

1988

# Melinda Rollins, personal representative of the Estate of Marcel Schopf and Royal Insurance Company v. Jon Michael Petersen, and State of Utah, State Hospital : Reply Brief of Appellants

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF UTAH

880280

MELINDA ROLLINS, personal  
representative of the  
Estate of Marcel Schopf,  
and ROYAL INSURANCE COMPANY,  
  
Plaintiffs/Appellants.

Case No. 880280  
Category No. 14b

vs.

JON MICHAEL PETERSEN and  
STATE OF UTAH, STATE HOSPITAL,  
  
Defendants/Respondents.

REPLY BRIEF OF APPELLANTS

AN APPEAL FROM A FINAL ORDER GRANTING SUMMARY JUDGMENT  
TO DEFENDANTS DALE AND SUZETTE BROWN AND THE STATE OF UTAH  
IN THE FOURTH JUDICIAL DISTRICT COURT  
OF UTAH COUNTY, STATE OF UTAH  
The Honorable Ray M. Harding, Sr., Presiding

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**FILED**

APR 3 1989

IN THE SUPREME COURT OF UTAH

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|--------------------------------|---|------------------|
| MELINDA ROLLINS, personal      | : |                  |
| representative of the          | : |                  |
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| and ROYAL INSURANCE COMPANY,   | : |                  |
|                                | : | Case No. 880280  |
| Plaintiffs/Appellants.         | : | Category No. 14b |
|                                | : |                  |
| vs.                            | : |                  |
|                                | : |                  |
| JON MICHAEL PETERSEN and       | : |                  |
| STATE OF UTAH, STATE HOSPITAL, | : |                  |
|                                | : |                  |
| Defendants/Respondents.        | : |                  |

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| STATE OF UTAH, STATE HOSPITAL, | : |                  |
|                                | : |                  |
| Defendants/Respondents.        | : |                  |

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REPLY BRIEF OF APPELLANTS

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SUMMARY FOR ARGUMENT

The specific allegations of negligence go beyond the allegation in the Complaint. Because this matter is before the Court on defendants' motion for summary judgment, the Court must also consider plaintiff's allegations of negligent failure to follow established hospital policies and procedures.

The negligent acts complained of do not involve discretionary acts. The actions of the hospital employees involved failure to follow established sign-out and AWOL procedures. The employee does not have discretion to ignore or amend the policies. As a result, the actions are not governed by the discretionary function exception to the immunity waiver.

The State owed plaintiff a duty as a member of a class of motorists who could reasonably be injured by Petersen's actions. The state assumed this duty statutorily and had the duty imposed upon it by court order.

### ARGUMENT

#### POINT I

THE ACTS WHICH GIVE RISE TO THIS CAUSE OF ACTION ARE NOT DISCRETIONARY FUNCTIONS WITHIN THE MEANING OF §63-30-10.

The State of Utah argues that the alleged acts and omissions of hospital employees is protected by the discretionary function exception to the general waiver of immunity for negligence. The State cites plaintiff's complaint which alleges that the State negligently gave Petersen trustee status and argues that the decision involves a discretionary function. That allegation of negligence, however; is not the only allegation before the Court. This matter is before this Court on the trial court's order granting defendant's motion for summary judgment. Plaintiff conducted discovery prior to the Court's ruling and alleged specific acts of negligence in addition to those stated in the complaint and were properly considered by the Court. The State now attempts to argue the allegations in the complaint while ignoring the specific allegation of negligence contained

in plaintiff's reply to defendant's motion for summary judgment.

Plaintiff's additional allegations of negligence arise due to defendant's negligent failure to supervise and implement Jon Petersen's treatment program; negligent failure to comply with hospital release and sign out procedure; and negligent failure to discover and prevent Petersen's AWOL and failure to follow established AWOL procedures. (R.242)

The specific acts complained of are not discretionary functions and instead relate to failure to implement existing policies and rules of the Hospital. The Supreme Court in Doe v. Arguelles, 716 P.2d 279 (Utah 1986), defined discretionary function as it relates to decisions implementing policy. In Doe, the Court distinguished those actions of a State employee that are a discretionary function and deserving of protection from those actions that are not a discretionary function and undeserving of protection, as follows:

Operational, routine, everyday matters not requiring evaluation of broad policy factors and which only implement established policy are nondiscretionary, ministerial functions. A decision or action implementing a preexisting policy is operation in nature and is undeserving of protection under the discretionary function exception. Little v. Utah State Division of Family Services, 667 P.2d at 52; Bigelow v. Ingersoll, Utah 618, P.2d 50 (1980); Frank v. State, Utah, 613 P.2d 517 (1980). 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. Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d 121 (4th Cir. 1976) (citing Johnson v. State, 447 P.,2d at 362). (Emphasis added).

