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Utah Supreme Court

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(2)

IN THE SUPREME COURT OF THE STATE OF UTAH

CRAIG CURTIS SMITH, Plaintiff/Appellant, vs. FOUR CORNERS MENTAL HEALTH CENTER, INC., a Utah Corporation, LARRY RANDALL and CAROLYN RANDALL, and unknown Defendants, X, Y, and Z, Defendants/Appellees.	**Supreme Court Case No.** 20010826-SC District Court No. 980700161 Argument Priority Classification No. 15

BRIEF OF APPELLEES LARRY AND CAROLYN RANDALL

APPEAL FROM SUMMARY JUDGMENT ENTERED SEPTEMBER 10, 2001 BY SEVENTH JUDICIAL DISTRICT COURT, HONORABLE BRUCE K. HALLIDAY

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JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction to decide the issues on appeal in the instant case pursuant to Utah Code Ann. § 78-2-2(3)(j) (1996). Because the matter comes before the Court as an appeal of a summary judgment in a civil case not involving domestic relations, pursuant to Utah Code Ann § 78-2a-3(2) (1996), it is not within the original jurisdiction of the Utah Court of Appeals, and was, therefore, appropriately transferred to the Utah Supreme Court. (*See* R. at 200 for the Court's Order.)

STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

ISSUE NO. 1: Whether Craig Curtis Smith ("Smith") is precluded on appeal from challenging the trial court's factual findings given that he did not marshal the evidence.

STANDARD OF REVIEW: As has been correctly argued by Four Corners in its appellate brief, an appellant who attacks the sufficiency of a court's factual findings must first marshal all of the evidence that supports the court's judgment, and then show that the evidence cannot support the judgment. Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985).

CITATION TO THE RECORD SHOWING THIS ISSUE WAS PRESERVED IN THE TRIAL COURT: The requirement of marshaling the evidence arises on appeal.

ISSUE NO. 2: Whether summary judgment in favor of Larry and Carolyn Randall should be affirmed on the grounds that the Randalls were clothed with the same governmental immunity from suit as the Division of Child and Family Services has.

STANDARD OF REVIEW: Summary judgment is proper only when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. Utah

R. Civ. P. 56(c). Whether the trial court's granting of a motion for summary judgment on grounds of governmental immunity was appropriate is a question of law; the appellate court accords no deference to the trial court's legal conclusions. Hall v. Utah State Dept. of Corrections, 24 P.2d 958, 962 (Utah 2001); Wilson v. Valley Mental Health, 969 P.2d 416, 417-18 (Utah 1998). The appellate court resolves only legal issues on an appeal from a summary judgment; it reviews the trial court's ruling to determine whether the trial court correctly held that no disputed issues of material fact existed. Taylor v. Ogden School Dist., 927 P.2d 159, 162 (Utah 1996). The granting of a summary judgment can be affirmed "on any ground available to the trial court, even if not relied on below." Wilson at 418.

CITATION TO THE RECORD SHOWING THIS ISSUE WAS PRESERVED IN THE TRIAL COURT: The Randalls' Memorandum of Points and Authorities in Support of Motion for Summary Judgment (R. at 102-103); Oral Arguments dated March 20, 2001, (R. 205, p. 29); and Oral Arguments dated June 19, 2001 (R. at 206, p. 17-21 and 23-25).

ISSUE NO. 3: Whether summary judgment in favor of Larry and Carolyn Randall was proper on the grounds that Smith did not timely comply with notice and prelitigation procedures of the Utah Health Care Malpractice Act, U.C. A. § 78-14-1, *et seq.* (hereinafter "UHCMA").

STANDARD OF REVIEW: Whether the Randalls, like Four Corner's Mental Health, were health care providers entitled to the protections of UHCMA is a question of law reviewed for correctness. Platts v. Helping, 897 P.2d 1228, 1230 (Utah Ct. App. 1995). See the additional standards set forth under Issue No. 2, above.

CITATION TO THE RECORD SHOWING THIS ISSUE WAS PRESERVED IN THE TRIAL COURT: The Randalls did not argue to the court below that they should be

protected by the provisions of the UHCMA. The Court, *sua sponte,* ruled that the Randalls were entitled to the same statute of limitations protection as were Four Corners.

ISSUE NO. 4: Whether, as foster parents appointed by the court, the Randalls are immune from claims of simple negligence.

