

1986

LaDawn Prue v. THE STATE OF UTAH, LEON HATCH, Deputy Warden of the Utah State Prison, WILLIAM 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: Appellant's Reply Brief

Utah Supreme Court

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AGENT

IN THE SUPREME COURT OF THE STATE OF UTAH

-----1986-20957-----

LaDAWN PRUE,

Plaintiff/Appellant,

vs.

THE STATE OF UTAH, LEON
HATCH, Deputy Warden of the
Utah State Prison, WILLIAM
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/Respondents.

Case No. 20957

Category No. 10

APPELLANT'S REPLY BRIEF

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
HONORABLE JUDITH M. BILLINGS, JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

LaDAWN PRUE,	:	
	:	
Plaintiff/Appellant,	:	
	:	
vs.	:	
	:	
THE STATE OF UTAH, LEON	:	
HATCH, Deputy Warden of the	:	
Utah State Prison, WILLIAM	:	
MILLIKEN, Personally and as	:	Case No. 20957
Director of the Utah State	:	
Department of Corrections,	:	Category No. 10
WELDON MORGAN, Individually	:	
and as Director of the Ogden	:	
Community Corrections Center,	:	
FELICIA ROBERTS, and KENNETH	:	
ROBERTS,	:	
	:	
Defendants/Respondents.	:	

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The appellant, LaDawn Prue ("Prue"), by and through her counsel, George M. Haley, of Haley & Stolebarger, and Jeffrey Weston Shields, hereby submits this Reply Brief of points and authorities in response to the Brief of Respondents ("the State"):

STATEMENT OF FACTS

Prue responds to the factual statements in the State's Brief as follows:

This appeal arises from the State's Motion for Summary Judgment before the Honorable Judith M. Billings. All facts must be taken in the light most favorable to Prue with all reasonable inferences drawn therefrom, and all doubts resolved in her favor. Draper Bank & Trust Co. v. Lawson, 675 P.2d 1174 (Utah 1983). Thus, if a factual dispute arises, the facts as set forth by Prue must control. This case has a great many disputed facts. Prue disputes the following factual statements in the State's Statement of Facts: paragraphs 2, 4, 18, 20, 22, 23, 24, 26, 28, 29, 35, 36, 37, 38 and 39.

The following facts, plus the facts stated in Prue's initial Brief, are material, must be presumed true, and warrant a reversal of Judge Billings' Order granting, in part, the State's Motion for Summary Judgment:

1. Kenneth Roberts ("Roberts") had a well-documented history of violence, escape and drug abuse. See Parts II, III and V(A) of Appellant's Brief.

2. Kenneth Shulsen did not directly delegate to Leon Hatch the authority to transfer inmates. Shulsen deposition, p. 5,

lines 9, 10; p. 8, lines 7 through 25; p. 10.

3. In December, 1982, in order for an inmate to be transferred to a halfway house, the recommendation of the Unit Management Team, the approval of the Community Corrections Screening Committee ("CCSC") and the approval of the Administrative Review Board ("ARB") was required. Daniels deposition, p. 26.

4. On December 10, 1982, the ARB voted to deny Roberts' transfer to a halfway house. Those others in attendance also voted to deny Roberts' transfer. Barnhardt deposition, p. 18.

5. The CCSC denied Roberts' requested transfer to a halfway house in August, 1982, refused to reconsider his transfer, and was not consulted concerning Roberts' transfer in December, 1982. Powers deposition, p. 22; Martin deposition, p. 20.

6. Leon Hatch altered the tally sheet of the ARB's December 10, 1982, meeting from a denial to an approval of Roberts' transfer because he believed his superior, William Milliken, wanted Roberts transferred to a halfway house before Christmas. Barnes criminal investigation deposition, pp. 17, 25, 27.

7. In August, 1982, the Board of Pardons ordered that Roberts be gradually phased into society. It was foreseeable that Roberts would act in a violent, sexual manner if he was unable to consummate his marriage with his wife and that it was imperative they undergo sex therapy. Rasmussen deposition, p. 39, lines 7 through 20; p. 50, lines 8 through 17.

8. On December 22, 1982, Roberts was in medium security protective custody. On December 23, 1982, he was on the streets, unsupervised.

The Utah State Corrections Annual Report, (Exhibit "E" of the Amicus Brief) states at page 63:

From the moment of a felon's confinement following sentencing, the Board assumes statutory responsibility for deciding when and under what conditions that individual shall be released.

At page 33, the Annual Report states:

The mission of the Utah State Prison is to provide a continuum of confinement to control committed offenders so that they may function in a manner which will not be harmful to society, other offenders, or themselves.

This Annual Report further recognizes the danger of directly removing an inmate from a totally isolated environment to one of total freedom. It states, at page 33:

This philosophy presupposes that inmates who are gradually reintroduced to community life are much less likely to recidivate than are inmates abruptly released from high security levels.

9. No arrangements had been made for Roberts to obtain sex therapy prior to his release. Rasmussen deposition, page 26, lines 13 through 15.

10. The Ogden Community Corrections Center ("OCCC") did not allow married residents overnight leave until they had at least two or more days' leave coming. Weekend Leave Policy, Addendum "A"; Martin deposition, p. 31.

