

1986

LaDawn Prue v. THE STATE OF UTAH, LEON HATCH, Deputy Warden of the Utah State Prison, WILLIAM MILLIKEN, personally and as Director of Utah State Department of Corrections, WELDON MORGAN, individually and as Director of the Ogden Community Corrections Center, KENNETH ROBERTS, and FELICIA ROBERTS : Brief of Respondent

Utah Supreme Court

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BRIEF

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20957

IN THE SUPREME COURT OF THE STATE OF UTAH

LaDAWN PRUE,

Plaintiff-Appellant,

vs.

THE STATE OF UTAH, LEON
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WELDON MORGAN, individually
and as Director of the Ogden
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KENNETH ROBERTS, and FELICIA
ROBERTS.

Supreme Court No. 20957

Category No. 10

Defendants-Respondents.

RESPONDENTS' BRIEF

Appeal from the Third Judicial District Court of
Salt Lake County, The Honorable Judith M. Billings

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STATEMENT OF THE ISSUES ON APPEAL

The fundamental question presented by this case is whether the State and/or its employees are to be held liable for the independent criminal acts of a person because that person was or at one time had been under the dominion of the State's criminal justice and corrections system. The issues on appeal are whether the trial court properly granted summary judgment in favor of respondent State of Utah, and whether the lower court erred in denying summary judgment to the individual state employees.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an action for damages for personal injury suffered by the plaintiff when she was shot by the defendant Kenneth Roberts. Plaintiff also sued the State and several of its individual employees alleging negligence in deciding to parole Roberts and to release him to a halfway house.

The District Court granted Summary Judgment in favor of the State of Utah, and in favor of William Milliken, as Director of the Utah State Division of Corrections, Leon Hatch, as Deputy Warden of the Utah State Prison, and Weldon Morgan, as Director of the Ogden Community Corrections Center, in their representative capacities. Appellant appeals that judgment as of right.

The lower court, however, denied Summary Judgment for Milliken, Hatch and Morgan in their individual or personal capacities, and this Court granted their petition for interlocutory appeal. The lower court also granted Summary Judgment in favor of Milliken, Hatch and Morgan on the issue of simple negligence, holding that they could only be liable for "gross negligence," and this Court granted appellant's petition for interlocutory appeal on that issue.

All appeals, whether of right or interlocutory, were consolidated, and for the purpose of the consolidated appeals, plaintiff below will appear as appellant and the State defendants as respondents. Andrew Gallegos, named below individually and as the Director of the Department of Social Services, was dismissed and that dismissal is not challenged. Kenneth Roberts and his wife, Felicia, were not concerned with the summary judgment motions below and are not parties to this appeal.

B. Facts of the Case.

On December 22, 1982, Kenneth Roberts ("Roberts") was transferred from the Utah State Prison to the Ogden Community Correction Center, a halfway house. This transfer was to prepare him for an August 9, 1983 parole date which had previously been granted by the Board of Pardons. In the early morning hours of December 24, 1982, while apparently under the influence of drugs, Roberts shot the appellant.

Organizational Structure of Utah Corrections System¹

1. The Governor of Utah administers the state corrections system through the Department of Social Services, whose Director in 1982 was Andrew Gallegos. The Department oversaw the Division of Corrections, whose Director in 1982 was respondent William Milliken. The Division operated a number of facilities and organizations including the State Prison, the halfway houses, and Adult Probation and Parole.

2. The prison was operated under the direction of the Warden, Kenneth Shulsen, who was statutorily empowered with the ultimate authority and responsibility for the housing of inmates. Utah Code Ann. §§ 63-13-10 and 11 (1977). Warden Shulsen directly delegated the responsibility for decisions affecting prisoner classification to the Associate (or Deputy) Warden, respondent Leon Hatch.² (Deposition of Kenneth Shulsen, at 6 and 9).

¹ A chart illustrating the organization of the Utah corrections system as it existed in December 1982 is attached hereto as Appendix "A," and is also found in Record on Appeal at 271. The corrections system has undergone some reorganization since that time. The facts set forth herein describe the system as it existed in 1982.

² The decision to release inmates from the corrections system is made by the State Board of Pardons, which is a separate entity from the Division of Corrections and answers only to the Board of Corrections and the Governor. The Board of Pardons has virtually unrestricted discretion in determining how long an inmate will stay in prison and in setting parole dates.

3. The men's facility at the prison is divided into minimum, medium and maximum security cell blocks. Within medium security is a block of cells known as "protective custody," which houses inmates who, for whatever reason, need protection from the general inmate population.

4. Each prisoner at each level of confinement is reviewed and classified, or rated, for advancement within the system; good behavior brings greater freedom, responsibility and benefits. Initial recommendations for inmate classifications were made by the inmate's Unit Management Team (UMT), which met weekly to review inmates. The UMT was comprised of the Cell Block Captain, lieutenants, case workers and psychologist, all of whom worked daily with the prisoners. (Id. at 12-13; Deposition of Laddie Pruett, at 4). These classification recommendations were then referred to the prison's Administrative Review Board (A.R. Board), previously called the Executive Classification Committee. The Chairman of the A.R. Board was respondent Leon Hatch, the Associate Warden, who was responsible for the administration of inmate classification. Other voting members of the A.R. Board included Eldon Barnes, Director of Prison Security; Richard Barnhart, Sr., Director of Medium Security; and Fred Hurst, Director of Minimum Security. Other members of the prison staff were invited to attend A.R. Board meetings and give input regarding prisoners. The staff

members were sometimes asked to join in the vote and to give the Associate Warden additional input in deciding difficult classification cases. (Deposition of Leon Hatch, at 15-16; Deposition of Kenneth Shulsen, supra).

5. Once an inmate was given a parole date by the Board of Pardons, he could be re-classified and transferred to a Community Corrections Center (halfway house). The Community Corrections Centers Administration, a subdivision of the Division of Corrections separate from the State Prison, and its Director Robert Anderson, were responsible for the five Centers in the state. Respondent Weldon Morgan was director of the Ogden Center. (Deposition of Robert Anderson, at 43-44).

6. Prior to 1982, the five individual Center Directors worked directly with the prison staff, including Unit Management Teams, in making recommendations to the A.R. Board for the transfer of those prisoners who had received parole dates. This method, however, sometimes resulted in disputes between Directors when the same prisoner was "approved" by more than one Director for transfer to more than one facility and encouraged maneuvering by directors in attempts to obtain the best inmates for their facility. (Deposition of John Powers, at 39-41).

7. Thus, in mid-1982, John Powers, a veteran Corrections employee, was appointed by Robert Anderson to develop a new

method of screening prisoners for transfer to the Centers. Powers became Chairman of the Community Corrections Centers Screening Committee, with an office at the prison, and he was to be the liaison between the Centers and the Prison A.R. Board. The Committee consisted of representatives from each of the five Centers and the Committee was to meet regularly to consider candidates for transfer to the halfway houses. (Id. at 8-10 and 38).

8. The Community Corrections Centers Administration maintained an appropriate consistency of operations throughout the various Centers, yet permitted the individual Directors latitude within their professional judgment and discretion to deal with the problems of their particular situation and residents. Each of the Centers had its own policies and procedures manual. (Id. at 33-34).

Kenneth Glen Roberts

9. Roberts was born in Payson, Utah, in 1950. He came from a broken home and spent his adolescent years in and out of the State Industrial School. (Utah State Board of Pardons File on Kenneth Roberts, Presentence Report, Nov. 20, 1967, Record on Appeal, at 272-76).

10. In 1967, Roberts, then 17, and two companions broke into an apartment, raped a woman, and stole her jewelry and

car. Roberts was certified to stand trial as an adult, pled guilty, and was sentenced to ten years to life. (Id.).

11. Roberts was paroled from prison in March 1973, after serving five years. His parole was later revoked after he was arrested and convicted for an armed robbery in May 1973. He received an indeterminate sentence for that offense of five years to life. After serving five years, he was paroled in December 1978. Nine months later he pled guilty to burglary and rape, and was given a one to fifteen year sentence for each offense. (Utah State Board of Pardons File, Miscellaneous Documents I, Record on Appeal, at 278-82).

12. During his second term at the prison, Roberts testified against another inmate who was charged with a murder at the prison. Thereafter, Roberts was placed on protective custody and remained there until his transfer to the Ogden Community Corrections Center in December 1982. (Kenneth Roberts Prison Jacket, C-Notes file, June 5, 1975 entry, Record on Appeal, at 283-84).

13. Roberts underwent a psychiatric evaluation at the Utah State Hospital in Provo, Utah, from December 1979 to February 1980. Tests performed at that time showed that Roberts had an I.Q. of 126 and was "of superior intelligence, having the ability to do college level work and . . . beyond." Roberts had completed high school and several semesters of college credit

while incarcerated in the state prison. On February 9, 1980, Roberts ran away from the State Hospital, but was apprehended almost immediately and transferred back to prison. (Utah State Hospital File on Kenneth Roberts, Psychological Assessment, Jan. 15, 1980, Record on Appeal, at 285-89; Utah State Board of Pardons File, Miscellaneous Documents II, Record on Appeal, at 290-95).

14. Felicia Santos Roberts is a New York native who graduated from Brigham Young University with a degree in applied sociology. Following graduation, she accepted employment at the Utah State Hospital as a psychiatric aide, and met Roberts there while he was undergoing psychiatric evaluation. After Roberts returned to prison, they corresponded daily, and ultimately were married in September 1980. They were divorced in 1983. (Deposition of Felicia Santos, at 2-8).

Roberts' Transfer to Ogden Center

15. Felicia Roberts first contacted Gary Webster, the Executive Secretary of the Board of Pardons, almost nine months prior to her September 1980 marriage to Kenneth Roberts. (Utah State Board of Pardons File, Miscellaneous Documents II, supra.) Both she and Roberts lobbied Webster and the members of Roberts' Unit Management Team at the prison, telling them of

the changes Roberts was making in his attitude and behavior, in an effort to have Roberts' parole rehearing date moved up. (Deposition of Felicia Santos, at 30 and 40) Laddie Pruett, Roberts' case worker, also noted positive changes in Roberts' behavior and attitude and wrote a favorable report to the Board of Pardons. At a redetermination hearing in March 1982, the Board moved Roberts' rehearing date up to August 1982. (Utah State Board of Pardons File, Miscellaneous Documents III, Record on Appeal, at 296-312).

16. The Board of Pardons met to consider Roberts for parole on August 18, 1982. (Id.). Roberts was serving time for his third felony conviction, as were nearly 65% of the other prison inmates. Roberts had served nearly 66 months on his first felony (rape), over 60 months on his second felony (robbery), and would have served 36 months on his third conviction (burglary and rape).³ (Id.; Affidavit of Christine

³ Nearly half of the inmates were serving time on at least their fourth conviction and more than one third had five or more felony convictions. Division of Corrections statistics also show that from October 1982 to October 1984, inmates released from the Utah State Prison had served, on average, less than 32 months for rape, less than 36 months for robbery, and less than 25 months for burglary. See Utah State Corrections Annual Report, infra, at p. 66, Record on Appeal, at 352. Thus, prior to Roberts' transfer to the Ogden Community Corrections Center on December 22, 1982, Kenneth Roberts was a statistically average inmate who had served his time.

Mitchell, Ph.D., and accompanying Utah State Corrections Annual Report 1984, Record on Appeal, at 313-355).

17. The staffs of both the prison and the Board of Pardons had recommended an August, 1984 parole date. However, the Board of Pardons, apparently impressed by Roberts' record of improvement, his demeanor at the hearing, and the appearance and support of his wife, set an earlier parole date of August 9, 1983. (Board of Pardons File, Miscellaneous Documents IV, Record on Appeal, at 356-368).

18. After the Board set the new parole date, Felicia Roberts contacted Weldon Morgan at the Ogden Halfway House. She told him of Roberts' parole date and asked about the possibility of Roberts being accepted at Morgan's facility. Morgan had known Roberts at the State Industrial School and told Felicia that if Roberts had not changed from his days at the State School, he would be reluctant to accept Roberts at the Center. (Deposition of Felicia Santos, at 40-41; Deposition of Weldon Morgan, at 19).

19. On August 31, 1982, the Community Corrections Centers Screening Committee considered, and denied, Roberts' request for transfer to the Ogden Center. Roberts had a pending disciplinary action arising from an altercation at the prison which made him ineligible for transfer, and some committee members were not convinced Roberts was an acceptable candidate. (Deposition of John Powers, at 9).

20. The pending disciplinary action against Roberts was later dropped when he was found not at fault in the altercation. In early October 1982, Roberts' Unit Management Team recommended to the A.R. Board that Roberts be transferred to the Ogden Center. The team members felt that Roberts had indeed changed his attitude and behavior since his marriage to Felicia. He had earned the highest classification level for protective custody, served as both the unit clerk and school teacher (for high school equivalency courses), and counseled other prisoners in a program he helped design to get them off of protective custody and back into the prison community. He also became involved in voluntary group therapy. The psychological evaluations performed on Roberts by the Unit psychologist, Merril Lee Rasmussen, and her contacts with him through group therapy, convinced her that Roberts was sincere, that he had made significant positive changes, and that he was determined to succeed on the outside. The members of Roberts' UMT felt that his chances would be improved if he had the advantage of living in a halfway house environment prior to parole release, which was less than a year away. Felicia Roberts' presence and employment in Ogden, as well as her support for Roberts and her persistent lobbying on his behalf, were also viewed as favorable factors by the UMT. (Kenneth Roberts Prison Jacket, C-Notes file, supra; Deposition of Merril Lee

Rasmussen, at 66-69; Deposition of Laddie Pruett, at 10-13; Deposition of Bruce Daniels, at 39-40).

21. However, at its weekly meeting on October 8, 1982, the A.R. Board denied the UMT's recommendation for transfer. Roberts and Felicia were both upset by the A.R. Board's decision. Felicia phoned William Milliken, Director of Corrections, and complained that Leon Hatch, the Associate Warden, was prejudiced against her husband and was not giving him fair treatment. (Kenneth Roberts Prison Jacket, Miscellaneous File, Administrative Review, Oct. 8, 1982, Record on Appeal, at 369-71; Deposition of Felicia Santos, at 22-25; Deposition of Bruce Daniels, at 38).

22. Milliken called Hatch to follow-up on Felicia Roberts' accusation, as he did with many inquiries he received about inmates. Milliken did not ask Hatch to do anything particular for Roberts; he called simply to get information about Roberts' status so that he could relay that information to Felicia. Hatch, however, acknowledged some prejudice about Roberts and agreed to reschedule him for review in December. (Deposition of William Milliken, at 8-14; Deposition of Leon Hatch, at 70-75).

23. Felicia also contacted Roberts' UMT and Weldon Morgan. She told Morgan that Roberts had indeed changed since his days at the State Industrial School. Based on Felicia's

representations and favorable reports on Roberts received from the prison, Morgan agreed to accept Roberts at the Ogden facility if he were approved by the A.R. Board. (Deposition of Weldon Morgan, at 20-21; Deposition of Marvin Hansen, at 7).

24. The UMT again submitted Roberts' name to the A.R. Board the first week of December for transfer to Ogden. The A.R. Board met on December 10, 1982, and considered Roberts' case as one of about ninety classification changes. Roberts' proposed transfer was discussed at length, and as he sometimes did with difficult cases, Associate Warden Hatch opened the voting to all those in attendance. The majority of those present favored transfer, although Eldon Barnes, a member of the A.R. Board, testified that he thought Roberts' transfer was denied. Hatch had to leave the meeting, and later asked Barnes to sign the type-written results of the meeting. Barnes' signature appears on the classification review sheet showing Roberts' transfer was approved. (Deposition of Leon Hatch, at 19 and 98; Deposition of Eldon Barnes, at 48).

25. Once approved by the A.R. Board, Roberts was cleared for immediate transfer to Ogden, subject to availability of space. Weldon Morgan called John Powers, Chairman of the Community Corrections Centers Screening Committee, on December 17, and asked Powers to complete the necessary arrangements for Morgan to pick up Roberts on December 22. (Deposition of Weldon Morgan, at 23-26).

26. John Powers did not convene the Community Corrections Centers Screening Committee prior to approving Weldon Morgan's decision to accept Roberts' transfer to Ogden. Powers was convinced by his conversations with Morgan that Morgan was agreeable to working with Roberts. Powers agreed that the Ogden Center presented the best chance for Roberts to succeed: Morgan knew Roberts, he had a track record of success with difficult cases, and Roberts' wife was living and gainfully employed in Ogden. Powers was certain that the other Directors would acquiesce in Morgan's judgment and his desire to work with Roberts, and would approve the transfer. Roberts would be paroled soon in any event, and the purpose of the halfway house was to do what it could to prepare inmates for life on the outside. (Deposition of John Powers, at 40-45).

27. Weldon Morgan picked up Roberts at the prison and transported him to Ogden on December 22. During the drive to Ogden, Morgan had a long talk with Roberts and as a result Morgan's feelings were reinforced that Roberts was sincere about changing his life and making the most of this opportunity. Upon arrival at the facility, Morgan discussed the halfway house rules with Roberts and reviewed the Resident Contract Roberts was required to sign acknowledging that he understood the rules and would abide by them. Morgan then called Felicia at work and told her Roberts was at the center;

she arrived shortly thereafter. (Deposition of Weldon Morgan, at 36-40).

28. The Ogden Center was scheduled to close for the Christmas holiday, allowing both residents and staff to spend the holiday with family. Felicia had told Weldon Morgan how excited she was to spend a belated honeymoon and Christmas with her husband. Prior to releasing Roberts to go with his wife, Morgan reviewed the rules with Roberts and Felicia and gave each of them his business card, and his home phone number, instructing them to call him if they needed help or had any problems over the holiday. (Deposition of Weldon Morgan, at 39-40).

29. Roberts was allowed to leave the Center that same afternoon (the 22nd) with Felicia to attend to some personal matters. He was to return to the facility by 11:00 p.m. that night, which he did, without incident. Felicia did not notice anything unusual about Roberts that evening and there is no indication he consumed any drugs or alcohol. (Deposition of Felicia Santos, at 116-17).

30. The next morning, December 23, Roberts left the Ogden Center with Felicia. He was to return by 11:00 p.m. on December 25. Roberts says that he obtained some drugs from another inmate (whom he refuses to identify) prior to leaving the facility. (Deposition of Kenneth Roberts, at 76-81).

31. Upon leaving the Center, Roberts and Felicia ran some errands and then returned to Felicia's apartment where Roberts took a shower and Felicia left to go to the bank. Roberts testified that while Felicia was gone he started ingesting drugs, beginning with an amphetamine (Preludin). He says that he took large quantities of amphetamine throughout the day while he and Felicia made a trip from Ogden to Provo and back. During this time they visited friends, and bought and delivered Christmas gifts. Felicia did see Roberts take seven or eight of her amphetamine diet pills, smoke some marijuana and drink two or three cans of beer over the course of the day's activities. According to Felicia, however, Roberts drove all day without noticeable adverse effect. (Deposition of Felicia Santos, at 52-56; Deposition of Kenneth Roberts, at 80-87).

32. While returning to Ogden, Roberts told Felicia that he wanted to have a party that night. They stopped at a friend's house and, upon Roberts' request, Felicia invited her friend to the party and asked her if she had any marijuana. The girl denied the party invitation but did provide some marijuana. (Deposition of Felicia Santos, at 57-60).