STANDARD OF REVIEW: As was previously noted, the granting of a summary judgment can be affirmed "on any ground available to the trial court, even if not relied on below." Wilson at 418. *See also,* Straub v. Fisher and Paykel Health Care, 990 P.2d 384, 386 (Utah 1999). Though raised by the Randalls in their Memorandum in Support of Motion for Summary Judgment, the trial court did not rule on this issue. The Randalls are asking the court to create a new legal standard in this case that pertains to court-appointed foster parents, such as the Randalls. Whether this Court should hold that the Randalls are immune from claims of liability for simple negligence is a mixed question of fact and law. Factual findings are reviewed for clear error and the legal conclusions for correctness. Nunley v. Weststates Casing Servs., 989 P.2d 1077, 1083 (Utah 1999).

CITATION TO THE RECORD SHOWING THIS ISSUE WAS PRESERVED IN THE TRIAL COURT: The Randalls' Memorandum of Points and Authorities in Support of Motion for Summary Judgment (R. at 102-103) and Oral Arguments dated June 19, 2001 (R. at 206, p. 30).

ISSUE NO. 5: Whether, as foster parents appointed by the court, the Randalls had a legal duty to protect Smith from assault by a third person.

STANDARD OF REVIEW: Again, the granting of a summary judgment can be affirmed "on any ground available to the trial court, even if not relied on below." Wilson at 418. *See also,* Straub at 386. Though this issue was raised by the Randalls in their Memorandum in Support of Motion for Summary Judgment below, the trial court denied summary judgment on the ground that disputed issues of material fact existed (R. at 188). The Randalls are asking this Court to create a new legal standard in this case that pertains to court-appointed foster parents such as the Randalls. Whether this Appellate Court should hold that the Randalls had a duty to protect to protect Smith from assault by a third person is a mixed question of fact and law. Factual findings are reviewed for clear error and the legal conclusions for correctness. Nunley at 1083.

CITATION TO THE RECORD SHOWING THIS ISSUE WAS PRESERVED IN THE TRIAL COURT: The Randalls' Memorandum of Points and Authorities in Support of Motion for Summary Judgment (R. at 99-101).

ISSUE NO. 6: Whether the trial court committed plain error in granting summary judgment when discovery requests from Smith to Four Corner's remained unanswered.

STANDARD OF REVIEW: Trial Courts are given broad discretion over matters involving discovery, and a court's determination on discovery matters is reviewed for abuse of discretion. Dugan v. Jones, 615 P.2d 1239, 1244 (Utah 1980). A review of a grant or denial of a Rule 56(f) motion is likewise reviewed under an abuse of discretion standard; a

failure to review missing evidence is not reversible error unless, but for the error, the outcome of the proceedings would have been different. Berrett v. Denver and Rio Grande W. R., 830 P.2d 291, 293 (Utah Ct. App. 1992).

CITATION TO THE RECORD SHOWING THIS ISSUE WAS PRESERVED IN THE TRIAL COURT: Smith raised this issue in his brief. It is the Randalls' and Four Corner's position that the matter was not properly preserved in the trial court and should not be considered on appeal.

ISSUE NO. 7: The Affidavit of Tracy Morris contains hearsay and unfounded opinion testimony, and Smith should not be allowed to add evidence to the record on appeal.

STANDARD OF REVIEW: Pursuant to Utah Rules of Appellate Procedure 24(h), the Randalls hereby adopt by reference the arguments of Four Corners as set forth under point 6 on pages 20 through 21 of its brief. This issue should be reviewed for clear error. State v. Parker, 2000 UT 51, ¶ 13, 4 P.3d 778, 781 (Utah 2000).

CITATION TO THE RECORD SHOWING THIS ISSUE WAS PRESERVED IN THE TRIAL COURT: Defendant Randall's Motion to Strike portions of Tracy Morris Affidavit and supporting Memorandum (R. at 160-164); Objection to Want Ads, Oral Argument (R. at 206, pp. 21-22).

KEY STATUTES

The meanings and applications of the following statutes are key in this case:

1. Utah Code Ann. § 63-30-4, subsections (3)(b) and (4), in their pertinent parts:

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

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

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

2. Utah Code Ann. § 63-30-2(2)(a):

"Employee" includes a governmental entity's officers, employees, servants, trustees, commissioners, members of a governing body, members of a board, members of a commission, or members of an advisory body, officers and employees in accordance with Section 67-5b-104, student teachers certificated in accordance with Section 53A-6-101, educational aides, students engaged in providing services to members of the public in the course of an approved medical, nursing, or other professional health care clinical training program, volunteers, and tutors, but does not include an independent contractor."

