

1989

CRELIA CONDEMARIN, Individually and as
Guardian Ad Litem of LEONEL
CONDEMARIN, and JOSE CONDEMARIN v.
UNIVERSITY HOSPITAL, UNIVERSITY OF
UTAH, R.M. LARKIN, M.D., GAYLE M.
CARTER, M.D., CARLOS DIBBLE, M.D., JOHN
SOPER, M.D., JANE and JOHN DOES I through
X : Petition for Rehearing

Utah Supreme Court

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

CRELIA CONDEMARIN, Individually
and as Guardian Ad Litem of
LEONEL CONDEMARIN, and JOSE
CONDEMARIN,

Plaintiffs-Appellants,

vs.

No. 20602

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M. CARTER, M.D., CARLOS DIBBLE,
M.D., JOHN SOPER, M.D., JANE and
JOHN DOES I through X,

Defendants-Appellees,

APPELLEE UNIVERSITY HOSPITAL'S
PETITION FOR REHEARING

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CERTIFICATE OF COUNSEL

Counsel for Petitioner, University Hospital, pursuant to
Rule 35, Rules of the Utah Supreme Court, hereby certify that
this Petition is presented in good faith and not for delay.

SNOW, CHRISTENSEN & MARTINEAU

By 

Merlin R. Lybbert
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Attorneys for Petitioner

APPELLEE UNIVERSITY HOSPITAL'S
PETITION FOR REHEARING

The University Hospital, pursuant to Rule 35, Rules of the Utah Supreme Court, hereby petitions this Court for a rehearing, based on the following reasons and grounds.

ARGUMENT

The plurality opinion of this Court is both complex and diverse. The four separate opinions written by members of the Court reveal that little was agreed upon by the members of this Court. After a careful analysis of the separate opinions appellees believe it fair to state that the following decisions were made:

1. The \$100,000 statutory cap provision of the prior governmental immunity statutes (§§ 62-30-29 & 34) was held unconstitutional as it applies specifically to the University Hospital.

2. Section 63-30-4, which provides that employees of governmental entities may not be held personally liable for acts or omissions within the course and scope of their employment, unless due to fraud or malice, is not unconstitutional as applied to employees of the University of Utah School of Medicine or the University Hospital.

3. Two members of the Court believe that a substantive due process analysis should be made regarding statutes limiting recovery rights, one member believes that an intermediate equal protection standard should be applied, and two members believe a rational basis equal protection standard should be applied.

Assuming that appellees' interpretation of the opinion is correct, it can be stated that this opinion per se does not

affect the present statutory scheme in which a \$250,000 maximum has been imposed nor does it affect governmental entities other than the University Hospital, either health care providers or non-health care providers. As a practical matter, however, this decision will have a substantial impact upon future application by the trial courts of the Governmental Immunity Act and its present damage cap, applicable to all governmental entities and particularly the University of Utah School of Medicine and the University Hospital.

Because of these important ramifications this decision must be viewed as more than merely a resolution of a conflict between the plaintiffs and defendants in the instant case. It establishes important principles and procedures which no doubt will be applied in many cases involving numerous other plaintiffs and defendants in a host of governmental liability disputes.

POINT I

A REHEARING SHOULD BE GRANTED TO ALLOW APPELLEES THE OPPORTUNITY OF ADDRESSING THE SUBSTANTIVE DUE PROCESS STANDARD ADOPTED BY TWO MEMBERS OF THIS COURT.

A review of the lower court proceedings on Appellants' motion for partial summary judgment reveals that the question of substantive due process was never argued by either party or decided by the lower court. Similarly, the briefs to this Court did not address this standard. Indeed, the Berry decision, upon which this standard is purportedly based was not decided until

after appellees' brief was filed. No request was made by this Court to file supplemental briefs during the three-year period this case was being decided.

Likewise, the open court provision was not relied upon by appellants in the proceedings below nor on this appeal. While it was urged that this constitutional provision was a right deserving the highest equal protection standard it was never claimed or argued that this provision should be a basis of invalidating the recovery limit statutes.

All Justices acknowledge that due process was not argued below or before this Court. Justices Durham and Zimmerman excuse this irregularity by claiming that equal protection and substantive due process are nearly the identical standards. See, e.g., Slip Opinion, pp. 15 (J. Durham); pp. 35 (J. Zimmerman concurring). On the other hand Justice Stewart argues that these standards are different and are designed for separate analyses. Slip Opinion, p. 39 (J. Stewart concurring). Finally, Justices Hall and Howe argue that the standards are separate and traditional concepts of judicial review have been violated by considering these issues on appeal. Slip Opinion, pp. 53-54, (J. Hall and J. Howe, dissenting).