11. Roberts was not entitled to any overnight leave until he had been a resident of the OCCC for at least five weekends. Addendum "A"; Martin deposition, pp. 32, 33.

12. All community corrections centers ("CCC's") in the state of Utah required that before an inmate became entitled to leave a halfway house, he fill out a leave application form setting forth what he was going to do and where (including addresses and phone numbers), when, and with whom he would be doing it. Roberts was not required to fill out such an application. Powers deposition, p. 35; Martin deposition, p. 37.

13. Weldon Morgan had the duty to supervise Roberts once he was released from the halfway house.

14. The 1985 Annual Report of the Utah State Corrections Office states, concerning CCC's:

As inmates approach the time of their designated releases from prison, many are placed in community corrections centers (CCC's) or halfway houses, even though still classified as inmates. This period, averaging around four months, allows the inmate a phased re-entry into society by re-establishing vital links with family and acquaintances, finding employment, and gradually readjusting to freedom while still under greater supervision than can be given by a parole agent. The success rate of inmates released in this way is about twice that of those released directly from prison. (It should be mentioned that "lower risk" inmates are selected for CCC placement.) . . . Residents' whereabouts are continuously monitored.

15. Weldon Morgan did absolutely nothing to supervise or monitor Roberts once he left the halfway house. Morgan deposition, p. 39.

16. It was foreseeable that an inmate with Roberts' history would obtain and take drugs upon his release.

17. It is reasonable to infer from the foregoing that Leon Hatch and Weldon Morgan bypassed the entire release policy and procedure of the Utah State Prison and the Division of

Corrections in response to perceived pressure from their superior, William Milliken, to allow Roberts an unsupervised Christmas honeymoon with his wife.

18. It is reasonable to infer from the foregoing that due to Roberts' well-documented sexual impotency problem, he failed in his attempt to consummate his marriage with his wife; and, in frustration, he went out to find a woman to rape -- LaDawn Prue.

ARGUMENT

POINT I

DOE V. ARGUELLES CONTROLS THE RESOLUTION OF THE INSTANT CASE.

The State has extensively argued that this Court's unanimous opinion in Doe v. Arguelles, 716 P.2d 279 (Utah 1985), is unsound. The State has argued this Court should adopt a definition of discretionary function that protects all State employees, regardless of their position in the government hierarchy, so long as their acts require some degree of discretion. This position ignores nearly 15 years of Utah precedent.

In 1972, this Court rejected the State's position in the case of Carroll v. State Road Commission, 496 P.2d 888 (Utah 1972), observing that all acts of government employees require some degree of discretion, but only those decisions and acts that take place at the basic policy-making level are entitled to immunity; those which concern routine, everyday matters not requiring evaluation of broad policy factors, are not. With the exception of Epting v. State, 546 P.2d 242 (Utah 1976), discussed

infra, this Court has consistently applied this test to governmental immunity cases since 1972. This Court should not abandon such well-settled precedent.

The State has mistakenly interpreted Doe v. Arguelles as support for its position that this Court should affirm Judge Billings' ruling against William Milliken and Leon Hatch. In Doe, defendant Stromberg was the Youth Development Center's (YDC) equivalent of the Parole Board. Stromberg had the complete discretionary authority to release Arguelles from the YDC under whatever terms he deemed appropriate. He exercised his discretionary authority by creating release requirements that included professional counselling. This Court ruled that his failure to ensure such release requirements were carried out exposed Stromberg to liability.

In the instant case, discretionary authority to release an inmate resides with the Parole Board. The acts of Leon Hatch and Weldon Morgan were outside the delegated parameters of their positions. The discretionary authority to determine which inmates should be released to halfway houses did not reside with Leon Hatch -- it resided with the ARB. The discretionary authority to determine whether or not an inmate should be released to a halfway house did not reside with Weldon Morgan -- it resided with the CCSC. Simply put, a State employee cannot exercise discretion which has not been delegated to him.

As this Court stated in Doe v. Arguelles:

A decision or action implementing a preexisting policy is operational in nature and is undeserving of protection under the discretionary function exception.

716 P.2d at 283 (Citations omitted). The Division of Corrections exercised its discretionary authority at the policy level by creating the ARB "for the express purpose of establishing uniformity, predictability and consistency, relative to all decisions, actions and recommendations made regarding inmates." The Medium Security Classification Procedures; Record on Appeal, at p. 708.

The purpose of the ARB was to provide a uniform and informed decision-making process regarding inmate transfers that would consider the nature of the offense (Roberts was convicted of rape and armed robbery), escape potential (Roberts escaped in 1980 and had a long history of escape in his prior criminal history), and history of violence (Roberts had a long history of violence in and out of prison).

Leon Hatch's changing the ARB's vote from denial to approval of Roberts' transfer to the OCCC was not a discretionary function.