33. Roberts and Felicia went on to their apartment, arriving at about 10:00 p.m. Felicia left to buy beer and some food for their holiday meals. Upon Roberts' request, she again

stopped at her girlfriend's home and asked her to come back to the apartment for a party. While Felicia was gone, Roberts claims he ingested PCP ("angel dust"). (Deposition of Kenneth Roberts, at 87-88; Deposition of Felicia Santos, 57-60).

34. When Felicia returned, she saw Roberts peering out of the bedroom window through the curtains with the bedroom lights out. As she entered the apartment, Roberts came out of the bedroom with a rolled up sleeping bag and asked for the keys to her car. He refused to tell her where he was going and left at about 11:00 p.m. in Felicia's red Pontiac, the registration of which listed the address of Roberts' brother. She later recalled that Roberts had asked her that morning where she kept her .357 pistol and he told her that they would have to get rid of it because it violated the halfway house rules. Felicia then discovered the gun was missing; apparently Roberts had hidden it inside the rolled up sleeping bag and taken it with him. (Deposition of Felicia Roberts, at 59-62).

35. Inexplicably, Felicia did not call Weldon Morgan at that time to tell him what happened. Instead, she called some friends in Salt Lake City, one of whom told Felicia not to worry, that Roberts would not do anything stupid and that he just needed to get away for awhile to do some thinking. Felicia sat up all night waiting for Roberts to return home. (Id. at 65-67).

36. In the morning Felicia received a call from Roberts' brother in Salt Lake City. He informed her that he had been visited by the police, who had traced the red Pontiac, and that Roberts was the prime suspect in several crimes. Only then did Felicia call Weldon Morgan at home, at approximately 9:30 a.m. on December 24th. (Id.).

37. Roberts' recollection of the 12 hour period from the time he left Felicia's apartment until he was arrested the next day is spotty, disjointed and confused. It appears that some time after he left the apartment, Roberts took a hallucinogenic drug called "MDA." Roberts had never taken MDA or the PCP ingested earlier, before. He told police after his arrest that he was high on drugs and alcohol. (Deposition of Kenneth Roberts, at 93-94; Board of Pardons File, Police Reports, Record on Appeal, at 375-81).

38. The first thing Roberts remembers after leaving the apartment in Ogden is being pulled over by a police officer in the Salt Lake City area. While talking to the officer, "something clicked" in his mind and he became paranoid that the police, including this particular officer, wanted to kill him. Roberts was prepared to shoot the policeman, but the officer did not arrest Roberts, and he went on his way. After that, however, Roberts was convinced that the police were after him,

"herding" him to a specific location where they would kill him. (Deposition of Kenneth Roberts, at 90-102).

39. At about 3:20 a.m., Roberts entered the plaintiff's neighborhood in the south part of Salt Lake valley. He saw a police car patrolling the area. Still under the influence of drugs, and still paranoid, he randomly turned into a cul-de-sac and spotted LaDawn Prue getting out of her car. He jumped out of his car, put the gun to her head and ordered her into his car; he wanted a hostage to help him escape the police dragnet which was closing in on him. (Id. at 101; Board of Pardons File, Police Reports, supra).

40. Even though plaintiff was complying with Roberts' orders, he inexplicably shot her twice and left her lying in front of her home. Later he broke into a home only to be confronted and chased away by the woman of the house; he then robbed a woman at gunpoint, kidnapped a different woman, had a shoot-out with police, and finally surrendered at 11:00 a.m. that morning on a road a short distance from the State Prison. (Deposition of Kenneth Roberts; Board of Pardons File, Police Records, supra).

41. Roberts pled guilty to five felony charges arising from the crime spree: attempted criminal homicide, aggravated burglary, armed robbery, aggravated kidnapping, and being a habitual criminal. He is presently incarcerated in maximum

security at the Utah State Prison with a Board of Pardons first review date of 1998. (Board of Pardons File, Miscellaneous Documents V, Record on Appeal, at 382-85).

SUMMARY OF ARGUMENT

Fundamental public policy issues are inextricably interwoven with the legal issues presented by this case. While considering the scope of governmental immunity, the meaning of discretionary function, and common law official immunity, this Court must also give consideration to the purposes and prospects for corrections in this state, to the allocation of risks associated with the corrections and criminal justice systems, as well as the disparate roles of the judicial, legislative and the executive branches of state government. Recent legislative changes in sentencing parameters and the resulting over-crowded conditions at corrections facilities, the consequential unavoidable early release of adjudicated prisoners, with the concomitant risk of crimes being committed by these early releasees, require that greater consideration be given to the underlying policy and legal issues here than might otherwise be the case.

Specific provisions of the Utah Governmental Immunity Act and authoritative case law hold that respondents are not liable for the independent criminal acts of a third person, at least

where government employees acted within the scope of their employment, committed no willful or malicious wrong, and exercised discretion.

A recent decision of this Court, Doe v. Arguelles, *infra*, upon which appellant bases virtually her entire case, is not consistent with recent developments in the law of governmental immunity and discretionary function. Although Doe v. Arguelles was a logical, albeit radical, extension of predecessor cases dealing with these issues, the opinion was written without the benefit of briefing on the recent significant changes in federal case law interpretation of these same legal principles. In view of this Court's longstanding precedent of following the lead of federal interpretation in this area, the recent federal developments require a re-evaluation of Doe v. Arguelles.

ARGUMENT

POINT I

THE UTAH GOVERNMENTAL IMMUNITY ACT AND DIS- POSITIVE CASE LAW BAR APPELLANT'S CLAIMS

A. The Act's Three-Step Test for Governmental Immunity.

The Utah Governmental Immunity Act (the "Act") codifies the common law principle that a governmental entity is generally immune from suit. The Act then establishes a three-step test for determining whether immunity applies in a particular case:

(1) The first step is to determine whether the injury complained of resulted "from the exercise of a governmental function." Utah Code Ann. § 63-30-3 (Supp. 1983). If so, there is immunity from suit.

(2) Step two is to determine whether immunity is waived by the Act for the particular governmental function in question. Both the Act and cases interpreting the Act instruct that any waiver must be strictly construed, and that an explicit expression of waiver and satisfaction of any qualifiers enumerated in the waiver itself must precede application of the waiver. Utah Code Ann. §§ 63-30-3, 4 and 15; Madsen v. Borthick, 658 P.2d 627 (Utah 1983); Holt v. Utah State Road Comm'n, 511 P.2d 1286 (Utah 1973).

(3) The third step is to determine whether the waiver of immunity is subject to any exception. For example, if the waiver in question is that found in Section 10(1) of the Act, waiving immunity for injuries "proximately caused by a negligent act or omission of an employee committed within the scope of his employment," it remains to be determined whether any one of the exceptions enumerated there retains immunity.

1. Step One: Governmental Function.

Section 63-30-3 of the Utah Governmental Immunity Act states: "Except as may be otherwise provided in this act, all

governmental entities are immune from suit for any injury which results from the exercise of a governmental function. . . ."

The Utah Supreme Court has declared that:

There can be no question but that the maintenance of a state prison and the keeping of prisoners therein is a necessary auxiliary of government and therefore a governmental function, nor that consequently the performance of the duties incident thereto would normally be protected by the traditional rule of sovereign immunity.

Sheffield v. Turner, 21 Utah 2d 314, 445 P.2d 367, 368 (1968).

In 1980, the Supreme Court formulated a test for determining whether the activity of a governmental entity is an exercise of a governmental function and thus entitled to immunity. In Standiford v. Salt Lake City Corp., 605 P.2d 1230 (Utah 1980), the Court wrote:

We therefore hold that the test for determining governmental immunity is whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental activity.

Id. at 1237. The Court expanded on this test a year later:

The first part of the Standiford test -- activity of such unique nature that it can only be performed by a governmental agency -- does not refer to what government may do, but to what governmental alone must do [T]he second part of the Standiford test "essential to the core of governmental activity" --, . . . refers to those activities not unique in themselves (and thus not qualifying under the first part) but essential to the performance of those activities that are uniquely governmental.

Johnson v. Salt Lake City Corp., 629 P.2d 432, 434 (Utah 1981) (emphasis in original).

While Sheffield predates Standiford and Johnson, there nevertheless should be no doubt of the correctness of Sheffield's conclusion: "that the maintenance of the State Prison and the keeping of prisoners therein is a necessary auxiliary of government and therefore a governmental function." It is self-evident that the apprehension, prosecution, confinement, punishment, and rehabilitation of criminals is peculiarly the province of government. These are precisely the types of activities which are uniquely governmental, something that "government alone must do" in the discharge of the Constitutional mandate to provide for the general welfare, and deserving of the immunity provided by the Act.

2. Step Two: Waiver.

Appellant's Amended Complaint makes no reference to any express waiver of immunity upon which suit can be brought. However, the nature of her claims could rely on no waiver other than that found in Section 63-30-10(1) of the Act. Like the other express waivers set forth in the Act, the express waiver of Section 63-30-10(1) has significant and unavoidable qualifiers attached. Failure to satisfy the qualifications for waiver set forth in this section means simply that the waiver does not apply and that immunity remains. The waiver, with its three qualifiers underscored and identified, reads as follows:

Immunity from suit of all governmental entities is waived for injury [1] proximately caused [2] by a negligent act or omission of an employee [3] committed within the scope of his employment . . .

Utah Code Ann. § 63-30-10(1) (emphasis added).

The Legislature specifically limited this particular waiver to situations where a "negligent act or omission" of a government employee, acting within the scope of his employment, "proximately caused" the injury complained of. Proximate causation and negligence are legal terms of art that the Legislature is presumed to have used knowingly and purposefully.

Utah Code Ann. § 68-3-11. This waiver, therefore, cannot apply where any of these three specific qualifiers are unsatisfied.

First, it must be found that an employee or the entity owed a duty to the injured party. The existence of a legal duty running from defendant to plaintiff is a requisite element of any negligence claim, Hughes v. Housley, 599 P.2d 1250 (Utah 1979), and, where no legal duty exists, no legal causation is recognized. Where there is no legal causation, as a matter of law, there can be no proximate causation. See Prosser, Handbook of the Law of Torts, 244 (4th ed. 1971).

The issue of existence of duty is a question of law for the court. See Metropolitan Gas Repair Service, Inc. v. Kulick, 621 P.2d 313, 317 (Colo. 1980); Moewes v. Farmer's Insurance Group, 641 P.2d 740, 741 (Wyo. 1982); 57 Am. Jur. 2d Negligence § 34 (1971). A finding by this Court that the defendants owed

no duty to plaintiff precludes application of the waiver of Section 63-30-10(1), and immunity remains. Conversely, a finding that a duty exists requires an assumption that the waiver of immunity cited above applies, and would then require consideration of the enumerated exceptions to the waiver which are found in subsections (a) through (1) of Section 63-30-10(1).

Because respondents believe that several Utah Supreme Court decisions dealing with the enumerated exceptions to the waiver of immunity are dispositive of this case, it will be presumed, for the purposes of this portion of the argument only, that a duty exists, that the waiver of Section 63-30-10(1) applies, and that the enumerated exceptions to the waiver should be considered.

3. Step Three: Exceptions to the Waiver.

Section 63-30-10(1) lists several distinct, well-defined exceptions to the general waiver of immunity for employee negligence. These exceptions are listed in the alternative rather than conjunctive, and thus only one need apply to void the waiver. In cases with facts remarkably similar to the instant case, both of which are discussed below, this Court has applied two of these exceptions to preserve immunity.

The waiver and the two exceptions read as follows:

(1) Immunity from suit of all government 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:

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

. . . .

(j) arises out of the incarceration of any person in any state prison, county or city jail or other place of legal confinement

Utah Code Ann. §§ 63-30-10(1)(a) and (j) (emphasis added).

These exceptions will be analyzed in reverse order.

B. Incarceration Exception Bars Appellant's Claims.

In Emery v. State, 483 P.2d 1296 (Utah 1971), this Court affirmed the dismissal of a claim against the State for the death of a patient who was voluntarily confined at the State Hospital. Applying the exception of Section 63-30-10(1)(j), the Court held that the statutory reference to "other place of legal confinement," when read in its entirety, "obviously referred to something other than a 'jail' or 'state prison,' including a hospital where one cannot be released without some kind of permission." 483 P.2d at 1297.

Five years later, this Court reaffirmed Emery and held that the arising-out-of-incarceration exception barred a claim for the death of a woman killed by a prison inmate who had walked away from his prison "work release" job shortly before the murder. Epting v. State, 546 P.2d 242 (Utah 1976). In Epting,

prison officials had granted the prisoner the privilege of participating in the prison's "work release" program. The prisoner was released from the prison each day, driven to work, and then picked up after work and returned to the prison. One day, the prisoner walked away from his job and that evening killed plaintiffs' decedent.

The Epting plaintiffs claimed that the State negligently failed to keep the prisoner incarcerated or under surveillance. The Court affirmed a Summary Judgment in favor of the State based on both the discretionary function exception and the arising-out-of-incarceration exception. With regard to the incarceration exception, the Court declared:

As to the status of [the prisoner] vis-a-vis the state prison, there seemed 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.

Epting, 546 P.2d at 244.

Two other Utah Supreme Court decisions, Schmitt v. Billings, 600 P.2d 516 (Utah 1979), and Madsen v. State, 583 P.2d 92 (Utah 1978), are consistent with and support the holdings in Emery and Epting. In Madsen, the wife and daughter of a prison inmate who had died following surgery in the prison

hospital filed a wrongful death action against the Utah State Prison and selected employees. The Madsen Court concluded that the plain meaning of the incarceration exception to the waiver of immunity found in Section 10(1) of the Utah Governmental Immunity Act "reflects a legislative intent to retain sovereign immunity for any injuries occurring while the incarcerated person is in prison and under the control of the state." 583 P.2d at 93. The Court impliedly recognized that the inmate technically was not incarcerated in the prison but rather confined to the hospital at the prison. The Court nevertheless concluded: "Since this injury occurred while Madsen was under the control of prison officials, the governmental entities, vis., the State of Utah and the Board of Corrections, are both immune from liability." 583 P.2d at 93 (emphasis added). Thus, reaffirming both the reasoning and conclusions of Emery and Epting, the Madsen court held that it is the prisoner's status and the state's control over the prisoner, rather than merely the prisoner's physical location, which are critical to the incarceration exception. See also Schmitt, 600 P.2d at 518 (holding the State immune for loss of inmate's personal property).

When Kenneth Roberts assaulted the appellant, he was an inmate/resident at the halfway house facility in Ogden. He had not been paroled by the Board of Pardons and he could not leave

the facility without permission. He was still serving time as an inmate under the jurisdiction of the State, see Utah Code Ann. § 64-13-11, but in a corrections facility less restrictive than the State Prison.

The Ogden halfway house, if not an extension of the State Prison itself, clearly constitutes an "other place of legal confinement," as defined by this Court in Emery. Kenneth Roberts was incarcerated there. Just as the injury in Emery arose out of an incarceration in a "place of legal confinement" other than a jail or a prison, the injury complained of by appellant here arose "out of the incarceration" of Kenneth Roberts at a "place of legal confinement."

The factual setting and plaintiffs' claims in Epting are virtually identical to those of the instant case. In both cases, the prisoner had not yet been paroled. In Epting, prison officials granted Michael Hart, the prisoner, the privilege of participating in work release away from the prison. Here, prison officials granted Kenneth Roberts the privilege of transfer to a halfway house, where he was still "under the control" of the state in a "prison . . . or other place of legal confinement," as defined in Emery, Epting, and Madsen. During Hart's employment away from the prison, he generally was free to do what people outside prison do when they are gainfully employed. During Roberts' Christmas leave from the

halfway house, he generally was free to do what people outside prison do during Christmas. Hart walked away from his place of employment and killed Mrs. Cynthia Epting Mitchell. Roberts left his apartment and his wife and shot LaDawn Prue. As in Epting, at the time Kenneth Roberts shot LaDawn Prue, either (a) he had totally escaped the control of corrections authorities and was acting on his own, "so the prison was not responsible for him;" or (b) he was under the control of corrections authorities and thus LaDawn Prue's injuries arose "out of the incarceration of any person in the state prison . . . or other place of legal confinement." Utah Code Ann. § 63-30-10(1)(j). Under either view, the State cannot be held liable for LaDawn Prue's injuries. To hold otherwise, this Court must, unavoidably, overturn Epting, Emery and Madsen.

C. Discretionary Function Exception Bars Appellant's Claims.

1. Epting v. State Is Dispositive Here.

This Court has been clear and consistent in its pronouncements that the decisions, programs and efforts of corrections officials in attempting the difficult task of managing and rehabilitating adjudicated criminals, require the exercise of discretion. Prisoner "rehabilitation is the responsibility of professional men and the manner in which it is accomplished must be a matter of discretion." Beal v. Turner, Warden, 22

Utah 2d 418, 454 P.2d 624, 626 (1969). "We think there is not much doubt that the use of work release programs is a worthwhile effort toward the . . . objective [of rehabilitation]. But that is within the discretion of the prison authorities to decide." Epting v. State, 546 P.2d at 244. "[There] is 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." Sheffield v. Turner, 445 P.2d at 369.

These declarations clearly enunciate that not only the decision-making processes involved but also the actual operation of corrections facilities and the handling of prisoners confined therein are discretionary and fall within the discretionary function exception of subsection (a) of Section 63-30-10(1). In Beal, the Court enunciated the policy affording this discretion:

The Board of Pardons and the men in the Adult Probation and Parole Department are striving in a professional way to rehabilitate adjudicated criminals, so that these criminals may take their place in a law-abiding society. To accomplish this objective, the Board of Pardons and the Adult Probation and Parole Department must have leeway in taking chances and enlarging the ambit of a promising prisoner, [even] when the confidence which they had in the parolee is [later] seen to be misplaced

Beal v. Turner, Warden, 454 P.2d at 626 (emphasis added). The

Epting Court also recognized the difficulties facing prison authorities in developing rehabilitation programs and in applying those programs to particular prisoners. The Court declared:

In regard to the problem: whether the placing of a prisoner in a "work release" program comes within subsection [(a)] above quoted as "the exercise of . . . a discretionary function, . . . ," we make the following observations: The prison authorities are faced with a dilemma which has always existed in penal institutions: As to what extent they are furnishing an education for further crime, or for the rehabilitation of prisoners into useful citizenship. We think there is not much doubt that the use of work release programs is a worthwhile effort toward the latter objective. But that is within the discretion of the prison authorities to decide. In addition to the exercise of this judgment as to the value and practicability of such a program generally, there are problems about its advisability as to each individual prisoner. In order to weigh the positive values of possible benefit for him in such a program against the negative factors such as the likelihood of his escaping and engaging in more anti-social conduct, it is essential to consider the various aspects of his personality: his intelligence, aptitudes and qualities of character such as honesty, integrity and industry; and whether he has demonstrated a sincere desire to rehabilitate himself so that there is a reasonable probability that he will succeed. Accordingly, we agree with the view of the trial court that the handling of the prisoner Michael Hart was something which "arises out of the exercise of a discretionary function" for which subsection [(a)] of Section 63-30-10[(1)] quoted above has retained its sovereign immunity.

Epting, 546 P.2d at 244 (footnote omitted) (emphasis added).

Note that Epting framed the issue not in terms of whether merely deciding to place an inmate in a work release program was discretionary, but rather in terms of whether the actual

placement of the inmate into the program was discretionary.

The Court, focusing on events which occurred after the decision was made to place the inmate in work release and centering its attention upon the the actual implementation of the work release decision, held that the "handling of the prisoner" was a discretionary function for which immunity was not waived. Id.

