffield v. Turner, 2 Utah 2d 314, 445 P. 2d 367 (1968), the Court stated that there is:

". . . the imperative need for those able in a supervisory capacity to have reasonable freedom to discharge the burdensome responsibilities of keeping in confinement and maintaining discipline of a large number of men who have been convicted of serious crime. If such officials are too vulnerable to lawsuits for anything untoward which may happen to inmates a number of evils follow, including a breakdown of discipline, and the fact that capable persons would be discouraged from taking such public positions."

An additional policy concern was expressed in McQuillin, Municipal Corporations, 3d Ed., Sec. 53.24:

"The reason (for immunity) as often expressed, is one of public policy, to protect public funds and public property.
"Taxes are raised for

certain specific governmental purposes; and, if they could be diverted to the payment of the damage claims, the more important work of government, which every municipality must perform regardless of its other relations, would be seriously impaired if not totally destroyed."

Respondents submit that there are additional compelling reasons for retention of immunity in situations such as the instant case. The modern trend in corrections is to rehabilitate inmates through vocational and educational training programs. Work release, school release, home visits, probation and parole are current methods used.

It is a practical impossibility to provide twenty-four hour guard supervision of inmates on such programs. Thus, if governmental immunity is not applied to protect these programs, they will have to be terminated. Secondly, the immunity frees the correctional employees from the fear of retaliation so as to allow them to function freely and give independent discharge of their duties, as stated in Sheffield.

Mention should be made of appellants' use of Brown v. Wichita State University, 217 Kan. 279, 540 P. 2d 66 (1975). The case was cited for the proposition that the Kansas Supreme Court voided the Kansas legislative provisions regarding governmental immunity as a violation

of equal protection. A careful reading of the case reveals that the only provisions voided were those dealing with the proprietary activities of government, i.e., those activities carried on for the specific benefit of a local community or which are generally performed by the private sector for profit.

"Having declared the doctrine governmental immunity as codified in K.S.A. 46-901, 902 to be constitutionally void, equality returns in regard to the responsibility of all levels of government in this state when engaged in proprietary activities. However, by equalizing responsibility we are confronted with the final question presented in this appeal. Is the transporting of football players, university personnel and interested alumni to a scheduled intercollegiate away football game a governmental or proprietary function?" (Emphasis added.)

The Kansas Supreme Court went on to state its acceptance of the doctrine of governmental immunity with respect to governmental activities, i.e., governmental activity carried on for the common good of the general public (e.g., the maintenance and operation of a state correctional facility).

"Nevertheless, we believe the governmental-proprietary distinction still has vitality. Implicit in the distinction is the recognition that it 'is not a tort for government to govern.' (Jackson, J., dissenting in Dalehite v. United States, 346 U.S. 15, 57, 73 S.Ct. 956, 979, 97 L. Ed. 1427.) Depending upon the facts and circumstances involved, the distinction can serve either

to place government in the shoes of the private tortfeasor, or to limit government liability. For example, under the distinction the state is not exposed to liability as to legislative or judicial action or inaction, or administrative action or inaction, of a legislative or judicial cast. Nor is the state liable in matters involving the exercise of official judgment or discretion. (Willis, et al v. Dept. of Cons. & Ec. Dev., 55 N.J. 534, 264 A.2d 34. See Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed. 2d 214 (1975).)" (Emphasis added.)

See Utah Code Ann. § 63-30-3 (1953), which limits immunity to governmental functions.

POINT II

APPELLANTS' CAUSE OF ACTION AROSE OUT OF AN INCARCERATION AND THE STATE OF UTAH IS, THEREFORE, IMMUNE FROM LIABILITY UNDER UTAH CODE ANN., § 63-30-10(10) (1953).

As indicated in Point I, the Utah Governmental Immunity Act should be judicially construed so as to preserve the presumption of sovereign immunity intended by the legislature.

Utilizing this strict standard of construction, an examination must be made of Utah Code Ann. § 63-30-10(10). That statute provides, as follows:

"Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of

an employee committed within the scope of his employment except if the injury:

(10) arises out of the incarceration of any person in any state prison, county or city jail or other place of legal confinement. . . ." (Emphasis Added.)