The CCSC was created to provide deliberate and informed decisions concerning the transfer of inmates to halfway houses. At the CCSC meetings at which Roberts was considered, his prison "jacket" was available. The Committee members had available Merillee Rasmussen's psychological reports on Roberts, the Parole Board release requirements, Roberts' institutional record documenting his stabbing an inmate with a screwdriver, barricading himself into his cell, and his use of amphetamines and hallucinogens, and other pertinent records. Morgan had none

of this information available when he decided to bypass the CCSC and transport Roberts to the halfway house. Morgan's actions in this case cannot be considered as a discretionary function.

These facts, viewed under the careful analysis provided by this Court in Doe v. Arguelles, warrant the reversal of Judge Billing's Order granting the State of Utah, William Milliken, Leon Hatch and Weldon Morgan's Motion for Summary Judgment.

POINT II

EPTING V. STATE IS NOT CONTROLLING IN THE INSTANT CASE.

The State has cited Epting v. State, 546 P.2d 242 (Utah 1976), to support the argument that retained immunity for injuries arising out of incarceration, as found at Utah Code Ann. §63-30-10(10) (1953), bars Prue's claim. This Court decided Epting under a discretionary function analysis and did not decide the case on arising-out-of-incarceration grounds. Justice Crockett, writing for the majority and joined by Justices Ellett and Henriod, held:

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 quoted above has retained sovereign immunity.

546 P.2d at 244. The Court supported its ruling with a discussion of the various factors the prison personnel reviewed while deciding to put Michael Hart in the work release program.

The State quotes from Epting, at page 28 of its Brief, in support of its arising-out-of-incarceration argument. However, the State left this clause out of their quotation: "We therefore

make this further comment: . . . " It is obvious that the language relied upon by the State in this case is dictum and, thus, not controlling here.

This Court held in Doe v. Arguelles that under certain circumstances, the State may be responsible for inmates who have left their physical control. Although contrary to the Epting dictum quoted by the State, Doe is consistent with Justice Maughan's dissent in Epting.

Justice Maughan, joined by Justice Tuckett, vigorously dissented from the majority in Epting, stating, in part:

. . . that a careful reading of the statute, and a consideration of the policy reasons behind enacting such a statute conclusively show that the statute's purpose is to prevent incarcerated persons from disrupting the orderly administration of governmental institutions where legal confinement, for crime of offense, is proper; by rendering nugatory frivolous lawsuits by incarcerated persons, against supervisory personnel. It has nothing whatever to do with a third party not even remotely connected with the incarceration.

Id., at 246. Justice Maughan cites Sheffield v. Turner, 21 Utah 2d 314, 445 P.2d 367 (1968), a case where an inmate who was stabbed by another inmate sued the State, as an example of the type of suit that the incarceration exception was intended to bar.

Justice Maughan's analysis was subsequently adopted by the majority in two later Utah Supreme Court cases which the State cites in support of its position in the instant appeal: Madsen v. State, 583 P.2d 92 (Utah 1978); and Schmitt v. Billings, 600 P.2d 516 (Utah 1979). In both Madsen and Schmitt, this Court held that both actual incarceration and control were prerequi-

sites to the application of the arising-out-of-incarceration exception, stating:

The plain meaning of this section reflects a legislative intent to retain sovereign immunity for any injury occurring while the incarcerated person is in prison and under the control of the state.

Madsen, 583 P.2d at 93; and Schmitt, 600 P.2d at 518 (emphasis added).

This Court has always required a finding of actual incarceration before concluding that Utah Code Ann. §63-30-10(10) (1953) barred a plaintiff's claim. This Court has yet to rule upon the issue of whether or not §63-30-10(10) would bar a claim arising outside the prison. Epting did not so hold and can have no stare decisis effect upon the facts of this case.

The interpretation of the discretionary function exception provided by Epting v. State is inapplicable to the instant case. In Epting, the issue of failure to comply with established procedures as a negligent implementation of a discretionary function was not pled. Epting Complaint, Addendum "B". Further, the Epting Court's holding as to what constitutes a discretionary function is suspect.

Prue asserts this Court has overruled Epting's interpretation of discretionary function sub silencio. Again, quoting from Justice Maughan's dissent in Epting:

When we commend the work release program we commend a discretionary act taken at the planning level, the basic policy-making level. Here we are not concerned with decisions made on that level, we are concerned with circumstances occurring and decisions made on the operation level. This court has clearly made that distinction in Carroll v. State Road Commission.

546 P.2d at 245. The majority in Epting did not decide the case on the basis of a planning-level versus operational-level analysis; however, this Court has utilized that distinction in every case interpreting discretionary function since Epting.

The dissenting opinion written by Justice Maughan in Epting became the model for the discretionary function analysis utilized by this Court in every decision since Epting. It would be inappropriate for this Court to look to the Epting analysis in applying the discretionary function test to the facts of the instant case. This Court should rely upon its analysis set forth in its most recent cases -- Doe v. Arguelles, Point I, supra; and Little v. Division of Family Services, 667 P.2d 49 (Utah 1983), Point III, infra.

POINT III

THE STATE OWED A CLEARLY DEFINED DUTY TO
PROTECT PRUE AND THOSE SIMILARLY SITUATED
FROM THE ACTS OF KENNETH ROBERTS.