Use of the phrase "handling of the prisoner," read in light of the discussion of the inherent difficulty in dealing with a particular inmate's personality, intelligence, potential for rehabilitation, etc., and how and to what extent such programs should be made available to that inmate, makes it clear that the Epting Court used those broad words advisedly. "Handling the prisoner" must therefore include decisions regarding the prisoner's classification within the system, implementation of those decisions, supervising the prisoner's work release program, monitoring the prisoner's participation in work release, granting freedoms commensurate with work release, and all other activities undertaken by corrections officials in connection with the incarceration and attempted rehabilitation of the prisoner.

The facts of Epting, with no significant differences, are the facts of the instant case. The issues addressed by the Epting Court, with no more than cosmetic alterations, are the issues presented here. Corrections officials' "handling" of

Kenneth Roberts, including the decision to transfer him to a halfway house and the monitoring of Roberts after his move to the halfway house, cannot be distinguished from the "handling" of Michael Hart in the Epting case. Epting's holding that "handling of the prisoner" on work release was a discretionary function is consistent with Beal v. Turner, supra, and Sheffield v. Turner, supra, and is dispositive of the discretionary function issue.

2. Epting v. State Is Still Good Law.

Appellant argues that Epting is suspect and is no longer good law. Appellant asserts that some Utah Supreme Court cases decided after Epting have applied an analysis of the discretionary function exception different than that used in Epting, and which, if applied here, would require this Court to reverse Epting and rule that the discretionary function exception does not apply. Appellant misconstrues the law.

In the 1972 decision of Carroll v. State Road Comm'n, 27 Utah 2d 384, 496 P.2d 888 (1972), the Utah Supreme Court held that a State road supervisor's decision to use berms as the sole means of warning travelers that a road was closed, was not a basic policy decision essential to the realization or accomplishment of some basic governmental policy, program or objective. 496 P.2d at 891. In arriving at this decision, the court adopted a planning level-operational level dichotomy

analysis. Citing decisions from the Supreme Courts of Hawaii and California, and making reference to the Federal Tort Claims Act, which contains a discretionary function exception virtually identical to that found in the Utah Governmental Immunity Act, the Carroll Court discussed "the principle that although basic policy decisions are allowed immunity, this exception is not extended to the ministerial implementation of that basic policy." Id. Plaintiff relies upon this and similar statements from Carroll and its progeny as support for the argument that the discretionary function exception does not apply to the facts of this case.

The Carroll Court, however, specifically concluded that:

[A] valid consideration in evaluating a factual situation was whether there was a reason for sovereign immunity, i.e., did the employee's decision . . . rise to the level of governmental decisions toward which judicial restraint should be exercised.

Id. This consideration evidently became a deciding factor when the Court considered the facts of Epting nearly four years later.⁴ Although not expressly stated in the Epting opinion, the Court must have determined that the decisions made by the defendants, including those at the lower levels of prison administration, whereby Michael Hart was put on work release,

⁴ It must be presumed that the Epting Court, with four of the five justices from Carroll still sitting, was well aware of the Carroll decision.

were decisions which rose "to the level of governmental decision toward which judicial restraint should be exercised," and therefore constituted a discretionary function. If the Epting Court had determined otherwise, it would have reversed the Summary Judgment granted in favor of the prison authorities.

Five years after Carroll and one year after Epting, this Court analyzed "discretionary function" in Connell v. Tooele City, 572 P.2d 697 (Utah 1977). In Connell, the Utah Supreme Court discussed in detail the distinction between "discretionary" and "ministerial" duties. Adopting the distinction used by Dean Prosser, the Court wrote:

. . . [A]cts which are regarded as "discretionary" or "quasi-judicial" in character, require personal deliberation, decision and judgment, and those which are merely "ministerial" amount[] only to obedience to an order, or the performance of a duty in which the officer is left no choice of his own.

The reason for the distinction between discretionary and ministerial duties has been enunciated by several authorities and we believe this distinction to be necessary and sound. For if every employee or officer of the government were to be held liable, individually, for errors in judgment or exercise of the discretion, which his employment requires him to make, such employee would fear to make decisions and the administration of government could be seriously jeopardized. On the other hand, if the employee's duties require no exercise of judgment or discretion, the reason for protecting his actions does not exist.

572 P.2d at 699, citing Prosser, The Law of Torts, §§ 131-132 (4th ed. 1977).

The conclusions in Epting are consistent with the analytical framework adopted by the Court in Connell for determining whether particular responsibilities of government employees are discretionary and thus immune from suit. The "personal deliberation, decision and judgment" exercised by the respondents in Connell, Epting, and in the instant case, constitute discretionary functions in fact and in law, consistent with this Court's decisions regarding corrections activities.

Appellant argues in her Brief that the recent case of Doe v. Arguelles, 25 Utah Adv. Rep. 9 (Dec. 27, 1985), in essence overrules Epting and those cases which support it. Contrary to appellant's position, however, it is Doe v. Arguelles, and not Epting, that is an aberration from the orderly development of the law of discretionary function.

3. Recent Developments in the Law Regarding Application of the Discretionary Function Exception Support the Conclusions of Epting v. State.

(a) Developments in the Law up to 1984.

Utah's discretionary function exception to the waiver of immunity closely parallels the discretionary function exception found in 28 U.S.C. § 2680(a) of the Federal Tort Claims Act (the "FTCA"). Little v. Utah State Div. of Fam. Serv., 667 P.2d 49, 51 (Utah 1983). The Utah Supreme Court "has followed the lead of cases interpreting that act." Id.; Frank v. State,

613 P.2d 517, 519 (Utah 1980). Indeed, this Court expressly adopted the planning level-operational level test for discretionary function developed by some federal courts, which distinguished "between those decisions occurring at a broad, policy-making level and those taking place at the implementing 'operational' level." Frank, 613 P.2d at 519. See also, Bigelow v. Ingersoll, 618 P.2d 50 (Utah 1980); Carroll v. State Road Comm'n, supra. This level-oriented, dichotomy approach grants discretionary immunity to those decisions made at the policy-making level, but denies immunity for acts and decisions made at the implementing or operational level because such decisions are "ministerial" rather than "discretionary."

As noted by this Court in Little, supra, the federal case law interpreting the FTCA's discretionary function exception began with Dalehite v. United States, 346 U.S. 15 (1953). In Dalehite, claims against the United States were made under the FTCA for damages resulting from an explosion of fertilizer which had been manufactured and distributed under the direction and control of the federal government. In holding for the government, the Court discussed at length the discretionary function exception of the FTCA and held that

[T]he "discretionary function" . . . 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.

346 U.S. at 35-36 (emphasis added).

The Dalehite Court did not stop at the "executive or administrator" level, however, holding that:

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 § 2680(a) would fail at the 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 superior, exercising, perhaps abusing, discretion.

Id. (footnote omitted) (emphasis added). Even though the Court refused "to define, apart from this case, precisely where discretion ends," id. at 35, the Court clearly and unambiguously included within the parameters of discretionary function the acts of subordinates implementing policy-level decisions of superiors.

A number of federal courts following Dalehite, however, tended to ignore the Dalehite holding immunizing subordinate implementation of policy decisions, and instead focused narrowly on one sentence, arguably dicta, found elsewhere in the opinion: "The decisions held culpable were all responsibly made at the planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program." Id. at 42. With the help of two post-Dalehite opinions from the Supreme Court,

which were generally interpreted to veer away from the Dalehite holding, Indian Towing Co. v. United States, 350 U.S. 61 (1955), and Eastern Airlines, Inc. v. Union Trust Co., 221 F.2d 62 (1955), aff'd per curiam sub nom., United States v. Union Trust Co., 350 U.S. 907 (1955), the planning level-operational level dichotomy approach to applying the discretionary function exception of the FTCA began taking shape.

The post-Dalehite federal cases, for the most part, drew an imaginary line between upper echelon planning level decision-makers and lower level "operational" employees who were charged with executing or implementing the policy, plan or program. The decision-makers above the line were granted immunity pursuant to the discretionary function exception. Those below the line, and their activities, regardless of the discretion or judgment involved, were labeled "ministerial" and subject to liability. See Allen v. United States, 527 F. Supp. 476 (D. Utah 1981), and cases cited therein. These federal cases invariably cite Dalehite as the source of this level-oriented dichotomy approach, but in doing so completely disregarded the Dalehite Court's holding that "acts of subordinates in carrying out the operations of government . . . cannot be actionable." 346 U.S. at 36.

The Utah Supreme Court followed the lead of these post-Dalehite federal decisions and adopted the dichotomy approach

for interpreting and applying the discretionary function exception of the Utah Governmental Immunity Act. Beginning with Carroll v. State Road Comm'n, supra, and followed by Frank v. State, supra, and Bigelow v. Ingersoll, supra, this Court struck a course consistent with federal case law applying this dichotomy approach that finally reached its logical end with Doe v. Arguelles in December of 1985.

That end result is a non-analytical, outcome-determinative, conclusory approach not unlike the pre-Standiford v. Salt Lake City Corp. "governmental capacity - propriety capacity" distinction used by this Court to determine whether or not certain activities were "governmental functions," as that term was used in the Utah Governmental Immunity Act. In Standiford, Justice Oaks decried the governmental-proprietary distinction as unsatisfactory, inconsistent, arbitrary, senseless and incongruous. 605 P.2d at 1233-34. This Court, and numerous others, had used the distinction as a "test" even though it amounted to little more than justification for a conclusory result.

The same holds true for the planning level-operational level distinction used for determining discretionary function. It is no longer a test (if it ever was), but is instead a justification for a result. How the result is reached becomes arbitrary and unpredictable. This Court should jettison the

planning level-operational level dichotomy approach for interpreting and applying the discretionary function exception, and replace it with a true analytical framework. The federal courts, which created the planning level-operational level distinction, have now done just that. This Court should do the same.

(b) Varig Airlines: A Unanimous United States Supreme Court Discards the Planning Level-Operational Level Approach.

In United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 104 S. Ct. 2755 (1984), plaintiffs brought suit under the FTCA alleging that the Federal Aviation Administration (the "FAA") was negligent in its inspection of certain components of an airplane during the course of certifying the aircraft for commercial use. The United States Supreme Court reviewed in detail the legislative history of the FTCA's discretionary function exception, quoted liberally from Dalehite, and noted that the case law⁵ had veered from Dalehite by adopting the level-oriented, dichotomy approach. By unanimous decision, the Court declared that Dalehite "represents a valid interpretation of the discretionary function exception." Id. at 2764. The Court isolated two determinative

⁵ The Court admitted that even its own reading of the discretionary function exception "has not followed a straight line" after Dalehite. 104 S. Ct. at 2764.

factors that should be used "in determining when the acts of a government employee are protected from liability by [the discretionary function exception]." Id. at 2765.

The first factor effectively prohibits consideration of the actor's rank, or his hierarchical position within the decision-making process, in determining whether the discretionary function exception applies to that actor's decisions or activities. Rather, the Court declared that "the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a government employee--whatever his or her rank--are of a nature and quality that Congress intended to shield from tort liability." Id. (emphasis added.)

Evaluating the facts in Varig Airlines pursuant to this factor, the Court held that both the governmental agency's decision and the actual implementation of that decision by agency employees were immunized from suit by the discretionary function exception to the FTCA. Id. at 2768. In Varig, the FAA's employees were empowered to make judgments regarding private persons' compliance with agency regulations, the need for changes to maximize compliance, the types of changes necessary, and the allocation of agency resources. The employees "necessarily took certain calculated risks, but these risks were encountered for the advancement of a governmental purpose

and pursuant to the specific grant of authority in the regulations and operating manuals." Id. at 2768-69. Such, the Court declared, "fall squarely within the discretionary function exception." Id. at 2769.

By eliminating the relevancy of the rank of the actor, Varig effectively eliminates any rational basis for the planning level-operational level dichotomy developed by some federal courts and adopted by the Utah Supreme Court. Varig instead rejuvenates Dalehite and requires a basic inquiry into the "nature and quality" of the questioned acts of government employees, and prohibits the semantic gymnastics too often used to distinguish an act of decision-making from an act of implementing that decision.

Similar to those federal cases which ignored express language in Dalehite, this Court, particularly in Doe v. Arguelles, ignored language in Frank v. Sate that is remarkably consistent with the first key factor delineated by Varig:

The exception to the statutory waiver here under consideration, however, was intended to shield those governmental acts and decisions impacting on larger numbers of people in a myriad of unforeseeable ways from individual and class legal actions, the continual threat of which would make public administration all but impossible.

Frank, 613 P.2d at 520. This language in Frank and the analysis in Varig are reminiscent of this Court's analysis in Epting, Beal, and Sheffield: corrections activities, including

the difficult task of rehabilitating criminals, are the "nature and quality" of government functions which the legislature intended to protect from judicial second-guessing.

The second determinative factor in Varig's analysis is as follows:

[W]hatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.

104 S. Ct. at 2765 (footnote omitted). Where government engages in corrections activities, government acts in "its role as a regulator of the conduct of private individuals" very possibly more than in any other activity. Where the government determines the extent to which it will supervise an individual (which is precisely what the respondents did with Kenneth Roberts), "it is exercising discretionary regulatory authority of the most basic kind." Id. at 2768. See Jet Industries, Inc. v. United States, 777 F.2d 303, 305 (5th Cir. 1985) (supervising and monitoring a federal probationer in the Federal Witness Protection Program "involves the regulation of the conduct of a private individual within the meaning of Varig Airlines").

Applying these two factors to the facts in Varig, the Supreme Court ruled that both the "decision to implement" the FAA "spot-check" system of compliance review for aircraft, and "the application of that . . . system to the particular

aircraft involved . . . are barred by the discretionary function exception to the Act." 104 S. Ct. at 2768. The Varig Court thus applied the holding in Dalehite and refused to distinguish "discretionary" decision-making and "ministerial" implementation of those decisions. To further emphasize the Court's return to Dalehite and the eradication of the planning level-operational level dichotomy approach to the discretionary function exception, the Court made it clear that:

Judicial intervention in such decision making through private tort suits would require the courts to "second-guess" the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policy making that the discretionary function exception was designed to prevent.

Id. The Court emphasized that the FAA employees involved had to make "policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer"; they were required to allocate agency resources in an efficient manner; and they were to attempt to "maximize compliance with FAA regulations." Id. ⁶ "It [therefore] follows," the Court held, "that the acts of FAA employees in executing the 'spot-check' program . . . are protected by the discretionary function exception as well." Id.

⁶ One might similarly observe that corrections officials are required "to make policy judgments regarding the degree of confidence that might reasonably be placed in a given" inmate, to allocate resources, and to attempt to maximize inmates' compliance with programs of rehabilitation.

The Dalehite holding, which for years was overlooked or ignored by the federal courts, has found new life. Varig Airlines has done to the planning level-operational level distinction what Standiford v. Salt Lake City did to the governmental capacity-proprietary capacity distinction: it replaced an unsound, conclusory and non-analytical approach with a reasoned framework of analysis by which sound legal judgments and efficacious policy decisions may be made without artificial, semantic distinctions.

(c) Application of Varig Airlines in the Federal Courts

Since Varig, nine of the eleven federal circuit courts considering discretionary function have applied the Varig/Dalehite analysis and have abandoned the planning level-operational level dichotomy approach.⁷ The Third Circuit

⁷ The federal appellate court decisions (listed numerically by circuit) expressly applying the Varig test for discretionary function are: Brown v. United States, 790 F.2d 199 (1st Cir. 1986); Shuman v. United States, 765 F.2d 283 (1st Cir. 1985); General Pub. Util. Corp. v. United States, 745 F.2d 239 (3rd Cir. 1984); Baxley v. United States, 767 F.2d 1095 (4th Cir. 1985); Ford v. American Motors Corp., 770 F.2d 465 (5th Cir. 1985); Flammia v. United States, 739 F.2d 202 (5th Cir. 1984); Feyers v. United States, 749 F.2d 1222 (6th Cir. 1984); Cisco v. United States through the E.P.A., 768 F.2d 788 (7th Cir. 1985); Cunningham v. United States, 786 F.2d 1445 (9th Cir. 1986); Natural Gas Pipeline Co. v. United States, 742 F.2d 502 (9th Cir. 1984); Russell v. United States, 763 F.2d 786 (10th Cir. 1985); Ostera v. United States, 769 F.2d 716 (11th Cir. 1985).

(continued)

Court of Appeals, for example, observed in General Public Utilities Corp. v. United States, 745 at 246 n. 8, that "our pre-Varig cases on the discretionary function must be re-evaluated." The First Circuit, in Shuman v. United States, 765 F.2d at 209, noted that "after Varig, 'our canvas of authorities is accordingly narrow.'"

The federal district courts have reacted similarly⁸ to Varig. The District Court in Kansas matter-of-factly acknowledged that in Varig, "the Supreme Court rejected the planning level/operational level line of cases adopted by various courts." Johnston v. United States, 597 F. Supp.

⁷ (continued)

Even prior to Varig, some federal courts saw problems with the level-oriented discretionary approach. In 1980, the Third Circuit characterized the planning level-operational level distinction as an ineffective "semantic attempt to decide in which category [a] case falls." Bernitsky v. United States, 620 F.2d 948, 951 (3rd Cir. 1980).

⁸ See Chrisley v. United States, 620 F. Supp. 285 (D.S.C. 1985); In re Consolidated United States Atmospheric Testing Litigation, 616 F. Supp. 759 (N.D. Cal. 1985); Bradley v. United States, 615 F. Supp. 206 (E.D. Pa. 1985); Ayala v. Joy Mfg. Co., 610 F. Supp. 86 (D. Colo. 1985); Cunningham v. United States, 625 F. Supp. 1016 (D. Mont. 1985); Bosco v. U.S. Army Corps of Engineers, 611 F. Supp. 449 (N.D. Tex. 1985); Wendler v. United States, 606 F. Supp. 148 (D. Kan. 1985); Federal Sav. and Loan Ins. Corp. v. Williams, 599 F. Supp. 1184 (D. Md. 1984); Johnston v. United States, 597 F. Supp. 394 (D. Kan. 1984); Jet Industries, Inc. v. United States, 603 F. Supp. 643 (W.D. Tex. 1984).

at 434. In Bradley v. United States, supra, the Court declared that if any question remained as to the appropriateness of the planning level-operational level test, "it has now been definitively laid to rest by Varig." 615 F. Supp. at 206 n.2. See also In re Consolidated United States Atmospheric Testing Litigation, 616 F. Supp. at 774 (the "continual vitality" of the planning level-operational level distinction "was in doubt" after Varig).

More important, however, than these decisions acknowledging the demise of the planning level-operational level analysis, is the manner in which the federal courts have been applying Varig. In Flammia v. United States, supra, plaintiff brought an action against the government to recover damages for injuries sustained when he was shot by a Cuban national named Diaz who had been admitted into the United States by the Immigration and Naturalization Service (the "INS"). Appellant alleged that INS personnel were negligent in: (a) releasing Diaz from its care, custody and control when it knew Diaz was a felon convicted of a violent crime and had a propensity to commit a similar crime in the future; (b) failing to maintain supervision over Diaz after his release; (c) failing to notify appropriate law enforcement agencies of Diaz's criminal record;

and (d) failing to take Diaz into custody after Diaz had been convicted of a felony in the United States.⁹ 739 F.2d at 204.