SUPPLEMENTAL STATEMENT OF THE CASE

The following statement of the case includes several issues not included in Smith's brief and also includes references to the record as required in the Utah Rules of Appellate Procedure.

During all relevant times in this case, Larry and Carolyn Randall (hereinafter **"Randalls"**) were court-appointed foster care providers who were licensed, approved and controlled by the State of Utah, Division of Human Services (also referred to in this matter as the Division of Child and Family Services (hereinafter collectively referred to as **"DHS"**) (R. at 002, ¶¶ 7-8). In addition, the Randalls were supervised by Four Corners Mental Health (hereinafter **"Four Corners"**) (R. at 002, ¶ 9).

Appellant Craig Smith claimed that during June 1993, while he was in the Randalls' care, he was sexually assaulted by another male foster child assigned to the Randalls (R. at 002 ¶¶ 13-14). Smith's Complaint alleged that the "Randalls were negligent and left [Smith] and the other foster placement unattended and without supervision thus allowing the attack on [Smith] to take place" (R. at 003, ¶ 17). Related claims were made against Four Corners and DHS (R. at 003-004).

DHS filed a motion to dismiss on or about January 7, 1999, asserting governmental immunity (R. at 014-15). Said motion was granted (R. at 026-27). While DHS's dismissal is not directly challenged in this appeal, it is highly significant because the trial judge incorporated DHS's arguments and its dispositive ruling on the Motion to Dismiss in granting the Randall's Motion for Summary Judgment. (R. at 188-89).

During October of 2000, the Randalls and Four Corners filed separate Motions for Summary Judgment and supporting memoranda (R. at 047-82 and 093-104). In general, the Randalls asserted that the undisputed facts proved they were not negligent, and the Randalls claimed that they were protected by the shield of governmental immunity to the same extent as DHS. Four Corners claimed, among other things, that Smith's claim was time barred under the Utah Health Care Malpractice Act (hereinafter **UHCMA"**). Following oral argument the court granted summary judgment for both parties (R. at 191). With respect to the Randalls, the trial court concluded that because of their relationship to DHS and Four Corners, the Randalls were "clothed with the same immunities and statute of limitation

protection as the Division of Child and Family Services [DHS] and Four Corners Mental Health" (R. at 189). Smith appeals the summary judgment ruling.

SUPPLEMENTAL STATEMENT OF FACTS

Smith has not marshaled the evidence. Consequently, the Randalls necessarily supplement the Smith's statement of facts. *See* Oneida/SLIC v. Oneida Cold Storage, 872 P.2d 1051, 1053-54 (UT Ct. App. 1994) (supplemental facts needed when appellant fails to marshal evidence).

1. Smith erroneously claims in Paragraph 1 of his Brief that the Randalls admitted during oral arguments that they are not a governmental entity immune from suit under the Utah Governmental Immunity act. The record does not support that claim. Four Corners alone admitted that it was not a governmental entity immune from suit. The Randalls, on the other hand, re-asserted their immunity claim. (Oral Arguments dated June 19, 2001, R. at 206, p. 17-21 and 23-25.)

2. The following statement is contained in the trial court's Memorandum Decision: "[B]ecause of the relationship of the Randalls with Division of Child and Family Services as the contractee (foster parents), and also because of the relationship which the Randalls have with Four Corners Mental Health, that is as foster parents or individuals supervised by/and for whom services were rendered by Four Corners Mental Health, the arguments which Four Corners Mental Health makes, which are beneficial to the Randalls as agents of Four Corners Mental Health as well as the arguments which Division of Child and Family Services previously made this Court believes controlling." (R. at 188-89.)

3. The Randall's Memorandum in Support of Motion for Summary Judgment (R. at 095-098) sets forth the following undisputed facts supported in the record as indicated:

> 1. On or about the 14th day of January, 1992, Craig Smith (**"Smith"**) was placed in DHS custody by order of the Seventh Judicial District court. (Complaint at ¶ 7.)
>
> 2. During March, 1992, DHS placed Smith in the home of the Randalls, persons who were licensed, approved and controlled by DHS as foster parents. (Larry and Carolyn Randall Affidavit. at ¶ 2, hereinafter referred to as the **"Randall Aff."**)
>
> 3. During February, 1992, DHS and/or Four Corners placed James Bybee (**"Bybee"**) in the Randall's home. Thus, Bybee was already in the Randall home at the time Smith was placed in the home. (Randall Aff. at ¶ 3.)
>
> 4. At the time Bybee was placed in the Randall's home, the Randalls were not made aware of or informed in any way that Bybee possessed a violent character or demonstrated homosexual tendencies. They were not instructed that he presented a risk of any kind to Smith or anyone else and they were not told to provide special and/or intensive supervision of Bybee or Smith. In fact, Bybee was working toward independent living and was under the least restrictive supervision available in the agency program. (Randall Aff. at ¶ 4.)
>
> 5. With full knowledge of the placing agency, Bybee and Smith shared the same bedroom for almost a year before Bybee left the Randall home in about February 1993. They did so without incident (other than the normal type of disputes typically exhibited between brothers who might share a bedroom). On at least three occasions, the boys were even authorized by the agency to sleep together outside unsupervised. (Randall Aff. at ¶ 5.)
>
> 6. The Randalls, on their own, did not know and had no reason to know of Bybee's alleged homosexual and violent tendencies, and at no time had any reason to suspect that he posed any kind of risk to others, especially boys. While he was with the Randalls, and even before the incident in question, Bybee's supervisors allowed him to date females, without supervision. Bybee dated on various occasions without incident. (Randall Aff. ¶ 6.)
>
> 7. Smith claims that during June 1993, Bybee bound Smith with ropes and also gagged him so he couldn't speak or yell. He then allegedly assaulted

Smith, touching his penis and anus, and raped him. (See Complaint at ¶ 14 & 15.)

8. At the time of the alleged commission of crimes by Bybee against Smith, the Randalls had no knowledge of any wrong doing and had no reason to anticipate or foresee any such problem. To this day, the Randalls are not sure exactly which night the alleged incidents took place. If they occurred during sleep outs, there is nothing the Randalls could have done to foresee or control the situation. The boys had been authorized to sleep out and had been sleeping unsupervised in the same room for almost three months by that time. The Randalls reported any allegations they received immediately. (See Randall Aff. ¶ 7). Smith never told the Randalls about the rape. The boys continued living together for up to eight additional months after the alleged rape and never said anything and did not act as though anything was wrong. (See Randall Aff. at ¶ 7.)

9. Smith remained in the Randall home after Bybee left. The Randalls had a great relationship with Smith. Smith fit in perfectly with their family. The Randalls loved Smith and would have gladly adopted Smith had they been given the opportunity (Smith would have been returned to the Randall home a short time after first leaving but sadly they were not allowed to take him because they had two other boys in their home at that time). The Randalls frequently engaged in open dialogue with Smith and never detected any problem. (See Randall Aff. at ¶ 8.)

10. The Randalls were shocked about the accusations when they learned of them. In part, they were surprised because they felt that Smith was stronger and tougher than Bybee and would have never allowed such an incident to occur. (See Randall Aff. at ¶ 9.)

11. At all times in question, the Randalls provided proper care and supervision over Smith and Bybee. (See Randall Aff. at ¶ 10.)

SUMMARY OF ARGUMENTS

The trial court correctly concluded that because of the relationship between DHS and the Randalls, who at all times relevant herein were serving as court-appointed foster parents, the Randalls were cloaked with governmental immunity to the same extent as DHS. Smith cannot challenge the factual findings pertaining to the relationship between the Randalls and

DHS, or any other factual matters, because he failed to marshal the evidence supporting the Court's findings. The appellate court should accept the trial court's factual findings as valid.

Based on the doctrine of "law of the case," it is incontrovertible that DHS was immune from suit under the Utah Governmental Immunity Act, Utah Code Ann. § 63-30-10, as a governmental entity that was engaged in a governmental function when the alleged assault took place. Because of and their relationship to DHS as court-appointed foster parents, the Randalls' were "employees" under the Act and are likewise immune from suit pursuant to the Utah Governmental Immunity Act.

Furthermore, the Randalls were protected by the provisions of the Utah Health Care Malpractice Act ("UHCMA") found at Utah Code Ann. §§ 78-14-1 to 78-14-16. The trial court, *sua sponte,* ruled that the Randalls were entitled to the same UHCMA statute of limitation protection as Four Corners. At the time of the incident in question, Four Corners was a "health care provider" under the UHCMA. Because of the special relationship between the Randalls and Four Corners, the Randalls were agents of Four Corners and, thus, protected under the UHCMA. Smith failed to timely file the required notice of intent to commence action, failed to seek prelitigation panel review as required under the UHCMA, and is thus barred by the statute of limitations from pursuing a UHCMA claim against the Randalls.