The State, by undertaking the responsibility to incarcerate violent offenders, has a duty to protect both the public at large and individual citizens who might foreseeably be harmed by said offenders. The acts of Roberts that caused Prue's injuries were not only foreseeable, but expected. The State's employees' failure to act within the authority of their defined administrative parameters and in furtherance of their duty to protect Prue from Roberts substantially contributed to Prue's injuries.

The State erroneously argues that it owed Prue no duty greater than that owed to the public at large, from which they

conclude that she was owed no duty at all. This is not in accord with this Court's decisions. This Court's latest discussion upon the issue of duty is found in Beach v. University of Utah, 42 Utah Adv.Rep. 30 (1986), wherein this Court held:

The law imposes upon one party an affirmative duty to act only when certain special relationships exist between the parties. These relationships generally arise when one assumes responsibility for another's safety or deprives another of his or her normal opportunities for self-protection. The essence of a special relationship is dependence by one party upon the other or mutual dependence between the parties.

Id., at 32; citations omitted; emphasis added.

There is no question the State has assumed a special relationship of protecting the community and the individuals who make up that community. The State has imposed upon itself a duty to protect the general public. The Division of Corrections states the primary mission of corrections is community protection. The State's "public duty" analysis is defeated by its own publicly disseminated written statement setting forth this clear purpose.

The Utah State Corrections Annual Report states:

The primary mission of the Department of Corrections is community protection in a manner which also enhances the safety of staff and offenders. To accomplish this, Corrections is committed to the establishment of operational policies and procedures which provide for the development of security and offender programs and to identify, control and attempt to modify the inappropriate behavior of offenders.

Utah State Corrections Annual Report 1985, p. VII; Appendix E to Amicus Curiae Brief.

Utah Code Ann. §64-9a-3 (1953) allows release of inmates

during reasonable hours for rehabilitation so long as it will not cause any undue risk to the public. Utah Code Ann. §64-9a-4(1) (1953) requires the Division to create written rules and regulations governing the release of inmates from CCC's. This was done when the "leave policy" and the "intake and orientation of residents policies" (Exhibits 1 and 2 of Prue's Brief on Appeal) were created. Utah Code Ann. §64-9a-4(3) (1953) gave Weldon Morgan the authority to arrest Roberts if he was not complying with the rules of the CCC's while on home leave.

The State accepted the responsibility of keeping the public safe from Roberts and, by failing to follow its own policies and procedures, deprived the public of their "normal opportunities for self-protection", Beach, at 32, thereby establishing "the essence of a special relationship" which is "dependence by one party upon the other". Id. Once such a special relationship is established, "the law imposes upon one party"; i.e., the State respondents, "an affirmative duty to act."

This Court, in Little v. Division of Family Services, 667 P.2d 49 (Utah 1983), set out a three-step test for analyzing duty, negligence and proximate cause in an action against the State of Utah:

1. Was there a factual connection between defendant's conduct and plaintiff's injury? -- an issue of fact.

2. Was the risk to which the plaintiff was subjected within the scope of the defendant's duty? Whether defendant's conduct was a substantial cause or factor in the harm suffered by plaintiff determines whether legal liability extends sufficiently to protect

the plaintiff -- a question of law. What was the standard required of defendant to avoid liability? The standard of care must be gauged by the duty imposed -- a question of fact.

3. Was the standard of care breached? -- a questions of fact.

667 P.2d at 53.

The only legal issue available for resolution at this stage of the proceedings is: "Is the risk to which the plaintiff was subjected within the scope of defendant's duty?" Id. The Court in Little defines that legal question as "whether the defendant's conduct was a substantial cause or factor in the harm suffered by the plaintiff." Id. The State's conduct in this case was a substantial cause of LaDawn Prue's injuries.

There is no controlling Utah case law on the issue of duty in a correctional institution setting. As Judge Billings found in her Memorandum Decision at page 25, the better-reasoned cases follow the Restatement (Second) of Torts §319, 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.

This Court recognized the Restatement of Torts as controlling authority in defining duty in Beach v. University of Utah, supra, and should continue to follow the Restatement analysis here.

The basis for applying different standards under the "public duty" rule generally and the correctional release situation specifically is artfully discussed in Nelson, Victims' Suits Against Government Entities and Officials for Reckless

Release, 29 Am.U.L.Rev. 595, 614-15 (1980):

By voluntarily assuming control over inmates, the government also assumes the obligation to control their behavior . . .

The (public duty) rule, however, should not apply to the release of inmates from government detention facilities. The 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 on 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 had 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.

Citations omitted; emphasis added.

One of the latest cases to speak directly on the issue of duty in a correctional setting is Division of Corrections v. Neakok, 721 P.2d 1121 (Alaska 1986). In Neakok, the Alaska Court applied the "special relationship" duty test to a negligent release situation similar to the instant case. In the course of a lengthy analysis of duty, the Court stated:

The state's enhanced ability to observe the conditions under which a prisoner might be expected to be especially dangerous increases its potential ability to limit his dangerousness as a parolee.

The state thus stands in a special relationship with the parolee, both because of its increased ability to foresee the dangers the parolee poses and because of its substantial ability to control the parolee. Given this special relationship, it is not unreasonable to impose a duty of care on the state to protect the victims of parolees.