Appellees believe there are fundamental reasons why a due process analysis cannot be applied in this case. However, it would be a waste of resources for appellees to brief this issue

unless the Court will allow the input of the parties. Appellee contends that this Court's failure to follow appropriate judicial review procedures, by deciding this case based on a constitutional provision and standards not relied upon by appellants, and therefore not briefed or argued by appellees, violates its rights to due process of law under the United States and Utah Constitutions. This Court has decided an extremely important issue based upon a state constitutional provision (Article I, Sec. 11), and an analytical standard (due process as opposed to equal protection) which were not briefed or argued by the parties. Appellees had no reason or right to brief or argue those issues because they were not raised by appellants. Appellees have been deprived of the right to be heard on critical issues upon which this Court's ruling is based.

This serious error should be corrected by allowing briefs and argument on these issues. Cf. Yotvat v. Roth, 290 N.W.2d 524, 532 (Wis. Ct. App. 1980). It is, therefore, respectfully requested by the University Hospital that a rehearing be granted on this most important question of limitation on state government liability.

POINT II

IN THE ALTERNATIVE, THIS COURT SHOULD AMEND
ITS OPINION AND REMAND FOR AN EVIDENTIARY
HEARING AND DETERMINATION BY THE TRIAL COURT
BASED ON THE NEWLY FORMULATED STANDARD.

If this Court declines to allow appellees the opportunity to

argue the legal standards that should be applied, it should, at a minimum, allow appellees the opportunity of having an evidentiary hearing in the lower court. A remand is essential because of the following:

1. This case originated as an interlocutory appeal from the denial of a motion for partial summary judgment, where no attempt was made to adduce substantive evidence.

2. The new standard formulated by a plurality of this Court has shifted the burden of proof thereby mandating a new hearing in which the burden can be correctly applied.

In the proceedings below a motion for partial summary judgment was made by the plaintiffs. No attempt was made by either party to extensively examine the factual basis upon which the \$100,000 cap was legislated. In fact, the major controversy below and in this Court was the standard which should be used in judging the constitutionality of the statutes. No effort was made by either party to develop empirical evidence of any magnitude concerning the validity of the statute because the magnitude of the evidence required was directly dependent upon the standard adopted.

The lower court, following then existing law, apparently applied the rational basis standard. In fact, this Court prior to Berry had never applied even a "heightened" standard under equal protection analysis, but had relied exclusively on a rational basis standard in cases not involving suspect classifications or fundamental rights. As such, the burden of

proof was upon the plaintiffs in the lower court to show the statute to be unconstitutional. As noted by one authority:

The burden of proving a constitutional violation must be sustained as a demonstrable reality and not as a matter of speculation, and is not sustained by generalities. Accordingly, the party having the burden of proving invalidity must do so clearly or beyond a reasonable doubt. Moreover, he must negative every conceivable or reasonable basis which might support the statute, or prove the absence of any conceivable grounds on which the statute may be supported.

* * *

The party attacking the statute has the burden of establishing the invalidating facts on which his claim is based, of showing that the legislative findings of fact are without rational basis, or that the stated facts on the existence of which a statute is predicated does not exist. 16 C.J.S. §104, Constitutional Law, pp. 344-48 (footnotes to citations omitted).

Thus, under this approach and as noted by Justice Hall in the dissenting opinion the burden of overcoming the presumption of constitutionality was clearly placed upon the appellants who must "prove abuse of legislative discretion beyond a reasonable doubt." (Slip Opinion, p. 52).

In spite of the clear burden placed upon the plaintiffs in the lower court, the various opinions written in this case repeatedly state that the appellees have failed to meet their burden of proof in the lower court and before this Court. A few examples of this required burden are as follows:

By means of (1) extending immunity to employees of all government-owned health care facilities and (2) imposing a blanket cap on all recoveries, the legislature has sought to respond to what the University Hospital and the Attorney General in his amicus brief describes as a "financial crisis" in state liability and liability insurance. No

factual information regarding the alleged crisis has been cited to this Court, either from the legislative history of the Act, the evidentiary record in the court below, or reliable sources of which this Court could legitimately take judicial notice. Indeed, most of the Attorney General's sources are newspaper articles from other states, and the majority of them deal with municipal, rather than state, liability problems. The state asks this Court to engage in the kind of speculation about legislative rationale associated with the "any conceivable rational basis test." However, because of the constitutional status of the right to a remedy for damages to one's person under Article I, §11, more is required. (Slip Opinion, pp. 18-19, Justice Durham opinion). (Emphasis added).

The recovery limitation in the Utah Governmental Immunity Act on all damages caused by government-owned health care providers and their employees is such an unreasonable burden. There is no factual showing in the legislative history or the trial court that the recovery limitation is reasonably necessary for preservation of the public treasury. It is true, of course, there will be less cost to the state and insurance will be more readily obtainable if the state does not have to respond in damages in excess of \$100,000 for injuries caused by its health care entities and employees or insure against those damages. However, before the state is permitted to conserve those monies at the expense of seriously injured citizens, its citizens are entitled to a showing in the courts that a measure so drastic and arbitrary as a \$100,000 cap on all damages is urgently and overwhelmingly necessary. (Slip Opinion, p. 28, Justice Durham opinion). (Emphasis added).