The Randalls also assert that foster parents cannot be held liable for acts or omissions involving simple negligence. They request that the court adopt the common law principle

that parents, or those standing *in loco parentis* (such as foster parents), can only be held liable for willful or wanton misconduct toward children in their care.

As another alternative argument, the Randalls argue that no special relationship existed between them and the foster placements, including Smith. Since there was no special relationship, the Randalls did not owe a duty of care to Smith and, therefore, cannot be held liable for damages sustained by Smith on the theory of simple negligence.

Additionally, the Randalls argue that the court should reject Smith's complaints regarding Four Corner's failure to fully respond to interrogatories. Smith did not properly preserve the matter in the court below. He failed to file a motion under URCP 56(f) and did not file a motion to compel.

Finally, as to the last two arguments, the Randalls adopted the arguments of Four Corners. The court should disregard the inadmissible hearsay and opinion statements contained in the affidavit of Tracy Morris and should disregard the want ad that was improperly offered into evidence by Smith during oral arguments.

ARGUMENTS

I. Smith Failed to Properly Marshall the Evidence and Is Precluded from Challenging the Trial Courts Factual Findings.

Pursuant to Utah Rules of Appellate Procedure 24(h), the Randalls hereby adopt by reference the arguments of Four Corners as set forth under point 4 on pages 19 through 20 of its Brief. Because Smith has made no attempt to marshal the evidence, he should not be allowed to challenge on appeal the court's factual findings regarding the relationship between the Randalls and DHS and the Randalls and Four Corners.

II. The Randalls Were Clothed with the Same Governmental Immunity as the Division of Child and Family Services.

The trial court's legal conclusion that the Randalls were clothed with governmental immunity to the same extent as the Division of Child and Family Services, referred to herein as "DHS," can best be understood by simultaneously keeping in mind two key rulings in the court below. First, the trial court ruled on a Motion to Dismiss filed by DHS that DHS was immune from suit in this case (R. at 026-27). Smith has not appealed that ruling. Second, in granting summary judgment in favor of the Randalls, the trial court explicitly incorporated and relied upon the arguments raised by DHS in its Motion to Dismiss; the trial court concluded that the Randalls were immune from suit to the same extent as DHS (R. at 188-89). The import of each of these issues is explained below.

In its Motion to Dismiss, DHS successfully argued that it was immune from suit pursuant to Utah Code Ann. § 63-30-10, which provides, in relevant part:

> Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of, in connection with, or results from: . . . . (2) assault, battery, false imprisonment. . . .

The trial court specifically adopted DHS's factual and legal arguments and concluded that DHS was immune from suit for the alleged assault pursuant to Utah Code Ann. § 63-30-10(2) (R. at 027). As supporting legal precedent, the trial court relied upon the legal doctrines set forth in Ledfors v. Emery County School District, 849 P.2d 1162 (Utah 1993) (school district immunized from suit arising out of battery of student by two fellow students; court to focus on the conduct out of which the injury arose, not the legal theory crafted by

plaintiff) and Sheffield v. Turner, 445 P.2d 367 (Utah 1968) (warden and prison officials immune from suit where one inmate has injured another).

Smith did not appeal or in any way challenge the trial court's ruling that DHS was immune from suit in this case. Thus, the court's factual and legal conclusions on that issue are conclusive in this appeal, *i.e.*, DHS was a governmental entity performing a governmental function and the alleged harm against Smith constituted an assault and/or battery; therefore, DHS was immune from suit by Smith against it. *See e.g.*, Thurston v. Box Elder County, 892 P.2d 1034, 1037 (Utah 1995) ("law of the case" doctrine provides that decision made on an issue during one stage of case is binding in successive stages of same litigation).

Given the law of this case, the sole question now before this Court on the issue of immunity is whether the Randalls, who were acting as court-appointed, foster parents at the time of the alleged assault and battery, are cloaked with the same immunity as DHS. The trial court correctly concluded that they were.

It is an undisputed fact in this case that "Smith was placed in DHS custody by order of the Seventh Judicial District Juvenile Court" and that "DHS placed Smith in the home of the Randalls, persons who were licensed, approved and controlled by DHS as foster parents" (R. at 002, ¶¶ 7 &8). Based on such facts,[1] the trial court logically concluded that the Randalls had a relationship with DHS as "contractee[s] (foster parents)" and that based on that legal relationship the Randalls were "clothed with the same immunities" as DHS (R. at 188-89). In reaching that conclusion, the trial court explicitly incorporated the arguments

[1]The trial court does not detail the factual basis for its conclusion.

made by DHS in its successful Motion to Dismiss (R. at 189). The trial court correctly and necessarily concluded that the Randalls were employees of a governmental entity and, therefore, were immune from suit for the injuries arising out of the alleged assault and battery.