Plaintiff's theories of liability against the State of Utah sound in implementing preexisting policy, to-wit:

1. Defendant's employees negligently failed to supervise Jon Petersen's activities on November 1, 1986 when they failed to accompany him to return the lunch trays.

2. Defendant's employees negligently failed to comply with ward and hospital rules requiring staff members to sign out all patients who leave the ward unaccompanied by staff including when the patient will return and what the patient was wearing.

3. Defendant's employees failed to discover Petersen's absence for 2 1/2 hours after they knew or should have known that Petersen was to return.

4. Defendant's employees failed to discovery Petersen's AWOL and implement procedures for finding and apprehending patient AWOLs.

None of the above actions involve discretionary matters and instead involve implementing preexisting policies designed to prevent the kind of problems that actually occurred in this case. This conclusion is supported by an analysis of the purpose behind the discretionary function exception.

In Little v. Utah State Family Services, 667 P.2d 49 (Utah 1983), the Court stated:

[W]here the responsibility for basic policy decisions has been committed to one of the branches of our tripartite system of government, the Courts have refrained from sitting in judgment of the propriety of those decisions.

Id. at 49.

The converse of this position is that a state employer does not have discretion to violate previously established procedures. In this case, a psych tech did not have authority to allow Petersen to leave the ward without first signing out, describing when he would return, where he was going and what he was wearing. Furthermore, none of the staff had discretion as to AWOL procedures. (Fact 35) The staff were under an affirmative duty to monitor their patients and report discovery of an AWOL. (Facts 34, 35) Because these acts are ministerial, defendant cannot escape liability under discretionary function exception to §63-30-10.

The interpretation of the discretionary function exception provided by Epting v. State, 546 P.2d 242 (Utah 1976), 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. 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.

Thus, the acts complained do not fall within the discretionary function exception to the general statutory waiver of immunity for negligence.

#### POINT II

DEFENDANT STATE OF UTAH'S PUBLIC DUTY ANALYSIS FAILS TO ACCOUNT FOR THE FACT THAT THE COURT ORDER IMPOSED A DUTY ON THE STATE TO SECURE PETERSEN UNTIL THE COURT ORDERED OTHERWISE.

The State cites Obray v. Malberg, 26 Utah 2d 17, 484 P.2d 612 (1971) and Christenson v. Hayward, 694 P.2d 612 (Utah 1984) in support of its argument that it owed no duty to plaintiff to follow established policies and procedures in supervising Petersen's court ordered commitment to the State Hospital. The above cases are inapplicable to this cause of action because a court order imposed a duty upon the State committing Jon Petersen to the hospital because he was a dangerous mentally ill person. Petersen could therefore only be lawfully released after the court modified its previous order. See §77-15-6 U.C.A. (1953 as amended)

Under the court's order the State had imposed upon it a duty to control Petersen. This important distinction was

noted in Sterling v. Bloom, 723 P.2d 755, 768-770 (Idaho 1986). Sterling involved a claim of negligent supervision of Bloom, an individual on probation by State. The probationer had pled guilty to a felony charge of operating a motor vehicle while under the influence of intoxicating liquor. Bloom was sentenced to prison but the sentence was suspended and Bloom was placed on probation. Bloom was placed under legal custody and control of the Director of Probation and Parole. A special condition of probation was that for the first year of probation, Bloom was not to drive a motor vehicle except for employment purposes.

Less than a year after entering into the agreement, Bloom operated a vehicle while intoxicated and was involved in a collision with plaintiff causing plaintiff's injury. Plaintiff filed an action against the State of Idaho and its probation department for acting negligently in its supervision of Bloom. Specifically, plaintiff alleged the following negligent acts:

- (1) allowing Bloom to drive a motor vehicle for nonemployment purposes, contrary to the order of probation;
- (2) allowing Bloom to operate a motor vehicle without the required written permission, contrary to the agreement of probation,
- (3) allowing Bloom to operate an uninsured motor vehicle in violation of I.C. §49-235, contrary to the agreement of probation,
- (4) allowing Bloom to reside in the same building which

housed the Seven Mile Lounge, and to work there as a bartender, (5) failing to require Bloom to report on a regular basis to his supervising probation officer contrary to agreement of probation, and failing to otherwise supervise his activities; (6) failing to initiate proceedings to revoke Bloom's probation despite the fact that Bloom had failed and/or refused to comply with the order of probation and the agreement of probation on numerous occasions prior to the collision; and (7) failing to act reasonably and prudently under the circumstances despite having knowledge that Bloom had been convicted at least on two prior occasions of operating a motor vehicle while under the influence of intoxicating beverages and hence posed a great threat to the safety of the public unless adequately supervised.

Each and all of those foregoing negligent acts and omissions of the Board were proximate causes of the collision and plaintiff Maude Sterling's damages.

Id. at 757

The State argued that the acts complained of were discretionary functions and that the State owed plaintiff no duty. After rejecting the State's discretionary function analysis discussed supra, the Court analyzed duty owed.