721 P.2d at 1126-27. The Court concluded its analysis by stating:

We therefore hold that state corrections personnel have the duty to use due care in supervising parolees and in protecting the foreseeable victims of parolees they know, or reasonably should know, to be dangerous. This duty requires that such officials take whatever precautions that a reasonable person with their knowledge and authority would take. We emphasize that the recognition of the duty does not make the state liable for all harm caused by parolees, but rather makes it liable only when its negligent supervision and administration of their parole causes the injury in question.

Id., at 1130, citing Lipari v. Sears Roebuck & Company, 497 F.Supp. 185, 192 (D. Neb. 1980).

Other State Supreme Court decisions discussing or adopting the special duty for correctional release situations of Restatement of Torts (Second) §319 include: Cansler v. State of Kansas, 234 Kan. 554, 675 P.2d 57 (1984); White v. State, 661 P.2d 1272 (Mont. 1983); Grimm v. Arizona Board of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227 (Ariz. 1977); State v. Silva, 86 Nev. 911, 478 P.2d 591 (1971); and Upchurch v. State, 51 Hawaii 150, 454 P.2d 112 (1969).

The State relies principally on three cases for support of its claims that there is no duty on the part of the State to protect or not increase the risk to LaDawn Prue. Two of these, Obray v. Malmberg, 26 Utah 2d 17, 484 P.2d 160 (1971), and Christenson v. Hayward, 694 P.2d 612 (Utah 1984), are distinguishable because their facts are based upon a "police duty" setting rather than a correctional setting. As there was no voluntary assumption of responsibility, those cases have no

application here. In the third, Humann v. Wilson, 696 F.2d 783 (10th Cir. 1983), the claim was brought as a civil rights claim under 42 U.S.C. §1983. The Tenth Circuit Court of Appeals confined its analysis to the issue of "state action" inherent in such federal claims, stating:

. . . The crime was too remote from state action to constitute a valid civil rights claim.

696 F.2d at 784; emphasis added. Contrary to defendants' argument, the Tenth Circuit specifically did not close the door on such actions by stating, "And again, we do not reach the immunity issue." 696 F.2d at 784.

Prue's injuries were a foreseeable result of the actions of Hatch and Morgan. Prior to Roberts' release in December, 1982, Roberts had already escaped from the Utah State Hospital's sex offenders program, had violated the trust granted him by the Parole Board on at least two other occasions, and violated the terms of his parole by engaging in more sexual violence and violent crimes.

In her reports, Merillee Rasmussen linked Roberts' impotency with his potential for violently "acting out" if he failed in his attempts at sexual relations with his wife. Everyone involved in the decision to release Roberts recommended gradually phasing him into society linked with intensive therapy, monitoring, and close supervision to see how he reacted as he was given increased amounts of freedom. Warden Shulsen and the Division of Corrections own Annual Report recognized the foolishness of allowing an inmate to go directly from protective custody to

complete freedom. The Parole Board required therapy as a condition of parole because they thought it was needed and that it would do some good. They recommended gradually phasing Roberts into society because they thought it was important. Conversely, if no therapy was given and Roberts was released immediately, it was foreseeable that Roberts would act out aggressively in a violent sexual manner.

The State owed a duty to LaDawn Prue. It negligently breached that duty and, as a result, she was shot and paralyzed. Judge Billings' analysis of the duty issue is sound and should be affirmed by this Court.

POINT IV

EVEN IF THIS COURT WERE TO UTILIZE THE "VARIG TEST", AN APPLICATION OF THAT TEST TO THE FACTS OF THIS CASE WARRANTS A REVERSAL OF JUDGE BILLINGS' RULING CONCERNING THE DISCRETIONARY FUNCTION EXCEPTION.

The State cites Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), and United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 260 (1984), as support for the notion that activities of subordinates are also protected by the discretionary function exception. Prue submits the following:

1. It is contrary to the Utah case law which has interpreted and developed the discretionary function exception (as more fully set forth in Point I of this Brief, supra); and

2. Even if this Court were to apply the "Varig test" to the facts of this case, it still warrants a reversal of the Trial

Court's ruling concerning discretionary function immunity.

Should this Court choose to diverge from the policy versus implementation analysis by applying the Varig or Dalehite tests, the outcome will remain the same. A subordinate does not have the power to act outside the parameters of his delegated authority. If the subordinate negligently does so, then he may be held liable for his actions.

The State cites Connell v. Tooele City, 572 P.2d 697 (Utah 1977), in support of its position that "in the trenches" employees are entitled to discretionary immunity. However, the holding in Connell supports Prue's position that State employees can only exercise discretion within the parameters of their authority. In Connell, this Court held:

On the other hand, if the employee's duties require no exercise of judgment or discretion, the reason for protecting his action does not exist.

572 P.2d at 699. A subordinate cannot exercise judgment or discretion to disregard the decisions made by his/her superiors.

The State cites Dalehite v. United States, supra, in support of its position, as follows:

The "discretionary function" . . . includes more than initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operation. Where there is room for a policy judgment and decision, there is discretion.