The Flammia Court quoted extensively from Varig and held:

[O]n the basis of Varig Airlines we must reject appellant's attempt to distinguish between high-level decisions concerning the admission or release of Cuban refugees in general and the specific operational decision to admit and release Diaz. . . . We view the language of Varig Airlines to dictate that the exemption under the Federal Tort Claims Act derived from this discretion extends to specific individual applications as well as to broad policies.

Id. (emphasis added). The Flammia Court stated further that in releasing and supervising foreign nationals, the INS was acting "in its role 'as a regulator of the conduct of private individuals.'" Id. at 205, quoting Varig, 104 S. Ct. at 2765.

Thus, the Fifth Circuit Court applied the two tests from Varig, i.e., the nature of the government conduct and regulation by government of private individuals, to issues identical to those presented by the instant case, found the discretionary function exception applicable and dispositive, and affirmed the dismissal of plaintiff's claims.

⁹ The first two allegations of negligence in Flammia are identical to the allegations in the instant case, i.e., negligent release and supervision. Appellant here has taken obvious care to describe these alleged negligent acts in terms suggesting that such are operational in nature, and thereby attempt to apply the planning level-operational level approach to discretionary function. The plaintiff in Flammia likewise carefully characterized the actions (or inactions) of INS personnel as operational, but to no avail under the Varig/Dalehite analysis.

The Eleventh Circuit, relying on Varig and Dalehite, did likewise in Ostera v. United States, supra. There, the FBI had obtained the release from a South Carolina jail of an adjudicated criminal for use as an informant. After his early release, the informant attacked plaintiff, blinding him in one eye. Recognizing that down-line decisions and actions implementing up-line decisions and policies cannot be arbitrarily distinguished from those up-line decisions and policies for the purpose of ascribing liability, the Ostera Court declared:

The decision to seek the release of an informant from prison is inextricably intertwined in the decision to use him as an informant. The decision to use a particular person as an informant is inextricably intertwined in the policy decision to use informants for law enforcement purposes. "Where there is room for policy judgment and decision there is discretion. . . ." . . . Neither the decision to use a particular person as an informant nor the decision to obtain release of that person from prison is subject to judicial scrutiny. . . , the government being immune from suit. . . under the discretionary function exception. . . .

769 F.2d at 718, quoting Dalehite, 346 U.S. at 36.

The Ostera Court recognized that a decision to use an adjudicated criminal as an informant cannot rationally be differentiated from the actual use of that informant. Similarly, the decision to obtain the release of an inmate from prison cannot be distinguished from the actual obtainment of the release, except by post-Dalehite/pre-Varig reasoning. The Ostera Court and all other federal courts herein cited, by barring claims for damages resulting from operational negligence, have discarded the judicially-created barrier between

deciding policy and implementing policy. So long as (a) the acts in question are of the nature and quality the legislature intended to protect from liability, (b) the acts involve governmental regulation of private individuals, and (c) the implementation of policy and goals has been left to the discretion of a governmental agency, then the implementation of decisions or policy is protected by the discretionary function exception.¹⁰

One of the most recent and best-reasoned post-Varig decisions is Brown v. United States, supra. In Brown, plaintiffs were operating fishing vessels off the coast of Massachusetts and were caught in a storm, resulting in loss of lives and

¹⁰ In Cisco v. United States through the E.P.A., supra, the Court reiterated the general rule with regard to discretionary function analysis: "Whether the [government agency] acted negligently or even abused its discretion has no effect on the applicability of the discretionary function exception." 768 F.2d at 789.

The Court in Cisco added that, after Varig, where "Congress has left to the EPA to decide the manner in which, and the extent to which, it will protect individuals and their property from exposure to hazardous wastes," the agency's actions fall within the Varig factors and the discretionary function exception bars claims based thereon. Id. (emphasis added). In the instant case, the state legislature has left to the Division of Corrections "the manner in which, and the extent to which, it will protect individuals and their property from exposure to hazardous" inmates, halfway house residents or parolees. Such discretion and the implementation thereof, have the nature and quality of activities the legislature intended to protect and constitute government regulation of the conduct of private individuals in its strictest sense.

vessels. Plaintiffs brought wrongful death actions against the government, claiming that the National Weather Service was negligent "in not earlier predicting the storm's true path," and the District Court awarded damages. 790 F.2d at 200. The First Circuit Court reversed, and, in so doing, expertly pointed out that the pre-Varig discretionary function analysis "would make the discretionary exception self-destructive." Id. at 203.

The Brown Court reviewed a Second Circuit case which the District Court in Brown had relied on, Eklof Marine Corp. v. United States, 762 F.2d 200 (2nd Cir. 1985), which held that even though the Coast Guard had no duty to mark a dangerous location at sea, once they decided to mark that danger and set a buoy there, they thereby accepted a duty and were thus obligated to perform that duty fully, "even, if necessary, to the point of setting two or three buoys." Brown, 790 F.2d at 202. The First Circuit then explained the errors in the Eklof reasoning (which similarly apply to Doe v. Arguelles):

[T]he court failed to consider the pernicious consequences that could flow from its approach. With necessarily limited funds, and unable to afford three buoys, will a Coast Guard official place one and risk heavy damages (\$382,000 in Eklof), or place none at all and play it safe--from the government's standpoint? Eklof cuts to the heart of governmental discretion, and, in effect, could deprive navigators of half a loaf, usually thought better than none.

Id. Is not the state corrections system faced with a similar dilemma? Limited funds and limited personnel versus an ever

expanding prison population means that corrections may only be capable of providing "half a loaf" of post-prison supervision programs designed to facilitate assimilation into the community.

The principle involved here is not limited to the failure to maintain preventive monitoring of a particular prisoner, but is universal, and could apply to anything a court might find impairs the success of rehabilitation programs. An expert might testify, and a court accept, that maintaining adequate post-prison programs would call for still additional programs, or for more advanced monitoring techniques, or for more personnel, ad infinitum. A court might even find misfeasance in the paperwork associated with the prisoner's processing. See Brown, 790 F.2d at 203.

All of these are matters which Congress [or the state legislature] reserved, both to itself with respect to appropriations, and to agencies' conduct, by the discretionary function exception from the F.T.C.A.'s [or the Utah Governmental Immunity Act's] consent to suit. . . . Without question, a weather service [or a corrections system] constitutes such, and to say that the very exercise of the function justifies reliance and a right to expect complete care would make the discretionary exception self-destructive.

Id.

Finally, the Brown court expressed the basic inquiry called for by Varig, and similar language permeates this Court's decisions in Epting, Emery and Sheffield:

We add that, from the standpoint of the government, the Weather Service [or corrections] is a particularly unfortunate area in which to establish a duty of judicially reviewable due care. A weather forecast [or

predicting criminal behavior] is a classic example of a prediction of indeterminate reliability, and a place peculiarly open to debatable decisions, including the desirable degree of investment of government funds and other resources. Weather predictions [and rehabilitation of criminals] fail on frequent occasions. If in only a small proportion parties suffering in consequence succeeded in producing an expert who could persuade a judge [or jury] that the government should have done better, the burden on the fisc would be both unlimited and intolerable. . . . [A]s the court said in Varig Airlines, 104 S. Ct. at 2768[:] "Judicial intervention in such decision-making through private tort suits would require the courts to 'second-guess' the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policy-making that the discretionary function exception was designed to prevent."

790 F.2d at 204.

The Brown court saw through the artificial semantics of the pre-Varig interpretation of discretionary function, and the decision would serve well as a model for this Court to follow in the instant case. Failing to follow the lead of Brown and the other post-Varig federal cases will result in this Court reading "the discretionary function exception right out by finding it does not apply at precisely the place to which it is particularly directed." Brown, 790 F.2d at 202.

The primary significance of the post-Varig federal cases is that the courts now apply the discretionary function exception to bar claims for damages allegedly caused by lower level government employees who exercised judgment and implemented policy. The federal courts are now using the two tests from Varig, or the express language of Dalehite, and have discarded

the planning level-operational level approach of pre-Varig federal case law. The current federal case law interpreting the discretionary function exception of the Federal Tort Claims Act now bears no resemblance to that relied upon by this Court in Frank v. State, Little v. Utah State Div. of Fam. Serv., or in Doe v. Arguelles.

4. Doe v. Arguelles Is Inconsistent with Federal Case Law Interpretation of the Discretionary Function Exception.

Appellant relies on Doe v. Arguelles,¹¹ for the proposition that the discretionary function exception does not apply here and that there is no immunity. This Court's holding in Arguelles, however, is not nearly as broad as appellant claims. In Arguelles, this Court declared:

It is widely held that the decision to release, parole, or put on probation criminal defendants,

¹¹ The facts of Doe v. Arguelles are as follows: Arguelles was a juvenile placed in the State Youth Development Center (the "YDC") with a history of sexual violence. On December 19, 1979, Arguelles was released from the YDC into the community. His release was approved by YDC Director Ronald Stromberg. On March 6, 1980, Arguelles assaulted the 14-year-old ward of plaintiff. Stromberg's decision to release Arguelles was based, at least in part, on the fact that certain conditions and requirements were attached to the release, e.g., weekly meetings between Arguelles and a counselor. Thus, Stromberg not only made the decisions to release and to place conditions on the release, but also, according to the Court's conclusions, personally was responsible for implementing and monitoring the release and the conditions of release.

juvenile defendants, or mental patients is a decision of a judgment, planning, or policy nature. . . . It accordingly follows that Stromberg's decision to place Arguelles fell into the category of functions designed to be shielded under the discretionary function exception, and his decision should not be questioned in a court of law.

25 Utah Adv. Rep. at 11.

According to Arguelles, then, appellant here has no claim based on any alleged negligence relating to the decision to transfer Kenneth Roberts from the state prison to the Ogden halfway house. According to Arguelles, the only actionable activities would be those occurring after the transfer, where, allegedly, corrections officials negligently supervised Roberts. See id. at 12. Thus, according to Arguelles, the discretionary function exception bars any claim against respondent William Milliken, who, as Director of the Division of Corrections, may have been indirectly involved with the decision to transfer, but who, according to the undisputed facts, had absolutely no involvement in the supervision of Roberts after his transfer. Likewise, appellant has no claim against respondent Leon Hatch, who, as Deputy Warden, was directly involved in the decision to transfer Roberts to the halfway house but was not involved in any way with the supervision of Roberts after he arrived at the halfway house.

Arguelles restricts the issues here to only the acts or failure to act of respondent Weldon Morgan, the Director of the

Ogden halfway house, who was responsible for supervising Roberts. All other acts of which appellant complains deal directly and intimately with the decision to transfer Roberts and are protected by the holding in Arguelles. If Arguelles stands for anything it stands for the proposition that a decision to release or transfer a prison inmate is discretionary.

The dilemma this Court must resolve, then, is the striking inconsistency which has developed between the federal case law interpretation of the discretionary function exception after Varig and this Court's interpretation of the exception in Doe v. Arguelles, particularly as that exception applies to those decisions and actions of respondent Weldon Morgan occurring after Roberts was transferred to the Ogden halfway house.

Frank v. State, supra, acknowledged that federal case law interpreting the discretionary function exception of the Federal Tort Claims Act (28 U.S.C. § 2680(a)) was the standard followed by the Utah Court in cases previous to Frank:

In this regard, this Court has followed the lead of cases interpreting the Federal Tort Claims Act by distinguishing between those decisions occurring at a broad, policy-making level and those taking place at the implementing "operational" level.

612 P.2d at 519. Citing Carroll v. State Road Comm'n as an example of the Court's adoption of the planning level-operational level approach of the federal courts, the Court used that approach to decide the issues in Frank. See also Bigelow

v. Ingersoll, 618 P.2d at 53-54. This well-established precedent was re-emphasized in Little v. Utah State Div. of Farm Serv., *supra*, where Justice Howe observed:

Utah's exceptions to waiver of governmental immunity closely parallel those enumerated under 28 U.S.C. § 2680(a) of the Federal Tort Claims Act. This Court has followed the lead of cases interpreting that act. Frank v. State, 613 P.2d 517 (Utah 1980). Beginning with the two root cases of Dalehite v. United States, 346 U.S. 61, 73, S. Ct. 956, 97 L. Ed. 1427 (1953) and Indian Towing Co. v. United States, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955), the lines in federal cases have been consistently drawn between those functions ascribable to policy making level and those to the operational level.

667 P.2d at 51.

This Court reached the logical, albeit radical, ultimate extension of the planning level-operational level approach to application of the discretionary function exception in Doe v. Arguelles. There, the Court held:

Because a probation officer's policy decisions are discretionary, he is immune from suit arising from those decisions. However, his acts implementing the policy must be considered on a case-by-case basis to determine whether they are ministerial and thereby outside the immunity protections . . .

. . . If it can be shown at trial that the injury to plaintiff's ward was proximately caused by Stromberg's omissions, it . . . result[ed] from . . . his negligence in monitoring the prescribed treatment after making the discretionary decision to do so.

25 Utah Adv. Rep. at 12 (emphasis added).

Arguelles thus grants discretionary immunity to decisions made at the policy making or planning level, but denies

immunity to acts implementing those very same decisions--even though in Arguelles it was the same person who made the decision and then acted to implement it. Arguelles has effectively written the discretionary function exception right out of the Governmental Immunity Act, which is exactly where the planning level-operational level dichotomy approach ultimately leads.

No decision or policy, left alone, ever caused any damage or injury, or, for that matter, any real benefit. It is only through actual implementation that a decision or policy can further legitimate governmental goals or sometimes, unfortunately, cause harm. By declaring that the thought processes used in making a decision are discretionary, but that acts implementing that decision are not, Arguelles destroys the protection intended by the discretionary function exception. All a plaintiff need do is allege negligent implementation of a policy decision - for, obviously, if plaintiff was injured, then there must have been an act or omission, and thus "implementation"--and no such claim can ever again be barred.

Arguelles may even eliminate discretionary protection of a non-implemented decision. The negligent implementation of a decision would, of course, include failure to implement where implementation should have occurred. Even though a governmental official may decide upon a policy, but decide not to

implement it, perhaps in part to avoid the liability that could attach under Arguelles, he nevertheless subjects himself to liability by not acting where possibly he should have acted. In any event, according to Arguelles, his failure to implement becomes an issue of fact. In the classic "Catch-22," the official becomes liable if he acts or if he doesn't act.

It is here that the inherent fundamental flaws of the planning level-operational level approach become most evident. It will not take long for government officials to learn that if liability attaches both for implementing decisions and for not implementing decisions, it is the decision itself that triggers liability. The ultimate extension of the pre-Varig approach to discretionary function then, as evidenced by Arguelles, makes the decision-making process the source of "case-by-case" consideration to determine whether there is negligence. The planning level-operational level approach in Arguelles thus effectively eliminates application of the Governmental Immunity Act's discretionary function exception.^{1 2}

It is for these reasons that, just as post-Varig federal courts have re-evaluated their pre-Varig decisions, this Court

^{1 2} Thus, the Arguelles Court "judicially admit[ted] at the back door that which has been legislatively turned away at the front door," Bradley v. United States, 615 F. Supp. 206, 211 (E.D. Pa. 1985), and, by judicial fiat, amended the governmental Immunity Act by effectively deleting Section 63-30-10(1)(a).

needs to re-evaluate Arguelles. By doing so, this Court will come to apply the Varig test to the undisputed facts of this case, determine that the actions of the corrections officials involved in this case are protected by the discretionary function exception, reaffirm Epting (just as Varig reaffirmed Dalehite), and ensure that the Governmental Immunity Act's discretionary function exception be given its intended effect.

To do otherwise would require this Court to do one or more of the following: (a) expressly overrule Epting, Emery and Sheffield; (b) repudiate the Court's decade-long adherence to the precedent of following the lead of federal case law interpretation of the discretionary function exception, and thereby explicitly reverse portions of Frank and Little; (c) disregard the unanimous United States Supreme Court opinion in Varig and the subsequent case law development in the federal courts; (d) intentionally preserve the same type of artificial and conclusory dichotomy approach this Court earlier rejected in Standiford and Johnson; and (e) by judicial fiat, write the discretionary function exception out of the Governmental Immunity Act by effectively eliminating any meaningful application of that exception.

POINT II

BOTH THE GOVERNMENTAL IMMUNITY ACT AND
COMMON LAW BAR APPELLANT'S CLAIMS FOR GROSS
NEGLIGENCE AGAINST THE INDIVIDUAL RESPON-
DENTS.

A. Representative Capacity.

Where a governmental entity is immune from suit, its employees, acting in their representative capacities, are likewise immune from suit. Madsen v. Borthick, 658 P.2d at 632; Utah Code Ann. § 63-30-4(3) and (4). As ruled by the District Court below, and supported by the legal authorities set forth at length above, appellant's claims against respondent State of Utah are barred by governmental immunity. According to the law in Utah, as set forth unequivocally in statute and by this Court in Madsen, appellant has no cause of action against respondents William Milliken, Leon Hatch and Weldon Morgan in their representative capacities as employees of the State of Utah. The District Court's summary judgment to that effect must be affirmed.

B. Personal Capacity.

1. Common Law Is Applicable Here.

In 1978, the Utah Legislature amended Section 63-30-4 of the Utah Governmental Immunity Act by adding two major paragraphs establishing the Act's express waivers of immunity as the exclusive remedy for injuries caused by entity employees while acting within the scope of their employment.

See 1978 Utah Laws Ch. 27 § 3. In the January 28, 1983 case of Madsen v. Borthick, supra, this Court interpreted this 1978 amendment to be an expression of legislative intent to eliminate any and all common law remedies against government entities and employees not otherwise expressed within the Act. See 658 P.2d at 633. The Court also held that the 1978 amendment indicated legislative intent to substitute the statutory immunity standards of the Act for any and all defenses that might have been asserted under common law, including, but not necessarily limited to, common law official immunity. Id.

At the legislative session held within weeks of the release of the Madsen opinion, the Utah Legislature added another subsection to Section 63-30-4 of the Act. See 1983 Utah Laws Ch. 129 § 3. By that amendment, the Legislature clarified its intent that the Utah Governmental Immunity Act generally, and the 1978 amendments to Section 63-30-4 specifically, not be interpreted to eliminate any defenses that might be asserted by a government entity or employee under state or federal common law.¹³ Id.

¹³ The 1983 amendment also re-emphasized what had been clarified by the amendments in 1978 -- that the provisions of the Act apply to government employees as well as their entity employers. See Utah Code Ann. § 63-30-4(2). In her brief, appellant cites three pre-1980 decisions of this Court in support of her argument that the Act does not apply to individuals. Such argument directly contradicts the 1978 and 1983 amendments, and is contrary to Madsen v. Borthick, supra, and, therefore, should be disregarded.

This Court cannot ignore the clear expression of legislative intent in that 1983 amendment, passed immediately after the Madsen decision. The new subsection 63-30-4(2) did not create any new law or affect any substantive or vested right. It was no more than a clear message to the courts of this state that the Legislature never intended the Governmental Immunity Act to eliminate or otherwise affect adversely any defense that an entity or its employee might assert under common law. This amendment is clearly consistent with the overall framework of the Act, which codifies the common law of sovereign immunity as the presumption in any suit for injury resulting from the exercise of a governmental function. The codification allows an injured party to sue the government or its employee only under the conditions and circumstances expressly enumerated. In other words, immunity is the rule and remedies are the exception. The 1983 amendment adding subsection (2) to Section 63-30-4 merely clarified that subsections 63-30-4(3) and (4) eliminate all common law remedies, substituting therefore the exclusive remedies of the Act, but do not affect applicable common law defenses.¹⁴

¹⁴ Thus, the Madsen analysis concluding that the Act eliminates application of all common law, both defenses and remedies, must be modified slightly. The Act eliminates only common law remedies; common law defenses may still be asserted to eliminate causes of action or bar recovery. With this modification, Madsen remains a valuable development of governmental immunity law in Utah.