Utah Code Ann. § 63-30-4, subsections (3)(b) and (4), in their pertinent parts, provide:

> (b) A plaintiff may not bring or pursue any other civil action or proceeding based upon the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless:
> (i) the employee acted or failed to act through fraud or malice;
>
> (4) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice.

(Emphasis added).

An "employee" is defined in Utah Code Ann. § 63-30-2(2)(a) as follows:

> [A] governmental entity's officers, employees, servants, trustees, commissioners, members of a governing body, members of a board, members of a commission, or members of an advisory body, officers and employees in accordance with Section 67-5b-104, student teachers certificated in accordance with Section 53A-6-101, educational aides, students engaged in providing services to members of the public in the course of an approved medical, nursing, or other professional health care clinical training program, volunteers, and tutors, but does not include an independent contractor."

The Randalls were employees or servants of DHS and, therefore, "employees" under the Governmental Immunity Act. As court-appointed foster parents, they were "licensed, controlled and supervised" by DHS (R at 002, ¶ 8). As employees of DHS, they are entitled

to the same immunity as their governmental employer. That conclusion is consistent with the language and intent of the Governmental Immunity Act. In articulating its reasoning as to why a prison warden is immune from suit for negligent acts under the Governmental Immunity Act, the Utah Supreme Court in Sheffield, *supra* at 369, spoke of "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." The Court further stated:

> If such officials are too vulnerable to lawsuits for anything untoward which may happen to inmates a number of evils follow, including a breakdown of discipline and the fact that capable persons would be discouraged from taking such public positions.

Foster parents too have an imperative need for reasonable freedom to discharge the equally burdensome, yet incomparably sacred, responsibilities of child-rearing, and all that it entails. Like other public servants whose duties immerse them in dealing with people of varying background and behavior, foster parents deserve protection from tort liability for simple instances of negligence.

But unlike a prison warden, foster parents often have an even greater responsibility to shelter, feed, clothe, discipline, and provide loving care for troubled, *yet dependent*, youths, without the benefit of on-site security staff, 'round the clock surveillance capabilities, and detention facilities. Therefore, foster parents should be shown greater protection from tort liability in relation to the children in their care.

Parenthood, like childhood, is an inherently risky undertaking. As the events of just the past few months have so starkly shown, even the most loving and responsible parents,

despite their best efforts, cannot protect their child from the vicissitudes of life or from the depraved who prey upon the innocent and the vulnerable. The foster parent program provides needy children and the State with an overwhelmingly superior (and considerably less costly) alternative to the fate such children and society would otherwise confront. Adopting a simple negligence standard for such a program would not only chill the willingness of potential foster parents, but among existing foster parents would dictate "defensive parenting" concerned more with risk avoidance and self-preservation than the self-sacrifice that decent parenting demands.

Accordingly, state-appointed foster parents in general (and the Randalls specifically under the facts of this case) should be deemed governmental employees under the Utah Governmental Immunity Act who are immune from suit under the provisions of the Utah Governmental Immunity Act. In this case, the trial court properly concluded that the Randalls, as court-appointed and DHS supervised foster parents, were clothed with the same governmental immunity as DHS.[2]

[2]*See, e.g.,* Pickett v. Washington Cty, 572 P.2d 1070, 1073-74 (Oregon Ct. App. 1977)(foster parents generally immune from liability for acts and omissions relating to provision, care, and custody of a ward).

III. Smith failed to timely comply with notice and prelitigation procedures of the Utah Health Care Malpractice Act ("UHCMA").

As has been previously noted, the Randalls did not argue in the court below that they should be protected by the provisions of the UHCMA. The Court, *sua sponte,* ruled that the Randalls were entitled to the same statute of limitations protection as Four Corners. Pursuant to Utah Rules of Appellate Procedure 24(h), the Randalls hereby generally adopt by reference the arguments of Four Corners as set forth under point two on pages 14 through 16 of its brief. What follows is an explanation of why or how the legal principles discussed by Four Corners are applicable to the Randalls, as well.