346 U.S. at 35-36. The language quoted by the State supports Prue's position. In the instant case, the establishment of the release procedures was discretionary. Prue argues that the

failure to follow those procedures is not discretionary.

The State has further quoted Dalehite as follows:

It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.

Id., at 36. Logic dictates that acts of subordinates in carrying out operations of government contrary to official directions should be actionable.

The State urges this Court to adopt a three-step "Varig" test to define particular conduct of a State employee as a "discretionary function", as follows:

1. The acts in question are of a nature and quality the Legislature intended to protect from liability.

Prue submits that the Legislature never intended to protect negligent employees who ignore written, established policies created by their superiors and then decide to bypass the system, resulting in injuries to citizens.

2. The acts involve government regulation of private individuals.

Prue agrees that they do.

3. The implementation of policy and goal has been left to the discretion of a government agency.

The implementation of the halfway house transfers policy was not left to the discretion of Leon Hatch and Weldon Morgan, but rather to the Warden, the ARB and the CCSC. The discretion in the implementation of the home leave policy was restricted by the parameters of the written guidelines. The negligent implementation of the policy by Hatch, Morgan and Milliken is actionable.

Whether the Court uses the Varig Airlines test, the ministerial operational test, or the policy-level versus implementation test, the inescapable conclusion is that the respondents' actions are not protected by immunity and that LaDawn Prue is entitled to her day in court.

For the foregoing reasons, LaDawn Prue urges this Court to reverse the portion of Judge Billings' ruling stating that the individual State defendants are immune from suit under the discretionary function exception.

POINT V

THE 1983 AMENDMENT TO UTAH CODE ANN. §63-30-4
IS NOT RETROACTIVE.

The State argues in its Brief that this Court should retroactively apply the 1983 amendment to Utah Code Ann. §63-30-4 (1953) deleting gross negligence as a ground for suing a State employee. The State argues that since LaDawn Prue could not have filed her action until after the expiration of ninety days, her right to sue the individual State defendants did not vest until after the operative date of the legislation.

The statute which was in effect at the time Prue's cause of action arose must apply. This is supported by both Utah statutory and case law. Utah Code Ann. §68-3-3 (1953) states:

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

Utah cases analyzing the application of statutes hold that an amendment to a statute cannot take away a vested right and that Courts must utilize the law as it exists at the time the

cause of action arose. See Okland Construction Company v. Industrial Commission, 520 P.2d 208 (Utah 1974); State Department of Social Services v. Higgs, 656 P.2d 998 (Utah 1982).

The cases cited by the State apply only to remedial legislation. The amendment to §63-30-4 is not "remedial legislation". If an individual sued a State employee in 1983 for gross negligence, the individual sued that employee outside the Governmental Immunity Act, Utah Code Ann. §63-30-1, et seq. (1953), and the Act has no application. Therefore, the individual would not have to comply with the notice requirement. Therefore, LaDawn Prue could have sued William Milliken, Leon Hatch and Weldon Morgan on the 24th of December, 1982, and her rights to sue for gross negligence vested on that date.

The State further argues that the individual State respondents have maintained their common law immunities. This is contrary to the plain language of §63-30-4, the holding of this Court in Madsen v. Borthick, 658 P.2d 627 (Utah 1983), and §68-3-3.

Any immunity a State employee retains in the exercise of his employment is confined within the parameters of the Governmental Immunity Act. Section 63-30-4 states that a State employee has no protection for injuries caused by his gross negligence. Therefore, a grossly-negligent State employee does not carry with him any common law immunity.

This Court should affirm Judge Billings' ruling that the individual State defendants are liable to Prue for her injuries

caused by their "gross negligence".

POINT VI

SOUND PUBLIC POLICY AND JUSTICE MANDATE THAT THIS COURT RULE THAT LADAWN PRUE IS ENTITLED TO HER DAY IN COURT AGAINST LEON HATCH, WELDON MORGAN, WILLIAM MILLIKEN AND THE STATE OF UTAH FOR COMPENSATION FOR HER INJURIES.

Under the guise of public policy, the State and the Amicus Brief request that this Court create a standard by which a subordinate state employee would be unanswerable to the public injured by the State's employees' negligent actions. This is contrary to Utah law and is bad public policy. Sound public policy supports the notion that State employees must follow established rules. If an employee decides on his own not to follow the rules, then he is liable to suit.

The policy versus implementation test is not a burden on the State and does not "open the floodgates". In fact, it affords the State an opportunity to minimize its risk of liability. If the State adopted coherent rules, regulations and criteria concerning the transfer of inmates to halfway houses and what steps corrections personnel should take in supervising an inmate, and then ensured those rules were followed, there would be no basis for the establishment of negligence and the State would be immune from suit.

Prue agrees with the statement at pages 16 and 17 of the Amicus Brief:

This Court should limit its dealings to law and legal principles, here, in the Prue v. State of Utah case, and leave the public policy issues to the legislative forum.

If the State of Utah is uncomfortable with the way the Governmental Immunity Act is written, then the State may lobby the Legislature for an amendment to the Act. This Court must not assume that responsibility. LaDawn Prue is entitled to her day in court and she respectfully requests that this Court provide her that opportunity.