Respondents submit that the language of Subsection (10) is clear on its face and was intended to preclude suits against the state in situations such as the present case. In the alternative, respondents submit that the meaning of the terms "arises out of," "incarceration;" and "other place of legal confinement;" must be strictly construed by this Court with a presumption in favor of preserving governmental immunity, as set forth in Point I.

Appellants concede that Mr. Madsen was legally confined in the State Prison at the time of his death. A prison is not just four walls with bars on the windows. Other basic functions essential to the sustaining of man are required to be performed for persons confined in a prison. Facilities for food preparation and medical attention as well as facilities for exercising the body and mind are part of the prison.

Respondents submit that occurrences in the various suboperations necessary for a complete prison facility are also covered by a statute providing for injuries arising out of incarceration of persons at a state prison.

Several recent Utah cases have shed judicial light on Utah Code Ann., § 63-30-10 (10). In a 1976 Utah case, Epting v. Utah, 546 P.2d 242 (1976), this Court was faced with the question of whether a murder committed by an escaped prisoner from a work-release program arose "out of the incarceration . . . in any state prison, . . . or other place of legal confinement." The Court held the state immune from suit arising out of this incident.

Although the Court chose to base its holding on subsection 1 of Section 63-30-10 and held the state immune because the supervision of a work-release program arose out of the exercise of a discretionary function, Justice Crockett commented that Paragraph 10 might also be applicable. In speaking to the point of whether the escaped convict inflicted injuries which arose out of incarceration in the state prison, Justice Crockett stated:

" . . . As to the status of Michael Hart vis-a-vis the state prison, there seem to be just two alternatives, either: (a) He had totally escaped the control of the prison and was thus acting on his own so the prison was not responsible for him; or (b) he was still under the control of the prison authorities so that his conduct would 'arise out of the incarceration of any person in (the) state prison'

in which latter instance the prison is
immune from suit under the statute."
(Emphasis added.) (546 P.2d at 244)

Justice Crockett seems to be saying that where a prisoner is still under control of prison authorities, incidents thereto "arise out of incarceration," and the state is immune from suit as per Section 63-30-10(10). In Sheffield v. Turner, supra, the Court was faced with deciding whether Warden Turner of the state prison was immune under Utah Code Annotated, Section 63-30-10(10), for injuries to an inmate within the prison. In this case, Chief Justice Crockett stated:

"Inasmuch as the statutes just referred to plainly retain sovereign immunity to the state for any injury arising out of incarceration in the prison, the trial court correctly dismissed the complaint as to it"
(Id. at 368)

Another Utah case dealing with Section 63-30-10(10), Utah Code Annotated, is Emery v. State of Utah, 26 Utah 2d 1, 483 P.2d 1296 (1971), in which this Court decided whether or not a state hospital qualified as "another place of legal confinement." Justice Henroid stated that the Court was of the opinion that, in reading the whole section, the words "other place of legal confinement" obviously referred to something other than a jail or state prison, including a hospital where one cannot be released without

some kind of permission. Surely, a private person voluntarily undergoing surgery within a prison facility must also fall within this provision, thus the state is immune from suit.

Respondents assert under such circumstances that the state prison and all the necessary auxiliary functions thereof, including the operation of the prison hospital, are governmental functions under the definition provided in Point VII, infra, and the cases therein. Consequently, the performance of the duties incident thereto are protected by the traditional rule of sovereign immunity.

Such protection does not constitute a complete shield for anything that may be done or permitted in prison. In Sheffield v. Turner, supra, the Court held that the warden and other prison officers are protected by the doctrine of sovereign immunity against claims of negligence so long as they are acting within the scope of their duties and in good faith, and that they could not be held liable unless they were guilty of some conduct which transcended the bounds of good-faith performance of their duty by a willful or a malicious wrongful act which they know, or should have known, would result in injury.

This analysis of subsection 10, provides an interpretation which protects the State under sovereign immunity, and permits liability only against individuals whose conduct transcends the bounds of good faith performance of a duty at the prison.