In beginning its duty analysis the Court noted that Idaho Code §6-903(9) provided:

every governmental entity is subject to liability for money damages . . . whether arising out of a government or proprietary function, where the governmental entity if a private person or entity would be liable for money damages under the Laws of the State of Idaho. . . Clearly then, the language has always stated that if a private person or entity would be liable, so, then, will be the government.

Id. at 767.

The State then argued that plaintiff was not foreseeably endangered by defendant. The Court responded by stating:

While the statute does not purport to identify by name or class those to whom that assigned duty is owed, in the instant circumstances, obvious to the utmost, the motorists foreseeably endangered by the negligent supervision of Bloom are within the class protected. See, e.g., Beck v. Kansas University Foundation, 580 F.Supp. 527, 534 (D.Kansas 1984) (Kansas Adult authority owed duty to protect those present at a university medical center from foreseeable danger posed by released prisoner); see generally Prosser and Keeton, *The Law of Torts* §53 (5th ed. 1984) (hereinafter "Prosser").

While the question of a "duty" may oftentimes be a difficult question, Prosser §53, it generally is not so considered in the context of a person charged with and empowered to control the conduct of a third person. Dean Prosser explains:

The general duty which arises in many relations to take reasonable precautions for the safety of others may include the obligation to exercise control over the conduct of third persons. . . .

. . . [Some] relationships are custodial by nature, requiring the defendant to control his charge and to guard other persons against his dangerous propensities. Thus the owner of an automobile is in such a position to control the conduct of one who is driving it in his presence that he is required to act reasonably to prevent negligent driving. A tavern keeper must act reasonably to prevent intoxicated patrons from injuring others. An employer must prevent his employees from throwing objects from his factory windows, and this had been extended

quite generally to include an obligation on the part of any occupier of premises to exercise reasonable care to control the conduct of any one upon them, for the protection of those outside. A franchiser may be liable for negligently permitting its franchisee to cheat the customers. The physician in charge of an operation may be liable for failure to prevent the negligence of his assistants. A hospital may be liable for permitting an unqualified doctor to treat a patient on its premises. The same rule has been applied to hospitals and psychotherapists who have charge of dangerous mental patients, and to those who have charge of dangerous criminals. A common application of the principle is found in the liability of parents for failure to exercise proper control over their children, which is considered in the chapter on domestic relations. Yet, in the absence of the requisite relationship, there generally is no duty to protect others against harm from third persons. Prosser, §56, pp.383-85 (emphasis added, foot notes omitted).

The duty to control a dangerous charge "and to guard other persons against his dangerous propensities" which Dean Prosser describes is acknowledged in the Restatement (Second) of Torts:

§319. 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 such harm.

Id. at 768-769.

The Court adopted §319 of the Restatement (Second) of Torts then specifically addressed the State's argument that it owed no specific duty to plaintiff.

Clearly a duty can be owed to more than single individuals known to the tort-feasor. In a case like the instant one, the duty is owed to a class rather than a single individual. With a drunk driver on the highways, it is strictly a matter of chance who may become his victim. For certain, however, potential victims include those persons in the class of motorists on the same highway. The negligent conduct here involved and alleged obviously endangered more than the single victim, Maude Sterling. As Dean Prosser noted, "liability in tort is based upon the relations of persons with others; and those relations may arise generally, with large groups or classes of persons, or singly, with an individual." Prosser, §1, p.5. Here, the admitted negligent supervision of Bloom by the probation officer foreseeably created a potential for harm to those motorists whom Bloom would encounter on the state's highways. The probation officer owed those motorists a duty.

Id. at 769 (Emphasis added)

Utah, like Idaho, also has a provision in its Governmental Immunity Act which provides that if immunity is waived, "liability of the (governmental) entity shall be determined as if the entity were a private person." §63-30-4(1) U.C.A. (1953 as amended). The same analysis used in Sterling applies to this case.

The State therefore owed a duty to protect plaintiff and all motorists and pedestrians because it assumed that duty statutorily (§64-7-8, U.C.A.) and because the court imposed a duty on the State to restrain Petersen until the court ordered his release.





CONCLUSION

For the above reasons plaintiff/appellant respectfully requests that this Court reverse the final order of the District Court granting Dale R. and Suzette Brown and the State of Utah summary judgment and remand this matter for trial.

Respectfully submitted this 20 day of March, 1989.

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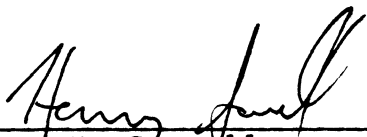
  
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CERTIFICATE OF MAILING

I do hereby certify that I mailed, postage prepaid, four (4) true and correct copies of the foregoing Reply Brief of Appellant to the following on this 20 day of March, 1989:

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