

2003

Jake and Jana Savage v. Utah Youth Village : Amicus Brief

Utah Supreme Court

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IN THE SUPREME COURT FOR THE STATE OF UTAH

JAKE AND JANA SAVAGE,
individually and for and on behalf of
JOHN DOE, a minor,

Plaintiffs/Appellants,

vs.

UTAH YOUTH VILLAGE, a Utah
Corporation,

Defendant/Appellee.

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Case No.: 20030087SC

District Court No. 010902453

BRIEF OF *AMICUS CURIAE* CORPORATION OF THE PRESIDENT OF
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS
IN SUPPORT OF NEITHER PARTY

APPEAL FROM THE THIRD DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH,
JUDGE J. DENNIS FREDERICK

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UTAH SUPREME COURT
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IN THE SUPREME COURT FOR THE STATE OF UTAH

JAKE AND JANA SAVAGE,	:	
individually and for and on behalf of	:	
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	:	
Plaintiffs/Appellants,	:	
vs.	:	Case No.: 20030087SC
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	:	
Defendant/Appellee.	:	

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Utah Code Ann. § 78-12-25.1	<i>passim</i>
Article I, § 11 of the Utah Constitution	<i>passim</i>
Article I, § 24 of the Utah Constitution	<i>passim</i>

ADOPTION BY REFERENCE

Amicus Corporation of the President of The Church of Jesus Christ of Latter-day Saints (hereinafter “the Church” or “the LDS Church”) adopts by reference the following sections of the parties’ briefs, without taking sides on any disputed issues:

(1) Jurisdiction, (2) Statement of the Issues, (3) Determinative Constitutional and Statutory Provisions, and (4) Statement of the Case.

SUMMARY OF ARGUMENTS

The liability limitations in Utah Code Ann. § 78-12-25.1 apply to churches and many other institutions that are very different – legally and otherwise – than the foster child placement agency at issue here. Churches, for example, enjoy constitutional protections not available to other organizations. The First Amendment bars claims that seek to hold churches liable for failing to prevent one church member from sexually abusing another where the abuse is unrelated to any church function, property, or position. With respect to churches, therefore, § 78-12-25.1 merely codifies important liability limitations that already exist in the law.

The Savages contend that as applied to limit liability in their case § 78-12-25.1 violates Article I, § 11 (Open Courts Clause) and Article I, § 24 (Uniform Operation of Laws Clause) of the Utah Constitution. The Church takes no position on the constitutionality of § 78-12-25.1 as applied to the unique facts, circumstances, and claims in this case. The narrow purpose of this *amicus* brief is to demonstrate that both the Open

Courts analysis and the Uniform Operation of Laws analysis are highly context specific. A law limiting liability might well be unconstitutional under both provisions when applied to the facts of one case, but perfectly constitutional in another case with very different facts or legal considerations. Accordingly, this Court should carefully tailor its holding to the specific circumstances and legal claims at issue here, leaving for another day whether the statute is constitutional in other contexts.

ARGUMENT

I. Utah Code Ann. § 78-12-25.1 Addresses a Serious Problem Facing Many Churches and Other Voluntary Associations.

Churches and other voluntary associations are increasingly targeted by lawsuits based on their alleged failure to affirmatively act to prevent one church member from harming another, even where the harm is entirely unrelated to church activities, property, or positions. In contrast to the more widely publicized child abuse lawsuits in which a clergyman abuses a child in the congregation with the alleged knowledge of the church, these less-publicized cases typically involve allegations that a simple member of the church sexually abused a child in a home, neighborhood, or other non-church venue, and that the church breached a purported duty to protect the child from the abuse. Under this theory, churches become the insurers of their members' safety, at least with respect to injuries caused by other members whom church leaders allegedly knew or should have known might be dangerous. These lawsuits often seek awards in the millions or even hundreds of millions of dollars.

Such lawsuits present serious problems for churches. By doctrine and disposition, most churches are open and inviting to all who desire to attend and participate. Membership is generally available for the asking. In the LDS Church, for example, members of the public are welcome to attend Sunday meetings and many other activities. Baptism and Church membership are freely granted. The Church requires only that a person affirm belief in its central tenets, assert compliance with certain Church standards of conduct, and desire baptism. Other churches have even fewer requirements. Indeed, the theologies of many churches – such as various Protestant denominations – do not envision any inquiry into the proselyte’s personal conduct or past. Theologically, these denominations believe such issues are solely between God and the person.

In this respect, a church is very different from a professional child care or child placement organization with the means and structure to screen or even conduct background checks on its members in order to weed out persons with troubled pasts. It is the very purpose of churches to be a “hospital for sinners” and not a “club for the saved.” Given this, churches cannot guarantee the legality of their members’ private conduct vis a vis other members, nor function as investigative or police agencies over their congregations. Even if that were an option theologically, as a practical matter churches lack the resources to do so. As explained below, Utah law has never saddled churches with such a duty, and to impose one would have far-reaching effects.