The Randalls are protected by the provisions of the UHCMA under the narrow and specific facts of this case. The trial court made a factual finding that due to the relationship between the Randalls and Four Corners, the Randalls were "agents" of Four Corners and "individuals supervised by/and for whom services were rendered by Four Corners Mental Health" (R. at 188-89). As agents of Four Corners, they are entitled to the same notice as Four Corners. The definition of "Health Care Provider" under Utah Code Ann. § 78-14-3(11), includes "agents" of the defined "health care providers.

The trial court's factual conclusion regarding the Randalls' relationship to Four Corners cannot be challenged in this appeal because of Smith's failure to marshal the evidence. The Randalls, as agents of Four Corners, were properly granted summary judgment because Smith failed to timely and properly file suit under the UHCMA.

IV. As Foster Parents Appointed by the Court, the Randalls Are Immune from the Claims of Simple Negligence Alleged by Smith.

In his Complaint Smith alleges that the "Randalls were negligent and left Craig and the other foster placements unattended and without sufficient supervision, thus allowing the attack on [the victim] to take place." (R. at 17.) If, for the sake of argument, such an allegation were deemed an instance of negligence on the part of the Randalls, the Randalls nevertheless contend that as a matter of law, Utah foster parents in general (and the Randalls specifically under the facts of this case) should be shielded from liability for merely negligent acts or omissions when one of their foster placements harms another foster placement. Inasmuch as there appears to be no controlling case or statutory law on this issue in this jurisdiction, it appears to be an issue of first review.

Under the common law, parents are generally immune from suit by their children in cases involving simple negligence. Elkington v. Faust, 618 P.2d 37, 40 (Utah 1980).[3] *See e.g.* Brown v. Phillips, 362 S.E.2d 786 (Ga. Ct. App. 1986) and Horton v. Reaves, 526 P.2d 304 (Colo. 1974) (discussing and adopting common law doctrine of parental immunity for negligent acts or omissions). The Randalls urge that the common law principle of parental immunity for the negligent acts of parents be acknowledged and/or extended to the Randalls and other foster parents. "When one stands *in loco parentis* to another, the rights and

[3]Elkington involved intentional sexual assault and abuse. The Utah Supreme Court acknowledged the common law concept of parental immunity but noted (in *dicta*) that the trend is away from immunity. Without ruling on the issue of parental immunity for negligent actions, the Court found that given the facts of the case the abuser clearly did not have a claim for immunity. Elkington v. Faust, 618 P.2d 37, 40 (Utah 1980).

liabilities arising out of that relation are, as the words imply, exactly the same as between parent and child." Gribble v. Gribble, 583 P.2d 64, 66 (Utah 1978) (quoting Sparks v. Hinkley, 78 Utah 502, 5 P.2d 570 (1931). Given that parental immunity is the law of this jurisdiction, as well as the other arguments against a simple negligence standard provided *supra*, Foster parents, who stand *in loco parentis* to the foster placements, should be accorded the common law shield against claims by their foster children for simple negligence.[4]

V. As foster parents appointed by the court, the Randalls had no legal duty to protect Smith from or warn him of the risk of assault by a third person.

Pursuant to Utah Rules of Appellate Procedure 24(h), the Randalls hereby generally adopt by reference the arguments of Four Corners as set forth under point three on pages 16 through 19 of its brief. What follows is an explanation of why or how the legal principles discussed by Four Corners are applicable to the Randalls, as well.

In general, there is no duty to control the conduct of others, except in certain situations such as when a special relationship exists. Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993). Utah courts have taken a "policy-based approach" in ascertaining whether a special relationship exists. *Id.* Such determination "requires careful consideration of the consequences of imposing that duty for the parties and for society." *Id.* (citations

[4]The Georgia Court of Appeals specifically concluded that foster parents, in their standing in loco parentis, were in every way entitled to immunity from suit by children in their care, just as regular parents, absent findings of willful and malicious conduct. Brown v. Phillips, 342 S.E.2d 786, 788 (Ga. Ct. App. 1986).

omitted). Appellate courts have been "loath to recognize a duty that is realistically incapable of performance or fundamentally at odds with the nature of the parties' relationship." *Id.* (citations omitted). The Court should examine the following factors in determining whether a special relationship exists: the identity and character of the parties involved, the relationship of the parties to each other and the "practical impact" that finding a special relationship would have. *Id.* (citations omitted).