Based on Utah Code Ann. § 63-30-10(10), appellants have no cause of action because the government has not waived immunity for negligent acts or omissions of employees which were committed within the scope of their employment where the resulting injury arose out of the person's incarceration in the state prison.

POINT III

THE INJURY TO MR. MADSEN IS WITHIN THE
CONSTITUTION OF SUBSECTION 10 OF SECTION
63-30-10 AND THE COURT CORRECTLY APPLIED
THE STATUTE.

Appellants allege in Point III of their brief that the legislative history of Utah Code Ann. § 63-30-10(10) (1953) compels a narrow reading of subsection (10). Respondents submit that the dialogue quoted by appellants reveals a decision by the legislature to protect the state from lawsuits exactly like the present one. The comment by Senator Welch which is quoted and underlined at page 26 of

appellants' brief logically refers to claims by inmates that they received improper treatment at the prison hospital. This reference is especially reasonable when the alleged mistreatment is a discretionary matter involving medical judgment. Under the circumstances of this case where Mr. Madsen requested surgery and did not inform the operating physicians or medical technician of any unusual chest pains or prior heart problems the resultant medical treatment was reasonable and should not subject the state to liability because of Mr. Madsen's death.

Appellants cite Sheffield v. Turner, 2. Ut. 2d 314, 445 P.2d 367 (1968) to show that governmental immunity "does not constitute a carte blanche protection for anything that may be done or permitted in a prison." Respondents agree with that proposition. If a guard brutally assaults an inmate governmental immunity offers no protection. If a medical technician or physician is recklessly or grossly negligent in treating an inmate governmental immunity may not shield such treatment.

Respondents contend, however, that the conduct in this case was clearly "the performance of duties incident (to a governmental function)" and therefore covered by the Governmental Immunity Act.

POINT IV

DEFENDANT STATE WAS PERFORMING A DISCRETIONARY FUNCTION AS PER UTAH CODE ANN, § 63-30-10(1) (1953), AND, THEREFORE, IS IMMUNE FROM SUIT UNDER THE UTAH GOVERNMENTAL IMMUNITY ACT.

Section 63-30-10(1), Utah Code Ann. (1953) as amended reads, in part:

"Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of his employment except if the injury:

(1) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused. . . . "

(Emphasis added.)

The above statute provides immunity from the types of activity alleged by appellants.

Judicial interpretation of what constitutes a discretionary function when performed by public officials has been extensive across the country.

Decisions on this issue have been influenced by the purposes of the sovereign immunity doctrine as mentioned in Point I. For example: In NeCasek v. City of Los Angeles, 233 Cal. App.2d 131, 43 Cal. Rptr. 294 (1965), it was said:

"Since obviously no mechanical separation of all activities in which public officials may engage as being either discretionary or ministerial is possible, the determination of the

category into which a particular activity falls should be guided by the purpose of the discretionary immunity doctrine."
(Emphasis added.).

In Garner v. Rathburn, 346 F.2d 55 (10th Cir. 1965), the Court defined the discretionary function as being an activity done within the framework of official duty "involving exercise of discretion which public policy requires be made without fear of personal liability."
(Emphasis added.)

This Court followed the above mentioned line of case in Sheffield v. Turner, supra, where an inmate at the state prison injured another inmate. The Court recognized the need for supervisors at the prison to be free to discharge the burdensome responsibilities of supervising confinement and maintaining discipline without being susceptible to lawsuits covering every activity of such men in a pressure-filled situation.

A leading case dealing with the meaning of the word "discretion" as it applies to sovereign immunity is Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 965 (1953). There, the United States Supreme Court, in interpreting Section 2680 of the Federal Tort Claims Act (which, in part, reads: "any claim . . . based upon the exercise or performance of a discretionary function or duty on the part of . . . an employee of the Government . . ."
is exempt from governmental liability), held that acts done

at the "planning" level were "discretionary," whereas those done at the "operational" level were not. The Court, however, went on to specify what type of governmental acts went into the "planning" level by specifically holding that the negligent acts in question (i.e., fertilizer bag labeling, determining bag temperature, coating of fertilizer, and bagging) done by government employees were themselves "planning" and thus "discretionary" since they "involved considerations more or less important to the practicality of the Government's fertilizer program" and were pursuant to the basic plan established by the "Field Director's Office." The Court said:

" . . . the discretionary function or duty . . . includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of Section 2680 (a) would fail at a time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the supervisor, exercising, perhaps abusing, discretion." Id. at 36. (Emphasis added.)