According to Frank v. State, supra, where an amendment is an "obvious manifestation" of legislative intent to clarify interpretation of the statute it amends, the amendment should be applied retroactively. 613 P.2d at 519. The manifestation is obvious here. The Legislature amended the Act as soon as possible after it perceived that this Court in Madsen had interpreted the Act in a way inconsistent with the Legislature's original intent.

Frank is controlling here and subsection (2) of Section 63-30-4 applies to this case,¹⁵ and respondents may properly assert any applicable common law defenses.

2. Common Law Official Immunity Bars Appellant's Claims Against Respondents In Their Personal Capacities.

Prior to Madsen v. Borthick, this Court recognized and applied the common law defense of official immunity. As stated by Justice Crockett in Sheffield v. Turner, supra, and in Cornwall v. Larsen, 571 P.2d at 928 (Crockett, J., concurring), and reiterated in Utah State Univ. v. Sutro & Co., 646 P.2d 715, 721 (Utah 1982), official immunity barred any action

¹⁵ In Doe v. Arguelles, 25 Utah Adv. Rep. at 12, this Court erroneously stated that subsection (2) of Section 63-30-4 was added by amendment in 1978. As noted herein, subsection (2) was added in 1983. Compare 1983 Utah Laws Ch. 129 § 3 with 1978 Utah Laws Ch. 27 § 3. Nevertheless, pursuant to Frank v. State, this Court properly applied the 1983 amendment retroactively to the pre-1983 facts in Arguelles.

against a governmental officer or employee for injury allegedly resulting from that employee's good faith execution of his legally authorized discretionary duties insofar as the employee was not guilty of any intentional or willful wrongdoing.

As recently as October of 1984, this Court cited favorably to Sutro, and held that, with respect to common law official immunity, "[a] discretionary duty is one that requires the exercise of judgment or requires choice of alternatives in its performance." Snyder v. Merkley, 693 P.2d 64, 65 (Utah 1984). This 1984 definition of discretionary performance for purposes of common law official immunity reiterates the position adopted by this Court in Sheffield and Sutro.¹⁶

The District Court below properly held that the State of Utah was immune from suit by virtue of the discretionary

¹⁶ Not until Doe v. Arguelles was decided in December of 1985, did this Court apply the planning level-operational level approach to common law official immunity. Prior to Arguelles, this Court applied at least two distinct standards for discretionary acts of government officials: (1) the planning level-operational level approach of Frank, Bigelow, et al., for application of the statutory discretionary function waiver of the Act; and (2) the exercise of judgment/alternate choices analysis of Sheffield, Sutro and Snyder, for application in common law official immunity cases. Without acknowledging the separate theories, Arguelles commingled the two and seems to have eliminated the Sheffield/Sutro/Snyder common law analysis without comment.

(continued)

function exception to the waiver of immunity; the discretionary acts which formed the basis of the lower court's decision were undertaken by none other than respondents Milliken, Hatch and Morgan. If the State is immune by virtue of the discretionary function exception, then, as a matter of law, the acts of these respondents were discretionary, requiring "the exercise of judgment" and the "choice of alternatives" in the performance of those acts. Snyder, 693 P.2d at 65. This Court in Sheffield succinctly stated the dispositive legal principle applicable here:

[T]he 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 . . . [T]hey 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 malicious wrongful act which they know or should know would result in injury.

Sheffield, 445 P.2d at 369 (footnote omitted).

¹⁶ (Continued)

Elsewhere in this brief, respondents set forth in detail the misapplication of the statutory discretionary function in Arguelles. The recent developments in the federal courts following Varig suggests that the two distinct approaches used by this Court prior to Arguelles can be harmonized, but the harmony must come from adoption by this Court of the Dalehite/Varig Airlines analysis, rather than a perpetuation of Arguelles.

The Court in Epting reviewed in detail the balancing of interests and the exercise of judgment that go hand-in-hand with the administration of penal institutions and the attempted rehabilitation of adjudicated criminals. Epting, 546 P.2d at 244. Numerous courts from other jurisdictions have discussed the inherent risks involved in corrections policies and programs, and how corrections officials daily are faced with making decisions and implementing programs that inherently require allocation of those risks. See Thompson v. County of Alameda, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980); Caril v. State, 323 N.W.2d 20 (Minn. 1982); Adamov v. State, 46 Ohio Misc. 1, 345 N.E.2d 661 (Ohio Ct. Cl. 1975); Evangelical United Brethren Church of Adna v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965).

The common law defense of official immunity, as defined by this Court in Sheffield, Sutro and Snyder attaches to the discretionary acts of respondents Milliken, Hatch and Morgan, and bars appellant's claims against them in their individual capacities. There is no evidence of willful or intentional wrongdoing which would preclude application of this common law immunity, and the District Court's ruling with respect to the personal liability of the individual respondents was error.

3. The Governmental Immunity Act Bars Appellant's Claims Against Respondents In Their Personal Capacities.

In 1983, the Utah Legislature amended Section 63-30-4 of the Utah Governmental Immunity Act by adding subsection (2), as discussed in detail above, and by deleting the term "gross negligence" from subsections (3) and (4). The District Court's ruling below, which denied summary judgment on the issue of the individual state respondents' alleged gross negligence, was based on the inclusion of "gross negligence" in the exclusive statutory remedy of subsections (3) and (4). See Memorandum Decision at 18-19, Record on Appeal at 900-901; copy of Memorandum Decision attached hereto as Appendix "B." As a matter of law, either (a) appellant's cause of action against respondents did not accrue until after the effective date of the deletion of "gross negligence" from the Act by amendment, or (b) the amendment should be applied retroactively to implement an obvious manifestation of legislative intent to clarify the Act's application and interpretation. In either case, based on Section 63-30-4 of the Act, appellant has no cause of action against respondents Milliken, Hatch and Morgan for gross negligence.

(a) Appellant's Cause of Action Did Not Accrue Until After the Effective Date of the 1983 Amendment Deleting Gross Negligence.

As discussed in detail above, subsection (3) and (4) of Section 63-30-4 sets forth the exclusivity of the remedies

available to an injured party wishing to sue a government entity or its employees. The remedy is statutory; it did not exist at common law, which barred all claims against the sovereign and its sovereign agents. See generally Madsen v. Borthick, 658 P.2d at 629. Appellant's cause of action thus is a creation of statute. The conditions set forth in the statute limiting or circumscribing the remedies available to appellant are conditions precedent which must be satisfied before the action can be maintained in a court of law. Cornwall v. Larsen, 571 P.2d at 926; Madsen v. Borthick, supra.

The Governmental Immunity Act requires that before an injured party can seek a remedy in the courts (for injury arising out of the exercise of a governmental function), the injured party must file a notice of claim with the entity and wait until that claim is expressly denied or ninety (90) days expires from the the time notice was given, whichever occurs first. The injured party has no cause of action in court to remedy his injury until these notice conditions are satisfied. Utah Code Ann. §§ 63-30-11 through -15.

It is the law in Utah that a cause of action "accrues at the time it becomes remedial in the courts, that is when the claim is in such condition that the courts can proceed and give judgment if the claim is established." State Tax Comm'n v. Spanish Fork, 99 Utah 177, 100 P.2d 575, 577 (1940). In the

case at bar, according to Utah law, appellant's claim against respondents did not accrue until it could be remedied "in the courts." Id.

Appellant was assaulted by Kenneth Roberts on December 24, 1982. She filed two notices of claim with the State of Utah. The first was filed on January 11, 1983, but did not name any of the individual respondents, and was a civil rights claim for deprivation of rights, representing to the State that a civil rights action would be filed in federal court. See Notice of Intent to Sue and Claim, Record on Appeal at 869-70, copy attached hereto as Appendix "C." Appellant then filed an Amended Notice of Claim on March 8, 1983, naming respondent William Milliken and several "John Does," in addition to respondent State of Utah. This second notice of claim put the state and respondent Milliken on notice that appellant was claiming negligence and gross negligence, and would be suing in state court if the claim were denied. See Amended Notice of Claim and Intent to Sue, Record on Appeal at 872, copy attached hereto as Appendix "D." The second notice filed on March 8 triggered the ninety (90) day statutory waiting period. The State did not expressly deny appellant's claim, so appellant could file an action in the District Court no sooner than June 8, 1983, ninety (90) days after she had filed her notice of claim. Until that date in June, appellant had no right to

any remedy in any court in the State.¹⁷ Thus, her cause of action against the State and its employees did not accrue until June 8, 1983.

It is also the general rule in Utah that "the facts and the law in a given lawsuit are to be applied as of the date of the filing of the original complaint." Archer v. Utah State Land Bd., 15 Utah 2d 321, 392 P.2d 622, 624 (1964). Appellant's original complaint was not filed until December 6, 1983, see Appellant's Complaint, Record on Appeal, at 17, but in any event could not have been filed before June 8, 1983, ninety (90) days after she filed her notice of claim.

The amendments to Section 63-30-4 became effective law as of May 10, 1983. See 1983 Utah Laws Ch. 129. The effective date of the amendment deleting gross negligence from the statute thus occurred well before the accrual of appellant's

¹⁷ The Governmental Immunity Act precludes application of regular tort law principles for accrual of causes of action. On December 24, 1982, appellant could have filed an action against Roberts for the assault, and regular tort principles would apply to such a suit. But where appellant seeks a remedy against the State and its employees, she could not find a remedy in the courts on December 24, 1982. The Legislature, by passage of the Governmental Immunity Act, created the remedy sought by appellant and circumscribed its availability. "[T]he general rule is that the Legislature may attach its own conditions to an exercise of the rights granted [by statute]." Montgomery v. Polk County, 278 N.W.2d 911, 915 (Iowa 1979).

cause of action on June 8, 1983. Thus, as of the time appellant could seek remedy from the courts, her remedy against the individual respondents in their personal capacities was limited to fraud or malice only. She therefore has no cause of action for gross negligence, and there being no claim of fraud or malice, nor any evidence to support same, her Amended Complaint should be dismissed.

(b) The 1983 Amendment Deleting Gross Negligence
Should Be Applied Retroactively.

As explained above, the legislature amended Section 63-30-4 of the Act within weeks of this Court's interpretation of that section in Madsen v. Borthick. The amendments did two things: (1) consistent with a portion of the Madsen opinion, the amendments clarified legislative intent that the Act displaced common law remedies, but made it clear that the Act was intended to preserve all applicable common law defenses; and (2) consistent with the common law defense of official immunity, which the Legislature manifestly intended to preserve, the Legislature deleted the term "gross negligence" from the statute, leaving fraud and malice -- both willful and intentional wrongs -- as the exclusive remedies against a government employee in his personal capacity.

The elimination of "gross negligence" conformed the statute to Utah case law authority defining common law official immunity. See Cornwall v. Larsen, supra, and Utah State Univ. v.

Sutro & Co., supra. The legislative response to Madsen was quick and clear. The Court not only had interpreted the statute's exclusive remedy provisions differently than the Legislature had originally intended, but also eliminated common law official immunity, which the Legislature had intended to preserve. According to Frank v. State, supra, an amendment of this kind should be applied retroactively by the courts in order to implement the clear legislative manifestation of intent.

The District Court below rejected this argument, ruling that retroactive application would divest appellant of a vested right to a cause of action for gross negligence. See Memorandum Decision, supra, at 22. In doing so, the District Court erroneously applied regular tort law principles affecting accrual of causes of action to a statutorily created remedy circumscribed by express statutory conditions. That statutory scheme creates a cause of action not affected by regular tort principles of accrual. The lower court ruled that since appellant was injured on December 24, 1982, the law in effect on December 24, 1982 was the law of the case. Obviously, if appellant were suing a private individual or corporation, she might have filed a complaint on the day she was injured and the District Court's conclusion would then be correct. Appellant's

desire to seek remedy from a government entity and its employees, however, involves different rules of accrual.

The Utah Supreme Court has not addressed vested rights in connection with actions against a governmental entity or its employees. Numerous states have, however, and the vast majority hold that the vested right analysis is inappropriate where the right to sue is granted only by consent of the government under specific statutory conditions.

The California Court of Appeal has declared:

[I]t is clear that the scheme for suing the government in California is based upon waiver of immunity from legal action. This scheme was not designed to create an independent source of substantive liability. . . . Moreover, the constitutional authority empowering the Legislature to control the manner in which the government is sued . . . , has been construed as a consent to be sued, not an independent basis on which to hold the government liable. . . . In short, since a government entity in California may be sued only by virtue of consent, the vested right analysis . . . is manifestly inappropriate.

Stanley v. City and County of San Francisco, 48 Cal. App. 2d 575, 121 Cal. Rptr. 842, 845 (Cal. Ct. App. 1975) (emphasis added). The Superior Court of New Jersey likewise held that the vested right "formulation" is

a misconception of the effect of the [governmental tort immunity] statute. It does not bar a cause of action; its effect, rather is to prevent what might otherwise be a cause of action, from ever arising. . . . The injured party literally has no cause of action.

Perillo v. Dreher, 126 N.J. Super. 264, 314 A.2d 74, 77 (N.J. Sup. Ct. 1974) (emphasis in original).

Similar rulings have been made by the Supreme Courts of Kansas, Woodring v. Hall, 200 Kan. 597, 438 P.2d 135, 142 (1968) ("It is the law of this state that a statute which merely changes a remedy is not invalid, as there are no vested rights in any particular remedy."), Colorado, Jefferson County Dept. of Soc. Serv. v. D.A.G., 199 Colo. 315, 607 P.2d 1004, 1006 (1980) (no such thing as a vested right in remedies), and Washington, Hansen v. West Coast Wholesale Drug Co., 47 Wash. 2d 825, 289 P.2d 718, 720 (1955) ("Where a tort action can be brought only by virtue of a statute, there can be no vested right therein, and the Legislature may take away the right at any time." (emphasis in original)). See also Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1961); White v. State, 661 P.2d 1272 (Mont. 1983); Gelbman v. Gelbman, 23 N.Y.2d 434, 297 N.Y.S.2d 529, 245 N.E.2d 192 (1969).

Thus, the District Court's ruling below in the instant case, that appellant had a vested right as of December 24, 1982 in a cause of action for gross negligence against the state employees in their individual capacities, is contrary to law. No such vested right existed. Accordingly, retroactive application of the 1983 amendment eliminating gross negligence will not enlarge, eliminate or destroy any vested right, and is, therefore, appropriate. See generally Pilcher v. State Dept.

of Soc. Serv., 663 P.2d 450, 455 (Utah 1983); State Dept. of Soc. Serv. v. Higgs, 656 P.2d 998, 1000 (Utah 1982).

POINT III

APPELLANT HAS NO CAUSE OF ACTION FOR SIMPLE NEGLIGENCE AGAINST THE INDIVIDUAL RESPONDENTS MILLIKEN, HATCH AND MORGAN.

By interlocutory appeal, appellant challenges the District Court's holding that she cannot sue the individual respondents in their non-representative, individual capacities for simple negligence. The District Court's ruling, however, is consistent with Doe v. Arguelles, which restated well-established law: "the legislature has mandated . . . that no employee may be held liable unless it is established that his act or omission constituted gross negligence." Id. at 12 (footnote omitted).

The Governmental Immunity Act section referred to by the Arguelles Court (Section 63-30-4) establishes the provisions of the Act as the exclusive remedy against a governmental entity or employee for any injury allegedly caused by the exercise of a governmental function. Only where the Act does not apply can a plaintiff bring a cause of action other than those specifically enumerated within the Act. Neither Section 63-30-4, nor any other section of the Act provides a remedy against a

governmental employee for injury caused by the simple negligence of that employee.¹⁸

Appellant's argument that the Act's insurance provisions in some fashion require personal liability of employees for simple negligence ignores not only the entire concept of the Act but specific provisions thereof as well. The argument is little more than a non-sequitor.

Appellant also relies on Madsen v. Borthick, supra, as support for the argument that simple negligence is actionable, even though she concedes that the Madsen facts are "unlike" the facts of this case. See Brief of Appellant, at 79. Appellant purposefully avoids the Court's holding in Madsen, opting instead to refer this Court to passages from one of the briefs filed in the Madsen case. If, as appellant asserts, the Madsen holding is not applicable, then arguments asserted by one of the Madsen parties in an appeal brief certainly do not apply here and need not be considered.

The applicable statute (Section 63-30-4) is unambiguous and clear. The holding in Madsen, 658 P.2d at 632-33, reaffirmed

¹⁸ Appellant does not here challenge application of the Act. The actions complained of are governmental functions and, pursuant to Section 63-30-3 of the Act, the provisions of the Act apply.

by Arguelles, is no less clear. As a matter of law, appellant has no cause of action for simple negligence against any of the individual respondents.

POINT IV

THE MAXIM OF DELEGATUS NON POTEST DELEGARE
IS NOT APPLICABLE HERE.

Appellant argues that the Prison Warden, Kenneth Shulsen, had a non-delegable statutory duty to authorize personally the transfer of Kenneth Roberts from the prison to the Ogden halfway house facility, and that his failure to be personally involved is an actionable breach of that duty. Appellant bases this argument on an ancient Latin maxim, delegatus non potest delegare, which, as a generality, states that delegated power may not be delegated further by the delegatee to whom such power is delegated. See Commonwealth Edison Co. v. Pollution Control Bd., 25 Ill. App. 3d 271, 323 N.E.2d 84 (Ill. Ct. App. 1975). Citing Section 64-13-11 which provides that "[t]he warden may transfer any inmate from one correctional facility or custody level to another," and arguing application of the Latin maxim, appellant contends that the warden must be personally involved in each and every internal prison transfer or custody level change involving each of the more than 1,900 inmates at the prison.

Ignoring the most obvious flaw in this argument, that appellant has never made claim against the warden, the argument fails for several reasons. First, the Utah Code provisions dealing with interpretation and construction of statutory language specifically declare:

"Sheriff," "county attorney," "clerk," or other words used to denote an executive or ministerial officer, may include any deputy, or other person performing the duties of such officers, either generally or in special cases. . . .

Utah Code Ann. § 68-3-12(17) (emphasis added). See also id. § 68-3-2 (statutes in derogation of common law to be liberally construed). By statutory provision, the use of the term "warden" in Section 64-13-11 may include "any deputy, or other person performing the duties" of the warden.

Simply put, the statute relied upon by appellant (Section 64-13-11), interpreted liberally in light of Sections 68-3-2 and 68-3-12(17), does not restrict the warden's powers as appellant suggests. Rather, where a deputy warden,¹⁹ acting on behalf of the warden and with his knowledge and consent, implements a statutorily authorized intra-system transfer of an

¹⁹ In this instance, the Deputy Warden was respondent Leon Hatch. As Chairman of the Prison Administrative Review Board, Hatch made the final decision approving Kenneth Roberts' classification change and transfer to the Ogden halfway house. Warden Kenneth Shulsen had delegated that assignment to Hatch, making him responsible for the management of all housing and custody programs. See Deposition of Kenneth Shulsen, at 6-11.

inmate, he does so as the alter-ego of the warden, and the transfer is valid and lawful. See State v. Aherns, 25 Utah 2d 222, 479 P.2d 786, 787 (1971). See also Poucher v. State, 46 Ala. App. 272, 240 So.2d 694 (Ala. Crim. App. 1970).