CONCLUSION

Doe v. Arguelles is good law. Applying the Doe policy level versus implementation test, or any other test this Court wishes to utilize, to the facts of this case leads to the conclusion that the State respondents were not engaged in a discretionary function when they violated previously established procedures and allowed Roberts an ill-advised Christmas honeymoon with his wife. The State negligently breached its duty to LaDawn Prue in releasing and failing to supervise Roberts. As a direct, foreseeable and proximate result, LaDawn Prue was shot and paralyzed.


Prue is entitled to her day in court against the State of Utah, together with William Milliken, Leon Hatch, and Weldon Morgan, both individually for gross negligence and in their representative capacities for simple negligence.

Therefore, LaDawn Prue prays that this Court reverse Judge Billings' Order dismissing Prue's Complaint against the State, Milliken, Hatch and Morgan in their representative capacities for their negligence, and affirm Judge Billings' Order denying Milliken, Hatch and Morgan's Motion for Summary Judgment for

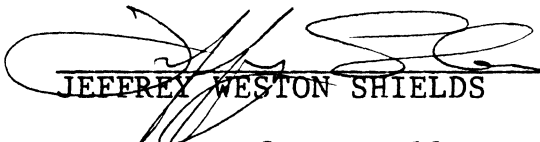
their gross negligence, award appellant's costs incurred in this appeal, and remand this case for trial.

DATED this 17 day of October, 1986.

HALEY & STOLEBARGER



GEORGE M. HALEY



JEFFREY WESTON SHIELDS
Attorneys for Appellant

ADDENDUM "A"

WEEKEND LEAVE

WED	_____
DATE	_____
SUSPENSE	_____

Weekend leave will be taken in the period of time from Friday after work until 11:00 p.m. Sunday. (In the case of Monday holidays, it can be extended one day.)

Leave is not to be considered automatic, but must be earned. Normally, a resident will have no leave his first three weekends in the center. Assuming a resident has performed well, he may be permitted weekend leave as follows:

Forth weekend: one day
Fifth weekend: two days
Sixth weekend: three days

Married residents may have overnight leave when they have two or more days' leave coming. Overnight leave will not normally be granted to single residents, but rare exceptions can be made where circumstances warrant. Justifiable circumstances include emergency situations, rewarding the resident for some outstanding service to the center, or rewarding him for excellent performance over a period of time.

Residents will not be allowed to schedule leave activities together.

Any resident who is eligible and wants to go on weekend leave must fill out a leave application, putting down the activities that he intends to engage in, the places he will be going, the people he will be with the times, etc. These activities must be approved by his counselor. The counselor should confer with his resident and read the leave application carefully, making sure that all stated activities are legitimate and that there are no gaps of time or lacks of other pertinent information. A counselor may allow a resident the privilege of putting down two or three alternate places to be, such as home, girl friend's, etc., without having to state specific

WEEKEND LEAVE
Page Two

times as long as a resident can be reached by phone at one of the alternate places. For any activity where a resident cannot be reached by phone, specific times must be put down on the leave application.

The application must be submitted in advance, in sufficient time for the counselor to structure the weekend leave activities no later than Thursday evening. If the application is not submitted in time, the counselor may deny weekend leave privileges.

The custody officer on weekend duty may give permission for a resident to make minor changes in his leave, such as allowing him to go howling instead of going to a movie. Extensions of time or requests to leave the Ogden area may not be granted.

A resident may be allowed to return to the center and leave again for such reasonable activities as changing clothes, getting meals, etc. Custody officers are also to log any such return, noting carefully how long a resident stays and any other information that may be pertinent, particularly if there are any suspicious circumstances.

If a man loses a day's leave for an infraction he should lose an entire day; in other words, Saturday or Sunday.

Special four-hour leave may be granted under compelling circumstances in rare instances when something unforeseen occurs and the resident is sure his counselor will approve. The resident will be held responsible if it develops his counselor does not approve. This is not to be used as an excuse to leave the center to do something that could be structured and taken care of later. It is to be used rarely.

ADDENDUM "B"

Jackson Howard, for:

Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY, STATE OF UTAH

THOMAS L. EPTING, II, and
AMY LYNN EPTING, by and
through their general
guardian, JAMES B. HANEGAN,

Plaintiffs, : COMPLAINT

vs. :

STATE OF UTAH, : Civil No. _____

Defendant. :

Come now the plaintiffs and complain of the defendant and
for cause of action, allege:

1. The plaintiffs are minor children residing in Utah
County, State of Utah, and appear in this action by their
general guardian and Grandfather, James B. Hanegan.

2. The defendant is a governmental entity.

3. The plaintiffs filed a claim against the defendant
pursuant to the Utah State Tort Claim Act on the 5th day of
December, 1974, and the defendant has failed to accept or
deny the said claim and more than three months has expired
since the filing of the claim. A copy of the claim is
attached, incorporated and made a part of this complaint.

4. On or about the 10th day of October, 1974, Michael
Hart was an inmate in the Utah State Penitentiary under the
control and custody of the warden of that penitentiary and
his subordinate officers.