Nevertheless, plaintiffs continue to try to hold churches responsible for sexual abuse inflicted by one member on another. For example, the LDS Church has been sued on several occasions for allegedly failing to warn or protect members from abuse by other mere members. In one Utah case, two plaintiffs (a mother and son) seek to hold the Church liable because its local leaders allegedly failed to warn them of an abusive member in their neighborhood. *See Complaint, Doe et al. v. Corporation of the President of The Church of Jesus Christ of Latter-day Saints et al.*, Civil No. 020904810 (3rd Judicial District, Utah), currently on appeal to the Utah Court of Appeals (Case No. 20030511-CA). The plaintiffs allege that the perpetrator sexually abused the mother as a teenager and then, about two decades later, abused her son. The abuse allegedly occurred in and around the neighborhood; none of it was connected with any Church activity, property, or calling. Making similar claims, the plaintiffs in a Washington case seek to recover against the Church for sexual abuse perpetrated against them in the privacy of their own home by their own step-father. *See Complaint, Doe v. Corporation of the President of The Church of Jesus Christ of Latter-day Saints*, No. 02-2-0415-1 (Wash. Co. Superior Court). And the plaintiffs in a pending Oregon case seek recovery against the Church because they were abused by an unassuming 80-year old member who moved into their neighborhood. *See Complaint, B.B. v. Corporation of the President of The Church of Jesus Christ of Latter-day Saints*, No. 02-CV-80 (D. Or.).

By enacting Utah Code Ann. § 78-12-25.1, the Utah Legislature precluded such claims against churches, freeing them from the tremendous burden of litigating suits based on their failure to prevent member-on-member child abuse. The legal and policy concerns at issue with churches are very different from those in other contexts where § 78-12-25.1 might apply. The context of this case entails many different considerations from those at issue when a church is being sued for member-on-member abuse. As demonstrated next, that difference mandates an analysis here that is limited to the facts and circumstances of this case, leaving open the question whether § 78-12-25.1 comports with the Open Courts and Uniform Operation of Laws provisions as applied to churches and other voluntary institutions.

II. This Case Should Be Decided as an “As-Applied” Challenge That Does Not Decide the Constitutionality of Utah Code Ann. § 78-12-25.1 on Its Face or in Other Contexts.

On appeal, the Savages contend that if § 78-12-25.1 truly bars their claims (a point they dispute), then it violates the Article I, § 11 (Open Courts Clause) of the Utah Constitution. *See* Brief of Appellants (“Brf. Aplt.”), pp. 20-23. As this Court has recognized, a “statute may be unconstitutional either on its face or as applied to the facts of a given case. A facial challenge is the most difficult because it requires the challenger to ‘establish that no set of circumstances exist under which the [statute] would be valid’” *State of Utah v. Herrera*, 1999 UT 64, ¶ 4 n.2, 993 P.2d 854 (*quoting United States v. Salerno*, 481 U.S. 739, 745 (1987)). “[F]acial challenges to legislation are generally

disfavored,” *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223 (1990); whenever possible, the law prefers as-applied challenges over facial challenges.¹

This is doubly true for an Open Courts challenge. This Court’s decisions make clear that the focus of the analysis is on whether the specific individual – the “injured person” (*Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 680 (Utah 1985)) – would have had a claim in the first place and, if so, whether the alternative remedies available to the person are “effective and reasonable.” *Id.* As Chief Justice Durham, joined by Justices Howe and Russon, stated in her opinion in *Wood v. University of Utah Medical Center*, 2002 UT 134, 67 P.3d 436, *petition for cert. filed*, 72 U.S.L.W. 3105 (U.S. Jul 11, 2003) (No. 03-82), “regarding article I, section 11 rights, this court should examine in an individualized inquiry whether a legislative enactment denies a litigant ‘a remedy by due course of law’ in order to determine whether article I, section 11 applies to the case at hand.” *Id.* ¶ 50 (Durham, C.J., dissenting, joined by Howe, and Russon, JJ.; emphasis added).² This individualized approach is most consistent with this Court’s interpretation

¹ Throughout their brief, the Savages acknowledge that their Open Courts Clause challenge is an as-applied one. Brf. Aplt. at 8 (“the statute, as applied, unconstitutionally violates Utah’s guarantee of open courts”) (emphasis added); *see also id.* at 20 (“As applied by the trial court, § 78-12-25.1 violates Utah’s constitutional guarantee of open courts.”); *id.* at 23 (“Therefore, as applied by the trial court, § 78-12-25.1 unconstitutionally deprives the Savages of a claim for negligence against UYV in violation of Utah’s guarantee of open courts.”).