Secondly, such transfer, whether accomplished by the warden or his deputy, is just as appellant describes it in her brief -- an exercise of discretion and quasi-judicial in character. See Brief of Appellant, at 69. While appellant tries to limit this discretion to the decision to transfer, thus eliminating discretion from the actual implementation of the transfer (as per Arguelles), appellant ignores the very language of the statute upon which she relies, which says "the warden may transfer," and not "the warden may only decide to transfer."

The term "may transfer" as used here, is obviously intended as discretionary, not mandatory, see Purcell v. Wilkins, 57 Utah 467, 195 P. 547 (1921), and the discretion intended by the Legislature clearly deals expressly with the actual transfer. The statute does not limit the discretion only to the decision to transfer, or to the decision-making procedure which may ultimately lead to transfer, nor does the statute exclude the implementation of the transfer. Rather, discretion attaches to the actual implementation of the transfer, as well as to the policy-level decisions preceding the transfer.

Where the Legislature expressly states that the warden (or his deputy) "may transfer any inmate," this Court cannot

justifiably interpret that clear grant of discretionary authority in any way other than what it says. There is no rational way, under any recognized principle of statutory construction, for this Court to interpret "may transfer" to mean: "discretion to decide to transfer, but once the decision is made to transfer, there is no discretion to implement that decision or to actually transfer the inmate."

Last, but not least, the maxim which appellant wishes to apply here is simply impractical and inappropriate in modern day society. A strict application of the maxim would bring the operation of government to a grinding halt. Clearly, the administrative aspects of running an overcrowded prison, including the coordination of corrections programs, overseeing inmates, and supervising hundreds of employees, simply do not conform to ancient Latin maxims.²⁰

²⁰

Numerous appellate courts have considered this maxim and found that it either has lost its force as a result of the impact of management problems in complex business and government operations, Adams v. Clearance Corp., 35 Del. Ch. 318, 116 A.2d 893 (1955), or that the legal principle espoused must be adapted to and its application restricted by the present-day concepts of government, City of Bayonne v. Palmer, 90 N.J. Super. 245, 217 A.2d 141 (N.J. Super. Ct. Ch. Div. 1966). See also Warren County v. Judges of the Fifth Judicial Dist., 243 N.W.2d 894 (Iowa 1976) (recognizing "modern tendency toward greater liberality" in application "as the complexity of governmental and economic conditions increase"); Ruggeri v. City of St. Louis, 441 S.W.2d 361 (Mo. 1969) (recognizing "'liberal trend' or even inapplicability of the doctrine").

POINT V

AS A MATTER OF LAW, RESPONDENTS OWED NO DUTY
TO APPELLANT.

The argument hereinabove set forth renders the issue of legal duty moot. Nevertheless, because the Court below ruled that a legal, actionable duty extended from the State respondents to appellant, the issue will be addressed briefly here to show the Court's error.

In order for appellant to recover against these respondents she must show that she had a special relationship with these respondents which would impose a duty greater than the general duty owed by respondents to the public at large. The United States Court of Appeals for the Tenth Circuit considered factual circumstances similar to this case in Humann v. Wilson, 696 F.2d 783 (10th Cir. 1983), and recognized that the plaintiff there "did not stand in any special relationship to the parolee from which the parole officers might have inferred a special danger to her." Id. at 784. This requirement that a "special relationship" exist between plaintiff and defendant before an actionable duty arises is an expression of the "public duty" rule. This rule requires that appellant "must show the breach of a duty owed to [her] as an individual, and not merely the breach of an obligation owed to the general public." 18 McQuillan, The Law of Municipal Corporations, § 53.046 at 165 (3rd Ed. 1971).

The "public duty" rule is the law in Utah. In Obray v. Malmberg, 26 Utah 2d 17, 484 P.2d 160 (1971), the Cache County Sheriff was sued for alleged failure to investigate a burglary of plaintiff's store. This Court declared that the failure, if any, of the sheriff to investigate was "ordinarily a matter of judgment and discretion, not actionable or compensable, and not pursuable by an individual since the public official's duty is to the public." 484 P.2d at 162 (footnotes omitted). Clearly, the same, if not greater, judgment and discretion are exercised by corrections officials making and implementing corrections decisions. Accordingly, the Obray public duty rule applies here.

In Christenson v. Hayward, 694 P.2d 612 (Utah 1984), this Court reached this same conclusion. There, plaintiff's decedent was killed when he failed to negotiate a corner on his motorcycle. Moments earlier he had been stopped by sheriff's deputies who had reason to believe that the decedent was intoxicated but nevertheless only requested that the decedent walk his motorcycle home. Plaintiff suggested that the Utah Supreme Court adopt "a trend to the effect that 'public employees should be held liable for their tortious acts to the same extent as private persons.'" Id. at 612-13. The Court refused, saying that to do so "would be to legislate by judicial fiat." Id. at 613. Instead, the Court concluded that the duty of a police officer is a duty "owed to the public at

large." Id., quoting Stout v. City of Porterville, 148 Cal. App. 3d 937, 196 Cal. Rptr. 301 (1983).

This general duty owed to the public at large may become a special duty owed to an individual, and thus one which is actionable by that individual, but only in circumstances where the government deals or acts directly with the injured party on an individual basis. See 18 McQuillan, supra, and cases cited therein. Such were the facts in Little v. Utah State Div. of Family Serv., supra. There, the Division of Family Services placed the child in a foster home, assumed a specific duty to provide proper care for the child, and then breached that specific duty. That is not the case here. No such direct contact took place between appellant and respondents; no special relationship was created, and no specific duty towards appellant was assumed. Even when the state assumes voluntarily to perform certain acts or functions, either by statute, regulation, or otherwise, no liability or actionable duty is created absent a special relationship with claimant.^{2 1}

^{2 1} The public duty doctrine is also the rule in a majority of jurisdictions across the country. See Dinsky v. Town of Framingham, 386 Mass. 810, 438 N.E.2d 51, 56 (1982) (application of majority rule that in absence of special duty to plaintiff, different from duty owed to public at large, no cause of action can be maintained against a government entity), and cases cited therein; J & B Development Co., Inc. v. King County, 669 P.2d 468, 472 (Wash. 1983) (it is necessary to decide whether there is a

(continued)

See generally, Thompson v. United States, 592 F.2d 1104, 1109-10 (9th Cir. 1979); Christenson v. Hayward, supra; White v. State, 579 P.2d 921, 923 (Utah 1978).

The District Court below erroneously adopted the duty analysis expressed in the Arizona case of Grimm v. Arizona Bd. of Pardons & Paroles, 564 P.2d 1227 (Ariz. 1977) (which held that individual members of the Board of Pardons could be held liable for their decisions regarding parole of prison inmates), and decisions from Montana, Hawaii, Colorado and Kansas. See Memorandum Decision, supra, at 25-26. The District Court, however, failed to take into account that each of these jurisdictions refuses to recognize governmental immunity, and, accordingly, the basic premises and concepts upon which duty is formulated there are entirely inconsistent with that prevailing here in Utah. See generally State v. Anderton, 69 Utah 53, 252 P. 280 (1926) (decisions of courts of other states under statutes differing from those of Utah are not controlling). In effect, the District Court ignored the Governmental Immunity Act

²¹ (Continued)

general duty to a nebulous public or whether that duty has focused on this particular claimant); Davidson v. City of Westminster, 32 Cal. 3d 197, 649 P.2d 894, 899, 185 Cal. Rptr. 252 (1982) (the common theme running through cases in which a special relationship has been found is the voluntary assumption by the public entity or official of a specific duty toward the injured party).

and the basic presumptions it created and perpetuates, which presumptions are expressed in the decisions of Obray and Christenson, and judicially legislated into existence a new law respecting governmental duty.

The District Court attempts to justify this creation of new Utah law by declaring that because the Legislature, in Section 63-30-4, allowed causes of action against individual government employees for gross negligence, fraud or malice, somehow that shows legislative acknowledgement of an actionable duty extending to the general public. Id. at 27. The Court rationalized, in essence, that a statutory provision allowing suit creates by reference an actionable duty running to every injured member of the general public. The statute simply does not do so. See` Ringwood v. State, 8 Utah 2d 287, 333 P.2d 943 (1959) (where a statute charges one with a duty or imposes a burden, it must do so with sufficient clarity). It merely allows suit under certain enumerated conditions. If the statute implies anything it implies that where a duty exists pursuant to law, suit may then be taken against governmental employees under the expressed conditions.

The law in Utah is clear. This Court must do here as it did in Christenson v. Hayward: (a) refuse to legislate by judicial fiat, as the District Court tried to do; and (b) apply the public duty rule. Accordingly, no actionable duty arises

between these respondents and appellant's claims are thereby barred.

POINT VI

THE GOVERNMENTAL IMMUNITY ACT AND THE PRINCIPLE OF SOVEREIGN IMMUNITY ARE CONSTITUTIONAL.

While appellant argued below that the Governmental Immunity Act was unconstitutional, she has not raised this issue on appeal. By this omission, the issue of the Act's constitutionality presumably is moot. In any event, on at least two separate occasions this Court has upheld the constitutionality of the Act, as well as the constitutionality of the legal doctrine of sovereign immunity codified therein. Madsen v. Borthick, 658 P.2d at 629; Madsen v. State, 583 P.2d at 94.

CONCLUSION

The Utah Governmental Immunity Act, the common law of official immunity, dispositive case law from this Court, and recent developments in federal case law interpreting discretionary function, mandate that, as a matter of law, these respondents are immune from suit in this case. Under the law and facts of this case, to conclude that the State of Utah or its employees are liable for the criminal acts of Kenneth Roberts, would be both legally incorrect and contrary to sound public policy. Such a ruling:

1. Would emasculate express provisions of the Governmental Immunity Act and result in judicial repeal or amendment of the Act's discretionary function exception;

2. Would be directly contrary to prior pronouncements of this Court, requiring express reversal of all or part of the following Utah decisions: Epting v. State, Beal v. Turner, Sheffield v. Turner, Frank v. State, Little v. Utah State Div. of Fam. Serv., Madsen v. State, and Emery v. State;

3. Would be contrary to recent federal case law developments, including the unanimous United States Supreme Court decision in Varig Airlines, and in direct contradiction to long-standing precedent in this Court to follow the lead of these federal cases;

4. Would transform the government of the State of Utah into a "super-insurer" of the well-being of everyone who happens to be damaged or injured within its jurisdictional limits by someone who, at one time, entered the criminal justice or corrections systems of the state;

5. Would require judicial "second-guessing" of legislative and administrative decisions and thereby take the administration of state corrections out of the hands of corrections professionals to whom it has been entrusted by law;

6. Would threaten the fiscal solvency of the State of Utah, either by a plethora of lawsuits for injury or damage

inflicted through the criminal acts of former prison inmates, parolees or halfway house residents, or by the massive spending needed to house all of those inmates through their entire terms of sentence, which would be required in order to prevent liability from attaching for these criminal acts committed after release or transfer from the prison;

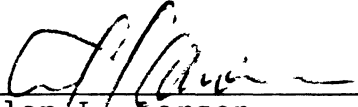
7. Would be contrary to the intent of the State Legislature.

Respondents State of Utah, William Milliken, Leon Hatch and Weldon Morgan are, as a matter of law, immune from suit. The District Court's summary judgment dismissing appellant's claims against the State of Utah and against Milliken, Hatch and Morgan in their representative capacities should therefore be affirmed. The District Court's denial of summary judgment as to appellant's claims against Milliken, Hatch and Morgan in their individual capacities should therefore be reversed, and, as a matter of law, those claims should be dismissed by this Court, thereby dismissing with prejudice and on the merits all of appellant's claims against the state respondents.

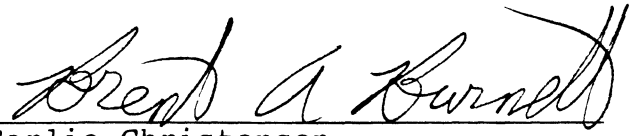
Respectfully submitted this 2nd day of September, 1986.

SNOW, CHRISTENSEN & MARTINEAU

By


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UTAH STATE ATTORNEY GENERAL'S
OFFICE

By 
for Carlie Christensen

Attorneys for State Respondents

SCM3738C

APPENDICES

APPENDIX "A"

Board of Pardons

Members (Aug. 1982)

Thomas R. Harrison, Chairman
Harriet L. Marcus, Vice-Chair
Edward Kimball
Dorothy E. Oliver
Victoria Palacios

Executive Secretary

Gary L. Webster

Hearings Officer

Alan Anthony

Governor of State of Utah

Department of Social Services

Andrew Gallagors, Director

Division of Corrections

William Milliken, Director

Utah State Prison

Kenneth Shulsen, Warden
Leon Hatch, Associate Warden
Chairman, Admin. Review Board

Medium Security

Richard Barnhart, Sr. Director

"A" Block West (Protective Custody)

Prince A. Daniels, Block Captain
Chairman, Unit Management Team (UMT)

"N" Block West Personnel (UMT)

Vincent Jack, Block Lieutenant
Merrill Lee Rosnussen, Block Psychologist
Chreston Cope, Block Case Worker
(Laddie Pruett, Block Case Worker)

Kenneth Roberts, Inmate

Community Corrections Centers Administration

Robert Anderson, Director

Community Corrections Center:
(Halfway Houses)

Admin. Review Bd.
Visiting Members:
Leon Hatch
Eldon Barnes
Richard Barnhart, Sr.
Fred Hurst

Other Members:

Bill Johnson, Secretary
Block Captains
Representatives from
UMT's

Community Corrections
Screening Committee

John Powers, Chairman
(Liaison to State Prison
Members:

John Powers
Directors of all five
Halfway Houses
Staff from Halfway
Houses as
appointed

Community Corrections Center:
(Halfway Houses)

Salt Lake City
Provo
Lakewood
Parkview
Ogden

Ogden Center

Weldon Morgan, Director
Marvin Hansen, Staff
Supervisor

Frank Martin, Staff
Supervisor

Kenneth Roberts, Resident

APPENDIX "B"

AUG 21 1985

Don D. Drysdale

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

LaDAWN PRUE,	:	
Plaintiff,	:	
vs.	:	
THE STATE OF UTAH, LEON	:	MEMORANDUM DECISION
HATCH, Deputy Warden of the	:	
Utah State Prison, WILLIAM	:	CIVIL NO. C-83-8431
MILLIKEN, Personally and as	:	
Director of the Utah State	:	
Department of Corrections,	:	
WELDON MORGAN, Individually	:	
and as Director of the Ogden	:	
Community Corrections Center	:	
FELICIA ROBERTS, and KENNETH	:	
ROBERTS,	:	
Defendants.	:	

The State of Utah and the individual defendants' Motions for Summary Judgment were heard by the Court on the 9th day of August, 1985. The plaintiff was represented by George M. Haley and Jeffrey Weston Shields, Esqs., and the defendants by Allan Larson, Bruce Jensen and Christopher Fuller, Esqs., and Carlie Christensen, Assistant Attorney General. The Court having previously reviewed the 325 pages of Memoranda submitted by counsel heard extensive oral argument on the difficult issues presented. The Court at the conclusion of oral argument asked for supplemental briefing, and took the matter under advisement for further review of the legal authorities submitted.

FACTS

On December 22, 1982, defendant Kenneth Roberts ("Roberts") was transferred from the Utah State Prison to the Ogden Community Correction Center, a halfway house. This transfer was to prepare him for an August 9, 1983 parole date. Roberts was almost immediately thereafter released for a Christmas home visit with his wife Felicia. In the early morning hours of December 24, 1982, while Roberts was under the influence of drugs, he brutally attacked and shot plaintiff LaDawn Prue near her residence inflicting severe and permanent injuries for which she seeks compensation in this proceeding.

The plaintiff has cited this Court to over 60 pages of facts extracted from defendants' records or from the depositions taken in this proceeding. The plaintiff in sum claims that she will establish at trial that the defendants were "grossly negligent" in that they failed to comply with their own policies and procedures in releasing Roberts, a known repeat offender and poor risk, to the Ogden Community Corrections Center, and ultimately for home leave; and that their "gross negligence" caused the plaintiff's injuries. For purposes of the defendants' Motions for Summary Judgment, the facts must be taken in the light most favorable to the plaintiff.

ISSUES

The Court in deciding the defendants' Motions for Summary Judgment must determine: (1) Whether the Utah Governmental Immunity Act is constitutional; (2) Whether the activities of the defendants which allegedly caused plaintiff's injuries are a "governmental function"; (3) Whether the State has waived its statutory immunity from suit under Section 63-30-10(1), Utah Code Ann.; (4) Whether any exception to the general waiver of immunity is applicable in this case; (5) Whether the individual defendants are legally responsible to the plaintiff as they acted or failed to act in a "grossly negligent manner"; (6) Whether the defendants owe a "duty" to the plaintiff and thus whether their acts can be the legal cause of the plaintiff's injuries.

Before proceeding with the legal analysis mandated by the defendants' Motions, the Court wishes to clarify what is not at issue in these proceedings. The uncontested facts of this case establish a grievous injury to an innocent victim, by a criminal under the supervision of the state correctional system. Whether the State should be financially responsible to innocent victims when the State's resources have failed to protect its citizens is a policy question. This policy question must be answered by our State legislature not this Court. The legislature has dealt with this difficult policy issue by passing the Utah

Governmental Immunity Act. The State to this date does not have a Victim Reparation Fund although a majority of states have such a resource. This Court makes no statement as to the soundness of these policy decisions as it is beyond the power and duties of this Court. Although this case presents the difficult conflict between the State's responsibility to victims of criminals and the need to protect the public treasury, this Court's inquiry of necessity will be limited as its constitutional responsibility is to enforce the laws as passed by our legislature and as interpreted by the Utah Supreme Court.

LEGAL ANALYSIS

I. STATE OF UTAH'S MOTION FOR SUMMARY JUDGMENT

A. THE UTAH GOVERNMENTAL IMMUNITY ACT IS CONSTITUTIONAL.

The Utah Supreme Court has on two separate occasions found the Utah Governmental Immunity Act, Section 63-30-3, et seq., Utah Code Ann. (Supp. 1983) ("Act") constitutional. Madsen v. Borthick, 658 P.2d 627 (Utah 1983); Madsen v. State, 583 P.2d 92 (Utah 1978). This Court is governed by the position taken by the Utah Supreme Court, and any arguments as to the soundness of these prior decisions must be reserved for argument before that Court.

B. THE HOUSING AND REHABILITATION OF CRIMINALS IS A "GOVERNMENTAL FUNCTION".

Section 63-30-3 of the Utah Governmental Immunity Act states:

Except as may be otherwise provided in this Act, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function

[Emphasis added]

The Utah Supreme Court in Sheffield v. Turner, 21 Utah 2d 314 (1968), states:

There can be no question but that the maintenance of a state prison and the keeping of prisoners therein is a necessary auxiliary of government and therefore a governmental function, nor that consequently the performance of the duties incident thereto would normally be protected by the traditional rule of sovereign immunity.

Id. at 316.