Dalehite v. United States, *supra*, represents a definite line of cases which hold that governmental activity pursuant to or connected with the basic policy decisions

at the "planning" level is itself "planning" and thus within the confines of "discretionary" immunity. In Downs v. United States, 382 F. Supp. 713 (M.D. Tenn. 1974), in an action against the United States under the Federal Tort Claims Act arising out of an incident of air piracy in which two people were killed, the Court, relying on Dalehite, supra, stated:

"Despite the growing conviction that the sovereign, like others, should be accountable for its wrongs, it seems clear that the conduct of certain types of governmental activity must remain free from the effects of litigation. Basically, the exemption for discretionary functions seeks to insulate from judicial inquiry the propriety of basic policy decisions made by officials of coordinate branches of government in whom are vested broad and pervasive decision-making responsibility. The rule contemplates those situations in which a court cannot undertake to determine the reasonableness of complex governmental decisions. Also, implicit in the concept of protection for discretionary acts is the probable effect which potential liability would have in dampening the ardor of those charged with the formulation and execution of governmental programs. The test for immunity, then, should be whether injury inflicted as a result of government action can be subjected to judicial review without thereby jeopardizing the quality and efficiency of government itself.

"Under these standards, it is clear that the substance of any hijacking plan or procedure formulated by the Department of Justice through the FBI or its executive officials could not be the subject of civil litigation under the Tort Claims Act. This would be true

even though the plan called for activity clearly negligent adjudged by traditional tort principles. Moreover, in order to achieve the purposes for which exemption from liability is deemed necessary, it is obvious 'that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.' Dalehite v. United States, *supra*, 346 U.S. at 36, 73 S.Ct. at 968. Thus, as urged by the Government, it is of no real moment that the allegedly negligent governmental agents in this case were operating at the 'field' level rather than at policy-making level." (Emphasis added.)

In Sullivan v. United States, 129 F. Supp. 713 N.D. 111, 1955), in an action under the Federal Tort Claims Act, the United States District Court held that any activity of a government employee at the operational level performed in accordance with the official plan or program constitutes performance of a discretionary function since its source is discretionary.

The Oregon Court of Appeals in Baker v. Straumfjard, 10 Ore. App. 414 500 P.2d 496 (1972), held that a state employed doctor was immune under the state immunity statute since the following acts, which the plaintiff alleged to be the source of liability, were within the "discretionary" function:

a. Admitting plaintiff to the state university hospital when plaintiff was suffering from a mental disturbance; and

b. Failing to supervise, guard, or attend him.

In Jarret v. Willis. 235 Ore. 51, 383 P.2d 995 (1963), an action was brought against the superintendent of a home for the mentally deficient as the result of injuries inflicted on the plaintiff by a resident on leave. The Court held that both the granting of leave of absence to the resident and the superintendent's failure to provide adequate means of supervision over the resident while on leave were within the "discretionary" function of the superintendent. The Court stated:

"His responsibilities require him to make constant discretionary judgment. Like the Board of Parole and Probation or the Superintendent of the State Hospital, he is required as the State's keeper of these unfortunates and in behalf of the state, to judge and govern human beings and human conduct, a judgment devoid of any of the standard weights and measures available for the decisions made by other public officials. There would be few of his decisions that would not be discretionary."

Respondents submit that the subjective element in treating and rehabilitating prisoners requires almost a total concentration of effort in discretionary functions, including, as in the instant case, allowing a prisoner to undergo a personally requested surgical procedure.

Medical treatment rendered by hospital personnel is of necessity discretionary in nature. Broad guidelines for care can be provided but specific treatment can only be given in the context of specific medical circumstances.