² Part I of Chief Justice Durham’s dissenting opinion in *Wood* regarding the appropriate standard of review “reflects the majority view on that issue.” *Id.* ¶ 41 (Durham, C.J., dissenting).

of the rights guaranteed under the Open Courts Clause as being part of the “specific individual rights” in the Declaration of Rights section of the Utah Constitution. *Id.* ¶ 43 (emphasis added).

Accordingly, it is standard for this Court to analyze Open Courts challenges as as-applied – not facial – attacks on the statutes at issue. The language of this Court’s decisions repeatedly refers to the as-applied nature of such challenges.³ Whether or not a

³ *Laney v. Fairview City*, 57 P.3d 1007, 1026-27 (Utah 2002) (“We therefore hold that the 1987 amendment is unconstitutional as it applies to municipalities operating electrical power systems. We express no opinion on the constitutionality of the amendment as applied to other municipal activities since a lower standard of care may apply and different considerations may be relevant.”) (emphasis added); *Jensen v. State Tax Commission*, 835 P.2d 965, 969 (Utah 1992) (“The requirement that [taxpayers] deposit the full amount of the deficiency assessed by the Commission is, on the facts of this case, an effective bar to judicial review. Thus, to the extent that Sec. 59-1-505 precludes reasonable access to judicial review, it violates the open courts provision and is unconstitutional as applied. We make clear, however, that the statutory requirement is not unconstitutional in all cases. When a taxpayer is able to meet the requirement, the deposit must be paid.”) (emphasis added); *Maryboy v. Utah Tax Commission*, 904 P.2d 662, 670-71 (Utah 1995) (“Unlike the petitioners in *Jensen*, the Maryboys were financially able to pay the \$10,855.38 deficiency. Although the requirement in Sec. 59-1-505 inconvenienced them, it did not deny them reasonable access to judicial review. As we made clear in *Jensen*, Sec. 59-1-505 ‘is not unconstitutional in all cases. When a taxpayer is able to meet the requirement, the deposit must be paid.’ 835 P.2d at 969. This is just such a case.”); *McCorvey v. Utah State Dept. Of Transportation*, 868 P.2d 41 (Utah 1993) (“We find no constitutional infirmity with the [Governmental Immunity] Act as applied to the facts of this case.”) (emphasis added); *Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989) (“[T]he holding of the Court [on the Open Courts issue] is limited to the following: the recovery limits statutes are unconstitutional as applied to University Hospital.”) (emphasis added); *Avis v. Board of Review of Industrial Commission*, 837 P.2d 585, 588 (Utah 1992) (“We further conclude that the [Worker’s Compensation Statute of limitations, Utah Code Ann. § 35-1-99] as applied to petitioner does not violate the open courts provision of the Utah Constitution because he knew of his injury within the limitations period.”) (emphasis added).

statute survives application in a particular case turns on the particular facts of that case. Indeed, given that § 78-12-25.1 covers numerous potential causes of action, innumerable factual scenarios, and many different types of defendants with potentially differing legal duties, a facial challenge proving that the statute is unconstitutional in every context might well be impossible.

An excellent example of a situation where § 78-12-25.1 is most likely constitutional can be found in the context of claims against churches for failure to prevent child sexual abuse by one member against another. Where no church function, property, or official calling is involved, no court has ever held that a church has a duty to protect members from the private misconduct of others. To the contrary, this and other courts have expressly held that churches do not owe these types of affirmative duties to their members because of the First Amendment problems they would create:

Defining such a duty would necessarily require a court to express the standard of care to be followed by other reasonable clerics in the performance of their ecclesiastical counseling duties which, by its very nature, would embroil the courts in establishing the training, skill, and standards applicable for members of the clergy in this state in a diversity of religions professing widely varying beliefs. This is as impossible as it is unconstitutional; to do so would foster an excessive government entanglement with religion in violation of the Establishment Clause.

Franco v. The Church of Jesus Christ of Latter-day Saints, 2001 UT 25, ¶ 23, 21 P.3d 198; *see also Bryan R. v. Watchtower v. Watchtower Bible and Tract Society*, 738 A.2d 839, 847 (Me. 1999) (rejecting imposition of duty on church to protect one church member from sexual abuse by another member: “The creation of an amorphous common

law duty on the part of a church or other voluntary organization requiring it to protect its members from each other would give rise to ‘both unlimited liability and liability out of all proportion to culpability.’”) (citation omitted).