The Utah Supreme Court after Sheffield, supra, outlined a specific test to determine whether or not the activity of a governmental entity is an exercise of a "governmental function" entitled to governmental immunity. Standiford v. Salt Lake City Corp., 605 P.2d 1230 (Utah 1980), Johnson v. Salt Lake City Corp., 629 P.2d 432, 434 (Utah 1981). Even under this narrowed test, because the running of a correctional system is "essential to the core of governmental activity" it is a "governmental function." Standiford, at 1377. It is a "function which by its very nature is a unique responsibility of the state, and should only be performed by the state" or its designated representative. Johnson, at 434. Since the acts complained of by the plaintiff arise out of the administration of the State's

correctional system, they are an exercise of a "governmental function" qualifying for the general immunity provided by Section 63-30-3 of the Act.

C. PLAINTIFF'S CLAIMS SOUND IN NEGLIGENCE AND THUS ARE WITHIN THE WAIVER OF IMMUNITY IN SECTION 63-30-10(1).

Plaintiff asserts that the State has waived immunity pursuant to Section 63-30-10(1):

Immunity from suit of all government entities is waived for injury (1) proximately caused by a negligent act or omission of an employee committed within the scope of his employment.

Defendants claim that four of the causes of action of the plaintiff, namely, the second, fifth, sixth and eighth claims for relief do not allege any circumstance for which immunity is waived by the Act. The gravamen of plaintiff's claims sound in negligence, even though the term "negligence" is not used in each claim. Thus the plaintiff has stated claims which qualify for the waiver of immunity in Section 63-30-10(1).

The Court will deal with the defendants' arguments that the plaintiff's injury was not "proximately caused by a negligent act or omission of an employee" in subsequent sections of this Opinion.

D. THE ACTIONS OF THE STATE OF UTAH ARE EXCEPTED FROM THE WAIVER OF IMMUNITY IN SECTION 63-30-10(1) AS THEY "ARISE

OUT OF THE EXERCISE OR PERFORMANCE OR THE FAILURE TO EXERCISE
OR PERFORM A DISCRETIONARY FUNCTION".

Section 63-30-10(1) enumerates particular exceptions to the general waiver of immunity for employee negligence. The waiver and the applicable exception read as follows:

(1) Immunity from suit of all government 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: (a) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused.

In Epting v. The State of Utah, 546 P.2d 242 (Utah 1976), the Utah Supreme Court held that the State was immune from suit under the "discretionary function" exception to the statutory waiver of immunity where a prisoner under the supervision of the board of corrections murdered a victim while on work release. The Epting court recognized the difficulties facing prison authorities in developing rehabilitation programs, and applying those programs to particular prisoners. The court states:

In regard to the problem: whether the placing of a prisoner in a work release program comes within subsection (1) above quoted as the the exercise. . . [of]. . . a discretionary function,. . . we make the following observations: The prison authorities are faced with a dilemma which has always existed in penal institutions: as to what extent they are furnishing an education for further crime, or for the rehabilitation of prisoners into useful citizenship. . . . But that

is within the discretion of the prison authorities to decide. In addition to the exercise of this judgment as to the value and practicability of such a program generally, there are problems about its advisability as to each individual prisoner. In order to weigh the positive values of possible benefit for him in such a program against the negative factors such as the likelihood of his escaping and engaging in more anti-social conduct, it is essential to consider the various aspects of his personality: his intelligence, aptitudes and qualities of character. . . . Accordingly, we agree with the view of the trial court that the handling of the prisoner Michael Hart was something which "arises out of the exercise of a discretionary function" for which subsection (1) of section 63-30-10(1) quoted above has retained its sovereign immunity.

546 P.2d at 244.

The Court can see no distinction between the facts in Epting and the facts presented by this case. The adoption of a general program of home visits, and the decision to place an individual such as defendant into this status involve the same policy evaluations which are required to adopt a work release program generally, and to place a particular prisoner in a work release program.

The plaintiff seeks to distinguish Epting by claiming that although the establishment of policies and procedures concerning the transfer of inmates within the penal system is a discretionary function entitled to immunity under Epting, that once it can be alleged that the State has failed to follow its own policy and procedures, its acts are no longer a "discretionary function."

Plaintiff's Memorandum In Opposition to Defendants' Motion for Summary Judgment, at page 69.

The Court finds the plaintiff's argument unpersuasive, as the statutory language is dispositive. It states that there is immunity not just for the "exercise or performance" of a discretionary function, but for the "failure to exercise or perform a discretionary function, whether or not the discretion is abused." Thus, although the failure of the defendants to follow their own policies and procedures is definitely relevant to the issue of gross negligence, this Court does not see its applicability to the issue of immunity.

Plaintiffs cite the recent Supreme Court case of Little v. Utah State Division of Family Services, 667 P.2d 49 (Utah 1943) as supportive of their argument. The Court states:

The acts complained of here are the state's failure to properly evaluate the home into which Jennifer was to be placed, failure to properly supervise her placement, and failure to protect her from harm when the State knew or should have known that such harm was likely. Assuming that the decision to place Jennifer in a foster home was a discretionary one, once that decision was made and the placement occurred, the question was no longer whether the child was to receive foster care, but whether due care was exercised under a duty assumed. Where a breach of that duty can be shown, the government is held to the same standard as private individuals, and cannot cloak itself with the mantle of discretion.

Id. at 51.

The language cited from Little merely restates the Supreme Court's continued adherence to the distinction between a ministerial and a policy level act. See, discussion at p. 13, infra. Other language of the Court in Little would support this conclusion:

Decision of attorney general to place an insane prisoner in a mental institution and decision of parole board to release prisoner on parole are discretionary functions.

Id. at 52.

The plaintiff next argues that Epting is no longer controlling law in Utah as the recent decisions of the Utah Supreme Court adopt a new ministerial versus policy level analysis, and that Epting has been overruled sub silencio. This argument is undermined by the case of Carroll v. State Road Commission, 27 Utah 2d 384 (1972), decided several years before Epting. In this case the Utah Supreme Court held that a state road supervisor's decision to use berms as a sole means of warning highway travelers that a road was closed and should not be traveled was not a basic policy decision essential to the realization or accomplishment of some basic governmental policy, program or objective and was thus not immune. In arriving at this decision, the court adopted a policy level operational ministerial level analysis. The court states:

The principle is that although basic policy decisions are allowed immunity, this exception is not extended to the ministerial implementation of that basic policy.

Id.

Thus, this Court must assume that the court in Epting was applying the analysis previously adopted in Carroll, and further supported in the recent cases of Frank v. The State of Utah, 613 P.2d 517 (Utah 1980), and Little v. Utah State Division of Family Services, 667 P.2d 49 (Utah 1983). Furthermore, the language in Carroll is supportive of this Court's finding today. The court in Carroll states:

. . . [A] valid consideration in evaluating a factual situation was whether there was a reason for sovereign immunity, i.e., did the employee's decision. . . rise to the level of governmental decisions towards which judicial restraint should be exercised.

Id. at 389

The professional judgment of correctional personnel as to the status of prisoners is just the sort of policy making decision toward which judicial restraint should be exercised.

Again, in Frank v. State, 613 P.2d 517 (Utah 1980), the Utah Supreme Court refused to shield the state from suit where the plaintiff alleged that the negligence of a state employed psychologist resulted in the suicide of his son, as the court found that the psychologist's acts were not legally discretionary, but ministerial. Nevertheless, the language of Frank again supports the earlier holding in Epting and this Court's decision.

The court states:

The exception was intended to shield. . . . those government acts and decisions impacting on large numbers of people in a myriad of

unforseeable ways from individual and class legal actions the continual threat of which would make public administration all but impossible.

Id. at 519-520.

A removal of the shield of governmental immunity in correctional policy making areas would submit the State in a "myriad of unforeseeable ways to individual and class legal actions, the continual threat of which would make public administration all but impossible."

In Beal v. Turner, Warden, 22 Utah 2d 418 (1969), the Utah court enunciates the policy behind affording discretion in a case such as is before the Court today:

The Board of Pardons and the men in the Adult Probation and Parole Department are striving in a professional way to rehabilitate adjudicated criminals, so that these criminals may take their place in a law-abiding society. To accomplish this objective, the Board of Pardons and the Adult Probation and Parole Department must have leeway in taking chances and enlarging the ambit of a promising prisoner. (Even) when the confidence which they had in the parolee is (later) seen to be misplaced. . . .

454 P.2d at 626.

The plaintiff further claims that analysis of the discretion involved in placing defendant Roberts into a halfway house and ultimately on home leave does not meet the four part test set out in Little, supra, at p.11. This Court disagrees. The decision to classify a prisoner by the Department of Corrections, whether that decision is made at the Board of Pardons level or by an

employee at a halfway house, is a basic policy making decision in which a myriad of policy and program factors must be analyzed. Interference with the discretion involved in such a decision could change the course and direction of the State's correctional program. Therefore, this Court can answer affirmatively the four questions posed. Little at p. 51.

The most troubling argument made by the plaintiff is that the Utah Supreme Court has adopted an analysis of the "discretionary function" exception which gives employees exercising discretion in the upper echelons of government immunity for discretionary policy decisions, but denies immunity to bureaucrats in the trenches, since they merely perform ministerial, implementing acts. The plaintiff finds support for this position in the recent cases of Frank v. State, 613 P.2d 517 (Utah 1980), Bigelow v. Ingersoll, 618 P.2d 50 (Utah 1980), and Little v. Division of Family Services, 667 P.2d 49 (Utah 1983). An example of the language upon which the plaintiff relies is the following from Frank:

In this regard, this Court has followed the lead of cases interpreting the Federal Tort Claims Act by distinguishing between those decisions occurring at a broad, policy-making level and those taking place at the implementing, "operational" level. In Carroll v. State Road Commission, this Court, recognized that almost all acts require some degree of discretion, and observed that the exception to the waiver set forth in the Act should be confined to those decisions and acts occurring at the "basic policy-making level,"

and not extended to those acts and decisions taking place at the operational level, or, in other words, ". . . those which concern routine, everyday matters, not requiring evaluation of broad policy factors."

Id. at 520.

Although this Court admits that the language of the Utah Supreme Court confuses the issue between the level at which the decision is made and the nature of the decision involved, a reference to the cases referred to under the Federal Tort Claims Act clarifies this important distinction. The seminal case under the Federal Tort Claims Act on discretionary function is Dalehite v. United States, 346 U.S. 15 (1953). In Dalehite, the court discussed at length the discretionary function exception of the Federal Tort Claims Act coining the analysis of policy versus ministerial. However, the court held that discretionary function includes:

More than initiation of programs and activities in that 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.

Id. at 35-36.

Some federal court cases following Dalehite narrowly focused on the term "policy" and developed a dichotomy analysis for determining the applicability of the discretionary function exception. These cases drew an imaginary line between upper

echelon "policy level" decision makers, and lower level "operational" employees charged with executing or implementing the policy. The plaintiff would claim that this is the analysis which the Utah Supreme Court has adopted. The recent Supreme Court case of United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 104 S. Ct. 2755 (1984), reaffirms that the level oriented analysis is not a valid interpretation of the discretionary function exception under the Federal Tort Claims Act. Rather, the Supreme Court discussed several factors which it recommended to be used in determining whether acts of government are protected from liability by the discretionary function exception. The first factor discussed by the court effectively prohibits consideration of the actor's rank or his hierarchical position within the decision making process in determining whether the discretionary function exception applies. The Court states:

The basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a government employee, whatever his or her rank, are of a nature and quality that congress intended to shield from tort liability.

Id. at 2765.

This Court finds the above analysis of the ministerial versus policy dichotomy to be the better-reasoned, and assumes that this is what the language cited by the plaintiff means since the Utah court has indicated an intention to follow the federal court's direction under the Federal Tort Claims Act.

If it is the same broad policy factors which must be considered, this Court can see no difference between their consideration by the Board of Pardons in determining whether or not someone should be placed on parole, and their consideration by the director of a halfway house in determining whether or not an inmate should be granted work release or home leave. It is the nature of the discretionary act, not the level at which it is made which should be analyzed.

Finally, this Court does not believe it leads to the orderly administration of justice for a trial court to assume that a case which is controlling precedent has been overruled without comment by the Supreme Court. If Epting is no longer the law, it is the Utah Supreme Court's responsibility to so state.

The Utah Supreme Court, the U. S. Supreme Court, and numerous other state courts have looked to the nature and quality of corrections decisions, and have concluded that these decisions are the type of acts which were intended to be protected by the "discretionary function" exception. Thus, this Court finds that the acts complained of by the plaintiff "arise out of the exercise or performance, or the failure to exercise or perform a discretionary function," and thus that the State of Utah is immune from liability.

Because this Court has found that the "discretionary function" exception is applicable, it need not reach the issue of the

incarceration exception, or the public duty doctrine as it applies to the State of Utah. However, in passing, this Court comments that the language cited by the defendants from Epting v. State would indicate that the conduct complained of would also be covered by the incarceration exception to the Governmental Immunity Act. A halfway house is an "other place of legal confinement" as the Supreme Court has held that a hospital where one is committed under a civil order is such a place. Emery v. State, 26 Utah 2d 1 (1971). The narrow issue is since the plaintiff's injury arose when the defendant Roberts was granted a temporary home leave from this halfway house, whether he was still within a place of legal confinement. This Court need not decide that issue, but believes that it is an issue which needs clarification from our Supreme Court.

The issue of duty will be discussed under the portion of this opinion dealing with the individual defendants.

II. INDIVIDUAL DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

A. THE INDIVIDUAL DEFENDANTS ARE IMMUNE IN THEIR REPRESENTATIVE CAPACITY.

The Utah Supreme Court in Madsen v. Borthick, 658 P.2d 627 (Utah 1983) has recently declared that the Governmental Immunity Act is the exclusive remedy against governmental employees, and that a government official or employee can only be sued in a representative capacity in an action against a governmental

entity when that entity itself is liable. Id. at 633. Since this Court has found that the State of Utah is not liable as it is shielded by governmental immunity, the individual defendants in their representative capacity are also shielded by that immunity.

B. THE INDIVIDUAL DEFENDANTS ARE PERSONALLY LIABLE FOR ACTS OR OMISSIONS CAUSING INJURY TO THE PLAINTIFF IF SHE CAN ESTABLISH THAT THE EMPLOYEES ACTED OR FAILED TO ACT DUE TO GROSS NEGLIGENCE, FRAUD OR MALICE.

The plaintiff mistakenly quotes pre-1978 cases for the proposition that the legislature intended that suits be allowed under the Governmental Immunity Acts against State employees for their negligence. See, generally, Cornwall v. Larsen, 571 P.2d 925 (Utah 1977); Schmitt v. Billings, 600 P.2d 516 (Utah 1979); Frank v. State, 613 P.2d 517 (Utah 1980). However, in the Governmental Immunity Act amendments of 1978, the legislature added the following provisions on official immunity in Section 63-30-4:

The remedy against a governmental entity or its employee for an injury caused by an act or omission which occurs during the performance of such employee's duties is after the effective date of this act exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless the employee acted or failed to act through gross negligence, fraud or malice.

As the court clearly held in Madsen v. Borthick, 658 P.2d 627 (Utah 1983):

The apparent purpose of these two paragraphs is to replace the common law of official immunity and its distinction between discretionary and ministerial acts or omissions with a new standard coordinated with the standard of governmental immunity established in the Governmental Immunity Act.

The court continues:

The second quoted paragraph of Section 63-30-4 reaffirms that the employee will not be personally liable unless he or she acted or failed to act due to gross negligence, fraud or malice. The second paragraph also a representative capacity in an action against the governmental entity, but only where the act or omission is one for which the governmental entity may be liable under the Governmental Immunity Act.

Thus, employees of State entities lose the protection of the Act and can be sued in their personal capacity if they act or fail to act through gross negligence, fraud or malice.

The individual defendants disagree with the plaintiff's argument that it is an issue of fact for the jury to determine whether or not the individual defendants' omissions and acts amounted to "gross negligence" within the meaning of the statute.

The defendants first claim that the 1983 amendment to Section 63-30-4 of the Act wherein the term "gross negligence" was eliminated bars the plaintiff's suit. The effective date of the amendment was March 10, 1983. The plaintiff's cause of action arose on

December 24, 1982. It is the statute which was in effect at the time the plaintiff's cause of action arose which must apply. This is reinforced by both statutory and case law in Utah. In Section 68-3-3 of Utah Code Ann., it states:

Revised statutes not retroactive. No part of these revised statutes is retroactive unless expressly so declared.

There is no such declaration of retroactive application in the 1983 amendments. Furthermore in the case of Okland Construction Co. v. Industrial Commission, 520 P.2d 208 (Utah 1974), the Utah Supreme Court states:

It is true, as the employer Okland contends: that it is entitled to have its rights determined on the basis of the law as it existed at the time of the occurrence; and that a later statute or amendment should not be applied in a retroactive manner to deprive a party of his rights or impose greater liability upon him.

Defendants attempt to escape this well accepted principle by stating that the plaintiff's cause of action did not accrue until she had filed a proper notice of claim, had waited the required period, and could proceed in court under the Act. Defendants claim that since the plaintiff's action is created by the Act, her cause of action cannot arise until she has complied with the conditions of that Act. The problem with this argument is that employees are within the ambient of the Act, but not when it is alleged that their conduct arises out of gross negligence,

malice or fraud. Thus, the Act has no application to the plaintiff's claim against these defendants in their personal capacity.

The defendants next argue that a statute or amendment may be applied retroactively if vested or contractual rights are not enlarged, eliminated or destroyed, citing State Dept. of Social Services v. Higgs, 656 P.2d 998 (Utah 1982). However, this case offers defendants no support as it deals with changes in the law strictly procedural, and not affecting substantive rights. The court in this case in fact states the well accepted principle argued by the plaintiff:

These authorities state the well established rule that statutory enactments which affect substantive or vested rights generally operate only prospectively.

Id. at 1000.

It is difficult to see how the removal of a plaintiff's right to sue for "gross negligence" does not take away substantive rights.

Finally, the defendants cite Haddenham v. State, 550 P.2d 9 (Wash. 1976) for the proposition that abolition by the legislature of an accrued cause of action based upon statute does not violate any rights of plaintiff, because a tort cause of action is not vested until it is reduced to judgment. This case stands for no such proposition. Rather, the case holds that statutes normally will be construed to operate prospectively only, unless they have a remedial effect:

. . . . Where, however a statute is remedial, and its remedial purpose is furthered by retroactive application, the presumption favoring perspective application is reversed. . . . Remedial statutes in general afford a remedy or better or forward remedies than those already existing for the enforcements of rights and redress of injuries. . . . The intent of the Crime Victims Compensation Act is to compensate and assist the residents of Washington who are innocent victims of criminal acts. Its purpose is patently remedial.

Id. at 12.

Thus, the court allowed retroactive application only because it found the statute in question which allowed compensation for the victim enlarged the rights of the plaintiff and was remedial. The change made by the 1983 amendment certainly is not remedial as it eliminates any remedy for the plaintiff.

Finally, the defendants attempt to persuade this Court that the purpose of the 1983 amendment eliminating "gross negligence" was simply to clarify the meaning of the earlier enactment. This Court finds this a strained argument, as the 1983 statute clearly sought to eliminate substantive rights which it had previously granted.

Finally, the defendants argue that even if the 1978 law applies, that the facts taken in the light most favorable to the plaintiff do not state a cause of action for gross negligence. The defendants' argument is based upon common law prior to the 1978 amendments to the Act, which indicates generally that public

employees will not be held responsible if they were acting honestly and in good faith within the scope of their authority. However, the Utah Supreme Court has made it clear in Madsen v. Borthick, supra, that the prior common law with respect to the liability of officials is no longer relevant, and that the language of the Act applying to employees must control.