Since appellants have not even alleged that the action of respondents were deliberate and in wanton disregard of definite rules of medical conduct, the alleged cause of action fails under subsection 10 of the Utah Code Annotated, Section 63-30-10, which retains immunity for injuries caused by an employee acting within the scope of his employment when it arises out of the exercise of a discretionary function, even if such discretion is abused.

POINT V

OPERATION OF A HOSPITAL FACILITY AT THE
STATE PRISON IS A GOVERNMENTAL FUNCTION
WITHIN THE COVERAGE OF THE UTAH
GOVERNMENTAL IMMUNITY ACT.

This Court has considered in several opinions the distinctive criteria which determine what is a governmental versus a proprietary function and, hence, what type of activities carried on by a government entity are covered by the Utah Governmental Immunity Act. In the recent case of Greenhalgh v. Payson City, 533 P.2d 799 (1975), this Court held that an operation of a hospital facility by a municipality is a proprietary function not covered under the Governmental Immunity Act. In this case, the Court reiterated four important factors to consider in deciding whether an activity is proprietary or governmental. The factors are:

1. Whether the activity is something which is done

2. Whether it is generally regarded as a public responsibility;

3. Whether there is any special pecuniary benefit to the municipality; and

4. Whether it is of such a nature as to be in competition with free enterprise.

It is undisputed that the operation of a prison facility by the state government is a governmental function. Therefore, the only issue before the court is whether the operation of a prison hospital meets the four criteria set down by the Supreme Court. In the Sheffield case, supra, this Court noted "the imperative need for those in a supervisory capacity to have reasonable freedom to discharge the burdensome responsibilities of keeping in confinement and maintaining discipline of a large number of men who have been convicted of serious crime." Respondents assert that a prison warden in the exercise of his discretion in running a prison hospital is doing so for the general public good. The public good would seem to be best served if the prison warden and the prison physicians were allowed to make their independent judgments as to what type of medical attention is to be given to individual inmates and where such treatment should be given.

The second criterion given by the Court is whether the disputed activity is generally regarded as a public

responsibility. The operation of a prison facility is clearly a public responsibility, and it follows that the administration of the various programs and facilities within that prison also are public responsibilities.

In the case of Ramirez v. Ogden City, 3 Utah 2d 102, 279 P.2d 463 (1955), from which the court in Greenhalgh, supra, extracted its four criteria, the Court noted that "where the activity is otherwise consistent with the governmental function, the fact that a fee is exacted, nor that there may be some incidental pecuniary benefit to the city, are by themselves controlling." A fortiori, if some pecuniary benefit can be received by the governmental entity and still pass this test, then the fact that no fees are extracted, or pecuniary benefit is derived by the state from the administration of this hospital, there can be no doubt that the third criterion has been met.

The last criterion is whether the activity is of such a nature as to be in competition with free enterprise. The state prison hospital is not in competition with any part of the free enterprise system, as there is nothing in the private sector that specializes in the treatment of people who have been removed from society by the court system and the legislature. The prison authorities have, in their discretion, found it desirable and beneficial to the public

to maintain a state facility for treatment of inmates' medical problems. Due to the unique patients at this hospital, prison authorities are best suited for determining how to best meet the prisoner's medical needs.

In no sense can it be said that in operating a prison hospital, the state is trying to obtain some pecuniary benefit in competition with the private sector.

Based on the guidelines given by the Supreme Court in Ramirez, supra, and reiterated in Greenhalgh, supra, it is clear that the operation of a prison hospital within the prison is strictly a governmental function as is the operation of the state prison itself, and is thus covered by the Governmental Immunity Act. This conclusion is supported in Sheffield, supra, where the Court noted that, "there can be no question but that the maintenance of the state prison and the keeping of prisoners therein is a necessary auxiliary of government, and, therefore, a governmental function, and the performance of the duties incident thereto would normally be protected by the traditional rule of sovereign immunity." (445 P.2d at 368)

In light of the above language, the discretionary actions of prison medical employees are immune as provided in the Governmental Immunity Act and appellants' appeal should be denied.