The Higgins court set forth the following guiding principles in cases like this one:

> In the context of a claim that an actor having custody or control of another owed a duty to prevent harm to or by that other, our overriding practical concern is whether the one causing the harm has shown him- or herself to be uniquely dangerous so that the actor upon whom the alleged duty would fall can be reasonably expected, consistent with the practical realities of that actor's relationship to the one in custody or under control, to distinguish that person from others similarly situated, to appreciate the unique threat this person presents, and to act to minimize or protect against that threat. When such circumstances are present, a special relationship can be said to exist and a duty sensibly may be imposed.

Id. (citations omitted).

Applying the forgoing legal principles to the facts in question in this case, the Randalls did not have a special relationship with Smith. In their role as foster parents over the two placements, the Randalls were subject to the orders of a court, the directions of DHS, and the supervision of Four Corners. They had no control over the details of their supervision and merely followed directions from those above them. Smith and the alleged perpetrator shared the same bedroom for almost a year without incident. The Randalls had no indication whatsoever that the alleged perpetrator had the inclination to rape, might attempt to rape, or could succeed in his attempt to rape, his male roommate.

As foster parents in this case the Randalls simply did not know or have reason to suspect that Bybee was a threat to Smith. They had no practical means of appreciating or recognizing the risk, and thus, no way to protect against it. On the night that Smith was allegedly attacked, the Randalls were following guidance from their supervisors who said the boys could sleep out unsupervised.

If the Randalls are held liable on the theory of simple negligence for the actions of a foster child 1) who over the course of almost a year gave no indications of being a threat to Smith in any way, 2) of whom Smith did not complain to the Randalls, after for months after the alleged assault occurred; and 3) over whom they had limited or no practical control, a pervasive chilling effect on state foster care programs is to be expected. It is the very nature of the foster care programs that parents receive at-risk children who are typically troubled in one way or another. If foster parents are to be held liable for negligent supervision of such children, then it is probable that many couples will choose to not take in and care for such children. The Randalls, therefore, as foster parents, did not have a special relationship with either foster child. As a consequence, they owed no duty to prevent Smith's alleged harm and cannot be held liable for its occurrence.

VI. Smith did not properly preserve his claim that the trial court committed plain error in granting summary judgment when discovery requests from Smith to Four Corner's remained unanswered.

Pursuant to Utah Rules of Appellate Procedure 24(h), the Randalls hereby adopt by reference the arguments of Four Corners as set forth under point 5 on page 20 of its brief. In addition, the Utah Supreme Court has emphasized that Rule 56(f) is intended to ensure that

diligent parties are given an adequate opportunity for discovery. Brown v. Glover, 16 P.3d 540, 547 (Utah 2000). The court added: "An attorney has a professional responsibility to 'act with reasonable diligence and promptness in representing a client.' Therefore, an attorney has a responsibility to use the available discovery procedures to diligently represent her client. The Utah Rules of Civil Procedure provide the means to do this." Id (Citations omitted). Smith did not even file a motion under Rule 56(f). He cannot now benefit from his own lack of diligence. Smith's complaints about discovery are ill-timed and unfounded.

VII. The Affidavit of Tracy Morris contains hearsay and unfounded opinion testimony and Smith should not be allowed to added evidence to the record on appeal.

Pursuant to Utah Rules of Appellate Procedure 24(h), the Randalls hereby adopt by reference the arguments of Four Corners as set forth under point 6 on pages 20 through 21 of its brief.

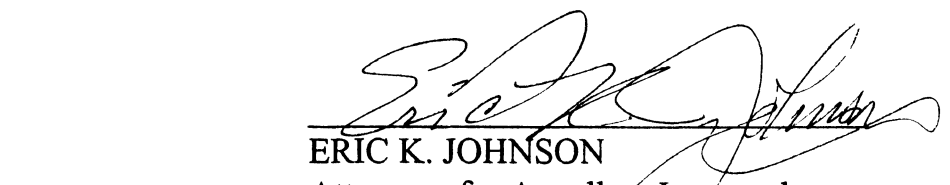
CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the summary judgment in the Randalls favor should be affirmed and the Randalls should be awarded their costs under Utah Rule of Appellate Procedure 34(a).

An Addendum is not necessary.

Dated this 29th day of July 2002.

STOWELL & ASSOCIATES, PLLC



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I hereby certify that on the 29th day July 2002, I hand-delivered a copy of the BRIEF OF APPELLEES LARRY AND CAROLYN RANDALL, in the above-captioned appellate matter, to a clerk or other responsible person at the office of the following legal counsel:

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