Therefore, taking the term "gross negligence" as somewhere between simple negligence and intentional wrong doing, this Court is persuaded that the facts alleged by the plaintiff, if proven, could be found by a jury to establish "gross negligence."

C. THE DEFENDANTS OWE A DUTY TO THE PLAINTIFF.

Before the individual defendants can be found legally liable for the plaintiff's injury, it must be established that there is a duty between the parties. Plaintiff cannot recover against these defendants if the only duty owed to her was a public or general duty. 18 McClelland, The Law of Municipal Corporations, Section 53.046 at 165 (Third Ed. 1971). This public duty rule has been recognized in Utah. In Obray v. Malmberg, 26 Utah 2d 17, 484 P.2d 160 (1971), the Utah Supreme Court declared that the failure of a sheriff to investigate, and not actionable by an individual, since the public official's duty is to the public. Again, in Christenson v. Hayward, 694 P.2d 612 (Utah 1984), where two deputy sheriffs were allegedly negligent in failing to arrest a motorcyclist they had reason to believe

was drunk, and he was later killed when he failed to negotiate a curve, the court refused to find any duty based upon the statutory duty of the defendants to preserve the peace and make lawful arrests. The court, however, stressed that the individual defendants undertook no duty, excepting employment as a police officer, a duty owed to the public. The language of the court is instructive:

Appellants did not allege that the officer assured Michael Stout he would take care of him, or by his words or conduct induce him to rely on the officer's protection. Appellants did not allege that the officer in any way induced him into a false sense of security. In sum, appellants failed to allege a common law legal duty owed to them by the city and/or the officer.

Id. at 613.

Another case which is instructive on duty is the recent Supreme Court case of Little v. Utah State Division of Family Services, 667 P.2d 49 (Utah 1983). In this case, as discussed infra, the Court found that the Division of Family Services had breached a duty when it was alleged that it negligently caused the wrongful death of an infant by failing to properly evaluate a foster home, and failing to supervise the child's placement in the home. Here, the court clearly held that even though the Division of Family Services had a duty generally to the public, that it also had individualized that duty to the plaintiff by affirmatively acting in the area.

There is no controlling case authority in Utah as to whether the defendants as correctional authorities charged with the responsibility to incarcerate, manage, supervise and rehabilitate violent and dangerous offenders owe a duty to act reasonably to protect the general public from these individuals. The case law nationally is split, and this is a new and developing area of the law. This Court, since there is no Utah authority directly on point, has taken the liberty to examine the authority from other jurisdictions, and has determined that the better-reasoned cases follow Section 319 of the Restatement of Torts Second, which states:

Duty of those in charge of person having dangerous propensities. One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing harm.

The difference between this duty and the general no liability for public duty in law enforcement situations is well addressed by Howard Nelson in his Law Review article entitled, "Victim's Suits Against Government Entities and Officials for Reckless Release," (Vol. 29: 595, 1980):

The [public duty] rule is generally used to deny claims against the government for failure to provide public services designed to benefit the community at large such as police protection. The duty to control the conduct of another based upon the relationship between the parties does not arise

in cases involving the failure to provide services. When a victim is attacked by an assailant against whom police protection has been refused, there is no duty owed to the victim, because there is no relationship between the police and the assailant. Furthermore, there is clearly no voluntary assumption of a duty by the police when they fail to provide protection to a citizen. In release situations, however, the government has voluntarily assumed the control of an inmate by placing him in a detentional facility. A duty to the victim arises out of this voluntary assumption of custodial responsibility by the government.

This analysis has been adopted by many neighboring states: Grimm v. Arizona Board of Pardons & Paroles, 564 P.2d 1227 (Ariz. 1977); State v. Silva, 478 P.2d 591 (Nev. 1971); White v. State, 661 P.2d 1272 (Mont. 1983); Upchurch v. State, 454 P.2d 112 (Hawaii 1969); Mason v. State, 689 P.2d 199 (Colo. Ct App., 1984). The Court finds particularly persuasive the authorities cited and the reasoning expressed by the Kansas Supreme Court in the recent decision of Cansler v. State of Kansas, 675 P.2d 57 (Kan. 1984).

The defendants argue that since governmental immunity is alive and well in Utah, that this indicates a legislative intent against creating a private cause of action in cases such as this. It is true that the legislature has chosen to insulate the State and even its negligent employees working in discretionary decision making areas such as corrections from liability generally. However, the legislature has specifically carved out an area

in which it will allow citizens redress (when the employee acts with "gross negligence, fraud or malice"). This indicates that the legislature would support a private cause of action to deter employee conduct of such an egregious nature and to compensate an innocent victim who suffers as a result of this conduct.

Furthermore, the legislature can, has and will continue to close areas of liability which it feels are contrary to the public interest. In fact, Ms. Prue could not recover if her cause of action were to arise today because the legislature by amendment in 1983 removed "gross negligence" from the statute. Thus, any argument as to the flood of potential liability which this Court's holding may create is not persuasive.

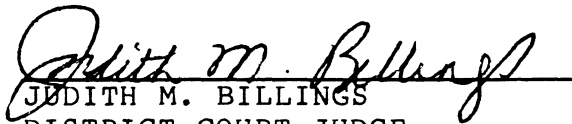
D. THE ISSUES OF BREACH OF DUTY AND FORSEEABILITY ARE ISSUES OF FACT WHICH MUST BE DETERMINED BY THE JURY.


Based upon the above-cited authority and the analysis of the Court, the State of Utah's Motion for Summary Judgment is granted on the basis of governmental immunity. The Motions for Summary Judgment of the individual defendants are denied as this Court finds that the plaintiff has stated facts which, if proved, could allow a jury to find that the "gross negligence" of the individual defendants acting in their personal capacity proximately caused the plaintiff's injuries.

The Court directs counsel for the plaintiff to prepare an Order in conformance with this Court's Memorandum Decision,

submit it to counsel for the defendants, and then to the Court for signature.

Dated this 2/ day of August, 1985.


JUDITH M. BILLINGS
DISTRICT COURT JUDGE

ATTEST
H. DIXON HINDLEY
Clerk

Deputy Clerk

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following this 21 day of August, 1985:

George M. Haley
Attorney for Plaintiff
175 S. Main, 10th Floor
Salt Lake City, Utah 84111

Jeffrey Weston Shields
Attorney for Plaintiff
50 West 300 South, #900
Salt Lake City, Utah 84101

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Carlie Christensen
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236 State Capitol
Salt Lake City, Utah 84114

Debra W. Drusdale

APPENDIX "C"

W. Richards

SHIELDS & SHIELDS
ATTORNEYS AND COUNSELORS
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243 EAST FOURTH SOUTH STREET
SALT LAKE CITY, UTAH 84111

(801) 228-4703

Hym Mackay
RECEIVED

JAN 11 1983

JED W. SHIELDS
JEFFREY WESTON SHIELDS

UTAH STATE OFFICE OF ATTORNEY GENERAL
ROY SHIELDS (1988-1996)

January 10, 1983

Office of Attorney General
STATE OF UTAH
Utah State Capitol
Salt Lake City, Utah

NOTICE OF INTENT TO SUE AND CLAIM

In accordance with the provisions of UTAH CODE ANN. §63-30-12, as amended, you are hereby notified that LA DAWN PRUE, by and through her attorneys, SHIELDS & SHIELDS, is herewith making claim for injuries she received on December 22, 1982 and/or December 23, 1982, when she was shot twice with a .357 caliber gun by an individual released from the Utah State Prison, allegedly to a "halfway house" facility.

Said LA DAWN PRUE is eighteen years of age and as a direct and proximate cause of the above-captioned events, claimant has been rendered a parapalegic for the remainder of her life which has been predicted to be of normal length.

Said LA DAWN PRUE alleges that the State of Utah was negligent and/or grossly negligent in allowing the release of the individual who shot her out of prison and that the State of Utah had knowledge, or should have known, that said individual harbored dangerous and violent propensities and was not a fit candidate for incorporation into society, and that the State of Utah has therefore fallen below its duty to protect the claimant from known dangerous felons, all proximately resulting in her present severe injuries. Claimant further alleges that the acts of the State of Utah as above set forth resulted in the deprivation of her civil rights as defined by Title 42, United States Code, §1983 and the United States Constitution.

LA DAWN PRUE herewith demands monetary compensation in a sum reasonable and proper to compensate her for her debilitated physical condition, pain and suffering, fear, loss of future employment opportunity, medical and surgical expenses presently expended and to be expended in the future, loss of present wages and income and such other and further relief as is just, equitable and appropriate in the premises.

Office of Attorney General
NOTICE OF INTENT TO SUE AND CLAIM
January 10, 1983
Page 2


You are further notified that after the passage of ninety (90) days or the refusal of the State of Utah to settle the above set out claim, said LA DAWN PRUE intends to commence an action in the United States District Court for the District of Utah, Central Division, for relief as demanded above on the grounds set forth above.

All correspondence or communication regarding the above matters is to be directed to the following:

Jeffrey Weston Shields
SHIELDS & SHIELDS
243 East Fourth South
Suite 303, Shields Building
Salt Lake City, Utah 84111
Telephone: (801)328-4703

Please govern yourselves accordingly.

SHIELDS & SHIELDS


Jeff W. Shields
Jeffrey Weston Shields
Attorneys for LA DAWN PRUE

APPENDIX "D"

George M. Haley
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Jeffrey Weston Shields
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Suite 303, Shields Building
Salt Lake City, Utah 84111
Telephone: (801) 328-4703
Attorneys for Claimant

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LaDAWN PRUE,	:	AMENDED
	:	NOTICE OF CLAIM
Claimant,	:	AND INTENT TO SUE
-vs-	:	

STATE OF UTAH, WILLIAM MILLIKEN,	:
personally and as Director of the	:
UTAH STATE DIVISION OF	:
CORRECTIONS, THE UTAH STATE	:
DEPARTMENT OF SOCIAL SERVICES,	:
ADULT PROBATION AND PAROLE,	:
OGDEN COMMUNITY CORRECTIONS	:
CENTER, JOHN DOES 1-10 and ABC	:
AGENCY 1-10,	:
Defendants.	:

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Comes now the claimant, LaDawn Prue, by and through her counsel, Jeffrey Weston Shields, of Shields & Shields, and George M. Haley, of Kipp and Christian, P.C., and pursuant to U.C.A. 63-30-1, et seq., (1953, as Amended), hereby file and amend the required Notice of Claim filed by the Claimant on January 10, 1983, as follows:

GENERAL ALLEGATIONS

1. Claimant is a resident of Salt Lake County, State of Utah.

2. On or about December 22, 1982, the claimant, LaDawn Prue, was shot twice by Kenneth Roberts in front of her home for no apparent reason.

3. As a direct and proximate cause of Kenneth Roberts action, the claimant has been rendered a paraplegic for the remainder of her life due to the fact that her spinal cord was severed by the gunshot wounds. Due to her disability, claimant is unemployable, requires present and future medical expenses, is suffering from ongoing pain and mental distress and loss of body function.

4. Claimant is informed and believes that prior to the time of Kenneth Roberts' release from Utah State Prison, he was

incarcerated for a number of violent and aggravated criminal acts in the "A" Block of the Utah State Prison, a secure area of the medium security area of the prison reserved for dangerous or problem inmates.

5. Upon information and belief, the claimant alleges that the State of Utah, by and through their agents, William Milliken, Director of the Utah State Division of Corrections, and others, were cognizant of Kenneth Roberts' dangerous and violent propensities.

6. Upon information and belief, claimant alleges that Kenneth Roberts communicated to the Board of Pardons, prior to his release, that he felt he was not a fit candidate for release and could not handle the outside world.

7. Upon information and belief, claimant alleges that in August of 1982, the Board of Pardons denied Kenneth Roberts parole and determined that he would not be reviewed for parole prior to August of 1983.

8. Upon information and belief, claimant alleges that Kenneth Roberts' criminal record and psychological profile indicate that he was not a reasonable or fit person for parole, or for release into the general public, or for release to the Ogden Community Corrections Center.

9. Upon information and belief, claimant alleges that in spite of the foregoing, William Milliken acting in his capacity as Director of the Division of Corrections authorized and ordered the release of Kenneth Roberts to the Ogden Community Center Halfway House, knowing that said halfway house would be closed for Christmas and that Kenneth Roberts would be released from the halfway house to the public at large.

10. Upon information and belief, claimant alleges that defendant Milliken did not follow the guidelines established by the Board of Pardons, the Division of Correction, and the State of Utah, in releasing an inmate from the Utah State Prison, and that the defendant Milliken released Kenneth Roberts from the Utah State Prison on his signature alone, and that defendant Milliken failed to have his decision to release Kenneth Roberts reviewed by the Screening Committee of the Board of Pardons, and failed to comply with other requirements for release of inmates established by the Board of Pardons, the Division of Corrections, the Department of Social Services and the State of Utah.

11. Upon information and belief, the claimant alleges that once Kenneth Roberts was released from the Utah State

Prison, that the State of Utah by and through the Board of Pardons and the Board of Adult Probation and Parole failed to supervise adequately Kenneth Roberts once he had left their custody and control.

12. As a result of the State defendants' conduct in releasing Kenneth Roberts into the public at large, Kenneth Roberts was able to affect the attack on the claimant and inflict the injuries and damages to the complaint complained of herein.

FIRST CLAIM FOR RELIEF

1. Claimant references and incorporates within allegations of Paragraphs 1 through 12 of the General Allegations contained above.

2. That William Milliken and other unidentified State employees, herein referred to as John Does I through III, were negligent, willful, wanton, reckless and grossly negligent in releasing Kenneth Roberts from the Utah State Prison.

3. As a direct and proximate cause of Kenneth Roberts' release, claimant sustained grievous personal injuries, past and future medical expenses in an amount subsequently to be determined, disfiguring permanent injuries, was rendered paraplegic losing the use of her legs permanently, suffered psychological

nd emotional trauma requiring past and future professional therapy, suffered loss of body functions and requires specialized equipment and care.

WHEREFORE, claimant seeks recovery from the State of Utah, the named agencies and the named individuals in the amount of \$4.3 Million.

SECOND CLAIM FOR RELIEF

1. Claimant references and incorporates within Paragraphs 1 through 12 of the General Allegations and Paragraphs 1 through 3 of the First Claim for Relief as though fully set forth herein.

2. Upon information and belief, claimant alleges that the defendant William Milliken, acting in his capacity of the Director of the Division of Corrections, failed to comply with the established guidelines and criteria for release of prisoners from the Utah State Prison. That had the established guidelines been followed, Kenneth Roberts would not have been released from the Utah State Prison.

3. The actions of the Utah State Division of Corrections and William Milliken, in failing to comply with the established criteria and guidelines for release of prisoners, proximately caused the injuries sustained by claimant, resulting from the attack upon her by Kenneth Roberts.

WHEREFORE, claimant seeks recovery from the State of Utah, the named agencies and the named individuals specified herein in the amount of \$4.3 Million.

THIRD CLAIM FOR RELIEF

1. Claimant references and incorporates within Paragraphs 1 through 12 of the General Allegations and Paragraphs 1 through 3 of the First Claim for Relief and Paragraphs 1 through 3 of the Second Claim for Relief, as though fully set forth herein.

2. Upon information and belief, claimant alleges that the individuals and agencies specified herein had actual knowledge of the violent, dangerous propensities of the Kenneth Roberts.

3. In spite of said knowledge, the individuals and agencies herein named authorized the release of Kenneth Roberts without complying with the established guidelines, requirements

and procedures. Further, that in spite of their knowledge as to the dangerous propensities of the Kenneth Roberts, they failed to supervise or oversee Kenneth Roberts once he was released from the care and custody of the Utah State Prison and the Ogden Community Correction Center Halfway House.

4. As a direct and proximate result of the State defendants' failure to supervise Kenneth Roberts once he was released, the claimant was attacked by the defendant Roberts and sustained the injuries complained of herein.

WHEREFORE, claimant seeks recovery from the named agencies, State of Utah, and individual defendants specified herein, in the amount of \$4.3 Million.

FOURTH CLAIM FOR RELIEF

1. Claimant references and incorporates herein Paragraphs 1 through 12 of the General Allegations, Paragraphs 1 through 3 of claimant's First Claim for Relief, Paragraphs 1 through 3 of claimant's Second Claim for Relief and Paragraphs 1 through 4 of claimant's Third Claim for Relief, as though fully set forth herein.

2. The State of Utah, acting by and through its agent William Milliken, and other agents whose identity is, as yet,

unknown to claimant, knowingly and willfully paroled and/or released Kenneth Roberts from the Utah State Prison with a reckless disregard for life and safety of the claimant, as well as other members of the public.

3. Said willful and wanton conduct constitutes gross negligence, and directly and proximately caused the unprovoked, violent, heinous, and destructive attack upon the claimant, resulting in the injuries referred to above.

WHEREFORE, claimant seeks recovery against the named agencies, named individuals and the State of Utah in the amount of \$4.3 Million.

FIFTH CLAIM FOR RELIEF

1. Claimant references and incorporates within Paragraphs 1 through 12 of the General Allegations and Paragraphs 1 through 3 of the First Claim for Relief, Paragraphs 1 through 3 of the Second Claim for Relief, Paragraphs 1 through 4 of the Third Claim for Relief and Paragraphs 1 through 3 of the Fourth Claim for Relief, as though fully set forth herein.

2. Upon information and belief, claimant alleges that the defendant William Milliken, and other employees of the State of Utah, yet to be identified, arranged to have Kenneth Roberts

released from the Utah State Prison to the Ogden Community Correction Center Halfway House.

3. The defendants, Milliken, and unidentified State employees, made this arrangement knowing that the halfway house was about to close for the Christmas Holidays and that Kenneth Roberts would, therefore, not be at a halfway house and would be released from the halfway house into the public at large.

4. Upon information and belief, claimant alleges that the individual State employees arranged to have Kenneth Roberts released from the Utah State Prison to the halfway house as a subterfuge to release him from the prison prior to the date established by the Utah State Board of Pardons in August of 1983.

5. That the actions of defendants Milliken and other as yet unidentified State employees, were outside the scope of the Governmental Immunity Act contained in 63-30-10 U.C.A. (as Amended, 1953); and as a direct and proximate result of the individual State employees' actions in enabling Kenneth Roberts to be released to the public at large, the claimant suffered the injuries complained of herein.

WHEREFORE, claimant seeks recovery from the State of Utah, the Utah State Department of Social Services, William

Milliken, State employees John Does I through III, in the amount of \$4.3 Million.


DATED this 8 day of March, 1983.

KIPP AND CHRISTIAN, P.C.



GEORGE M. HALEY

SHIELDS & SHIELDS



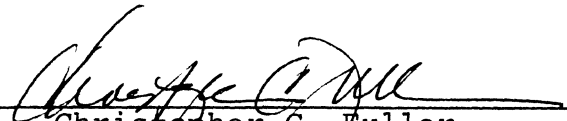
JEFFREY WESTON SHIELDS
Attorneys for Claimant

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Respondent's Brief by mailing four copies to George M. Haley of Haley & Stolebarger, Attorneys for Appellant, Tenth Floor Walker Center, 175 South Main Street, Salt Lake City, Utah 84111, and one copy to Jeffrey Weston Shields, co-counsel for Appellant, at 50 South Main Street, Suite 2001, Post Office Box 30815, Salt Lake City, Utah 84130, this 2nd day of September, 1986.

SNOW, CHRISTENSEN & MARTINEAU

By


Christopher C. Fuller
Attorneys for Respondents.