5. Michael Hart was incarcerated as a result of a crime involving moral turpitude, to-wit: arson, and by reason of the fact that he had a long history of violent criminal conduct, was known to the defendant, or should have been known to the defendant as being violent, malicious, incorrigible and a sexual deviate.

6. The criminal and dangerous propensities of the prisoner, Hart, were known to the defendant or, with the exercise of reasonable care, should have been known to the defendant and notwithstanding this fact, the defendant, acting by and through its agents, officers and employees, allowed the prisoner to be released from custody without an order of the Court, without having served his sentence, and without having been rehabilitated; and in doing so, the defendant failed to exercise ordinary prudent control over the prisoner, thereby exposing the general public to the danger and risk attendant to such exposure.

7. The care of prisoner Hart by the defendant was so flagrantly negligent that those charged with his custody and supervision allowed him to purchase alcoholic beverages, to drink them while in custody and to regulate the terms and conditions of his own incarceration to suit his (Hart's) convenience.

8. On or about the 10th day of October, 1974, prisoner Hart failed to return to the prison and this fact was known to the defendant, its officers, agents, and employees as of 9:30 p.m. on that date.

9. It was known to the defendant, its officers, agents and employees that the prisoner was acquainted with one, Cynthia Hanegan Mitchell, the mother of the plaintiffs, and the defendant knew or should have known that the prisoner was a former resident of Orem and that in light of his acquaintance

with Cynthia Hanegan Mitchell and her husband, he was likely to seek out and find Cynthia Hanegan Mitchell and her husband, and notwithstanding the knowledge known to the defendant, its officers, agents and employees, the defendant failed and neglected to inform Cynthia Hanegan Mitchell or her husband or relatives, or the Orem Police Department, of such escape and the defendant failed to exercise prudent, diligent and prompt efforts to apprehend the said prisoner after he had escaped and knowing the facts of the prisoner's propensities and his likely objectives and destinations, the defendant, nevertheless, did not act in a reasonable manner to apprehend the said prisoner

10. The prisoner Hart, on or about the 10th day of October, 1974, did batter, rape and murder Cynthia Hanegan Mitchell, the mother of the plaintiffs.

11. By reason of the negligence of the defendant, the plaintiffs have been deprived of the comfort, society, love and support of their mother all to their general damage in the amount of \$1,000,000.00.

WHEREFORE, plaintiffs pray judgment against the defendant as follows:

1. For compensatory damages in the amount of \$1,000,000.00.
2. For costs of this action and such other relief as to the Court may seem just and proper in these premises.

s/ Jackson Howard
Jackson Howard, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiffs
120 East 300 North
Provo, Utah 84601

Plaintiffs' Address:

840 West 400 South
Provo, Utah 84601

CLAIM

This Claim is made against the State of Utah by Thomas L. Epting and Amy Lynn Epting, acting by and through their general guardian, James R. Hanegan. This claim is founded upon the negligence of the State of Utah, its officers and agents, to-wit: the Warden of the Utah State Penitentiary and his subordinates, in failing to guard and maintain custody of one, Michael Hart, a convicted felon with a known propensity for violence, and, further, the said officers were negligent in failing to pursue the said escapee, and in failing to warn local residents, and in particular, under the circumstances in this case, in failing to warn the decedent and her husband, Richard M. Mitchell, that Michael Hart had escaped. As a result of the negligence of the officers and employees of the State in this regard, the said Michael Hart on the __ day of October, 1974, escaped custody and thereafter in Utah County, State of Utah, assaulted and murdered Cynthia Epting Mitchell, the mother of your claimants, all to their general damage in the amount of \$1,000,000.00.

This claim is filed pursuant to Title 63, Chapter 30, of Utah Code Annotated, 1953, as amended.

Govern yourself accordingly.

DATED this 5th day of December, 1974

(s) James R. Hanegan
JAMES R. HANEGAN
Guardian of:
Thomas L. Epting and Amy Lynn
Epting

STATE OF UTAH)
 : ss.
COUNTY OF UTAH)

On the 5th day of December, 1974, personally ap-
peared before me, a Notary Public in and for the State of
Utah, James R. Hanegan, the signer of the above instru-
ment, who duly acknowledged to me that he executed the
same.

My Commission Expires:

12/14/77.

Lawrence Howard
NOTARY PUBLIC

Residing at Perry, Utah

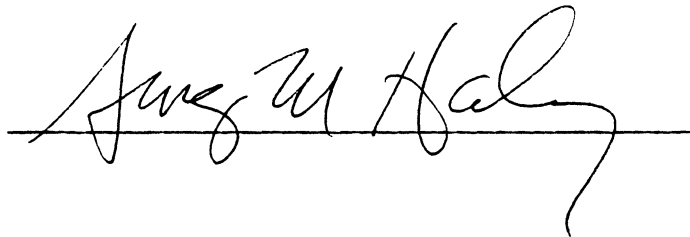
CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing Appellant's Reply Brief were mailed and/or hand-delivered on the 17 day of October, 1986, to the following parties:

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A handwritten signature in cursive script, reading "Angus M. Haley", is written over a horizontal line.