POINT VI

RESPONDENTS SAMUEL H. SMITH, LEON HATCH, TAGE SPONDECK, AND DOES 1 THROUGH 5 WERE ACTING WITHIN THE BOUNDS OF GOOD FAITH IN PERFORMING THEIR DUTIES AND ARE THUS IMMUNE FROM SUIT.

Respondents submit that three recent Utah cases that deal with suits against government entities and their employees in their private capacities provide immunity to respondents in the instant case for the types of activities alleged by appellants. In the case of Sheffield v. Turner, 21 Utah 2d 314, 445 P.2d 367 (1968), already discussed, the court held that the prison warden and other prison officers are protected by the doctrine of sovereign immunity against claims of negligence, so long as they are acting in good faith and within the scope of their duties. Sheffield also indicated that they could not be held liable unless they were guilty of some conduct which transcended the bounds of good-faith performance of their duties by a willful or malicious wrongful act which they knew or should have known would result in injury. The court reasoned that to subject such officials to lawsuits for anything which may happen to inmates would create a number of evils, including a breakdown of discipline and the likelihood that capable persons would be discouraged from taking such public positions.

In the case of Rosendaal, supra, in which a taxpayer was bringing suit against the members of the State Tax Commission in their private capacities, the Court held:

"It appears from the record in this case that defendants in the matters herein complained of by the plaintiff were pursuing their duties in the collection of excise taxes the defendants claim to be due the state. It also appears that the acts complained of were performed in good faith by the defendants and within the statutory authority granted. The ruling of the court below that the defendants are not subject to suit for damages in their private capacity is correct." (Id. at 448)

In a 1972 Utah case, Anderson Investment Corporation v. the State of Utah, 28 Utah 2d 379, 503 P.2d 144 (1972), the plaintiffs sought to enjoin members of the State Road Commission from proceeding to work on a viaduct before the plaintiff had been paid the appropriate dollar damages from his alleged diminution in value of easements to light and air. In Anderson, the Court held:

"In the instant suit, Anderson did make the individual members of the commission parties defendants. . . . These members in the performance of their duties which have the same immunity as does the commission which they constitute." (Id. at 146)

The above three cases clearly point out that appellants improperly brought suit against the individual

members named in this action, since they have not alleged that any of the named respondents was guilty of any conduct which transcended the bounds of good-faith performance of their duties by a willful and malicious wrongful act which they knew or should have known would have resulted in the injury complained of. The individuals named as party respondents were properly dismissed by the lower court.

CONCLUSION

In summary, appellants have cited substantial case authority, dicta, and commentary supporting the proposition that absolute governmental immunity is archaic and without legal foundation. The Utah Legislature took this same position many years ago when it enacted the Utah Governmental Immunity Act. The Act severed legal tradition by waiving governmental immunity in many areas of governmental activity, including the negligence of its own employees while retaining immunity in certain areas deemed necessary by the legislature. This same approach is followed by the United States in the Federal Tort Claims Act and by the vast majority of the states. Appellants have cited no controlling authority requiring the complete abolition of the governmental immunity doctrine and have failed to overcome the strong presumption favoring the constitutionality of legislative enactments.

This, coupled with this Court's traditional acceptance of the governmental immunity doctrine in general and the Utah Governmental Immunity Act, specifically indicates that the Act is constitutional and controlling in the instant case.

It should be noted that this Court was presented with the identical legal claims in Epting v. State, supra, in a petition for rehearing. This rehearing was denied. Likewise, the same constitutional challenge was brought in the Fourth Judicial District in Utah County in the case of Mitchell v. State of Utah, (Civil N. 42, 647, 4th District Court of Utah, July 14, 1976) with the same result. In both instances above, the courts were presented with identical issues, case authority, etc. as is before this court, challenging the constitutionality of the Utah Governmental Immunity Act and thus stare decisis dictates that appellants' claim has already been decided in respondents' favor. Therefore, appellants' appeal should be denied, and the lower court decision affirmed.

Respectfully submitted,

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