Of course, this case does not present the issue of whether churches have – or constitutionally could have – special common law duties to prevent, protect against, or report child sexual abuse, and there is certainly no need for this Court to address that issue in this case. The point here is simply that regardless of the merits of the Savages’ position, there are powerful arguments that § 78-12-25.1 is perfectly constitutional in other contexts, precluding facial invalidation of the statute.

III. The Savages’ Uniform Operation of Laws Arguments Should Likewise Be Considered an “As-Applied” Challenge That Does Not Decide the Constitutionality of Utah Code Ann. § 78-12-25.1 on Its Face or in Other Contexts.

The Savages also contend that to the extent § 78-12-25.1 bars their claims it further violates Article I, § 24 (Uniform Operation of Laws Clause) of the Utah Constitution. *See* Brf. Aplt., pp. 23-25. For many of the same reasons as those stated above, this argument should also be subjected to an as-applied analysis.

As with their Open Courts arguments, the Savages have expressly denominated their § 24 challenge to § 78-12-25.1 as an as-applied attack and not as an attempt to invalidate the statute under all circumstances. *See* Brf. Aplt, pp. 23, 25 (“as applied” the statute violates § 24). More substantively, the Savages’ § 24 challenge should be addressed in an as-applied setting because, depending on the facts and claims at issue, the

appropriate level of judicial scrutiny in this case might well be very different than in other potential cases challenging § 78-12-25.1. “[T]he broad outlines of the analytical model used in determining compliance with the uniform operation of laws provision remain the same in all cases, [but] the level of scrutiny [the Court] give[s] legislative enactments varies” depending on whether a fundamental right or suspect classification is at issue. *Blue Cross & Blue Shield of Utah v. State*, 779 P.2d 634, 637 (Utah 1989); *see Ryan v. Gold Cross Servs., Inc.*, 903 P.2d 423, 426 (Utah 1995).

An as-applied analysis under the Uniform Operation of Laws Clause will generally be required in situations where the Open Courts inquiry under different facts is capable of producing different outcomes and thus different standards of judicial scrutiny, because the degree of judicial scrutiny is often outcome determinative.⁴ That is precisely the situation when § 78-12-25.1 is at issue. The Savages contend that the Open Courts Clause guarantees them a legal remedy against the Utah Youth Village. If that turns out to be true, then their § 24 challenge to § 78-12-25.1 might well require heightened scrutiny, assuming they have properly defined the relevant class and that the statute

⁴ Such was the case in *McCorvey v. Utah State Dept. Of Transportation*, 868 P.2d 41 (Utah 1993). In *McCorvey*, this Court held “that there is no ‘fundamental right’ [under the Open Courts Clause] to recover damages from government entities performing governmental functions.” *Id.* at 48 (Stewart, J., concurring and dissenting) (summarizing majority holding); *see id.* (majority opinion) (statute “does not infringe on a fundamental right”). Based on that conclusion, the Court ruled that “therefore a heightened standard of scrutiny is not applicable for determining the constitutionality” under § 24 of applying the challenged statute to the facts of that case. *Id.* (Stewart, J., concurring and dissenting; emphasis added); *see id.* (majority opinion).

actually discriminates. *See McCorvey*, 868 P.2d at 48. However, as outlined above, it is most likely that the Open Courts Clause does not ensure a common law remedy against churches for failure to prevent, warn against, or report member-on-member child abuse. Thus, a § 24 challenge in a case involving a church would be subject to a very deferential standard of review that would almost assuredly uphold the statute as applied to churches. *See Peterson v. Coca-Cola USA*, 2002 UT 42, ¶ 23, 48 P.3d 941 (“low threshold” applies under § 24 in a case not involving fundamental rights or suspect classifications and “statute has a strong presumption of constitutionality, with doubts resolved in favor of its constitutionality”) (citation and internal quotation marks omitted). After all, it can hardly be a violation of § 24 if a statute specifically precludes a class of persons from obtaining a remedy that doesn’t even exist – for anyone – in the first place.

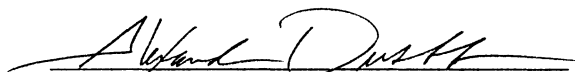
The fact that § 78-12-25.1 could be constitutional under § 24 in the context of churches necessarily precludes a successful facial challenge here. The Savages’ Uniform Operation of Laws arguments should be expressly adjudicated as an as-applied challenge.

CONCLUSION

For the foregoing reasons, the Savages' objections to Utah Code Ann. § 78-12-25.1 based on Article I, §§ 11 & 24 should be considered as-applied and not facial challenges. The Church takes no position on the constitutionality of § 78-12-25.1 as applied to the facts and claims in this case.

Dated this 12th day of September, 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 2003, I caused two true and correct copy of the foregoing **BRIEF OF *AMICUS CURIAE* CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS** to be mailed through United States mail, postage prepaid, to each of the following:

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