* * *

[T]he burden of demonstrating the constitutionality of the statute shifts to its proponents. The supporters of the legislation have not carried their burden. The justifications advanced for the legislatures having abridged the important right of citizens to recover even out-of-pocket losses occasioned by injuries to their persons is a narrow category of circumstances for the benefit of a narrow category of defendants are extraordinarily weak. In fact, at oral argument both the Attorney General and the lawyer for the hospital and physicians involved admitted that they had no empirical evidence that damage awards in Utah have threatened the stability of any unit of government and that the concerns that led to the legislation were based on

anecdotal evidence. (Slip Opinion, pp. 37038, Justice Zimmerman opinion). (Emphasis added).

* * *

[T]here is no basis for concluding that according patients at the University Hospital a full remedy for tort liability will threaten the financial stability of government or of the hospital, or even result in an undue drain on resources. While there will be some additional expenditures incurred by the hospital's liability for full damages, there is no reason to believe that that cost cannot be recovered as present liabilities. . . . Neither the hospital nor the Attorney General in this case even begins to demonstrate that requiring the hospital to shoulder the full cost of liability will have a substantial effect on the state's treasury. There is no evidence that in Utah personal judgments are unduly large or that they have increased greatly in their number. Indeed, since the government bears only a fraction of the total cost of the operation of the entity, it is clear that the vast bulk of the activity is self-financed by fees and charges. (Slip Opinion, p. 46, Justice Stewart opinion). (Emphasis added).

The separate opinions of the Court based upon substantive due process and an intermediate standard of equal protection have elevated the standard of review and at the same time reversed the presumption of constitutionality and shifted the burden of proof to the state to prove the validity of the statute.

A review of the circumstances of this case shows the following: The lower court adopted the rational basis test as the correct standard thereby placing the burden upon the plaintiffs to show that the legislation in question could not be supported under that standard. The defendants made no effort to create a record proving the legislative reasons or justifications for the statute because it was not required. On appeal, however,

this Court adopted a new standard which was not argued below. In deciding that the recovery limitations statutes are unconstitutional three Justices of this Court based their decision on the failure of the State to produce any evidence showing the reasonableness or necessity of the recovery limitation statutes. Because the state made no effort during the lower court proceedings and minimal effort on appeal to produce evidence justifying the statutes, there is naturally not a record in this case which could satisfy the new heightened standard now applied by this Court.

In effect, therefore, appellees have been denied due process of law. They have not been given the opportunity to produce evidence supporting the validity of these statutes and have been found to be deficient in their quantum of proof even though the lower court proceedings did not require such proof to be introduced. Not only did the University Hospital not have the opportunity to argue the formulation of this new standard but it does not, unless this decision is remanded, have the opportunity to present evidence in accordance with new standard.

It is not only fundamentally unfair to the University Hospital in this case to be denied an opportunity to meet the standard now created by a plurality of this Court but is also against all judicial rules of appellate procedure to prohibit a party from presenting evidence in accordance with the new

standard. It may well be, for example, that the lower court upon an evidentiary hearing would conclude that there were substantial reasons justifying the \$100,000 cap under both the substantive due process standard and the heightened equal protection standard.

The Idaho Supreme Court in Jones v. State Board of Medicine, 555 P.2d 399 (Idaho 1976) remanded its case for a factual determination of whether a medical malpractice crisis actually existed justifying a limitation upon medical damages. This same procedure should be utilized in the instant case to allow the appellees the opportunity of meeting their newly acquired burden of proof. To deny this opportunity to appellees will violate the very rights this Court professes to protect by this opinion.

POINT III

BECAUSE APPELLEES JUSTIFIABLY RELIED UPON THE
RECOVERY LIMITATION STATUTES, THIS DECISION
SHOULD BE APPLIED PROSPECTIVELY ONLY.

The recovery limitation provision was enacted by the Legislature in 1965. It has remained unchallenged until the instant case more than twenty years later. This Court in 1980 specifically held that the University Hospital performed a governmental function for purposes of determining applicability of the Governmental Immunity Act. Frank v. State, 613 P.2d 517 (Utah 1980).

In fact, in reliance on the recovery limitations statutes, the Hospital set its fees charged to patients, established its reserves for liability claims, funded its malpractice defense trust, and decided not to purchase insurance. In essence the Hospital's entire risk management system has been established in reliance on the recovery limitation statutes and prior opinions of this Court. It is impossible to "pass on" this increased liability exposure of pending cases to patients who have long since departed from the University Hospital. It is also impossible to purchase insurance for pending claims.

"Constitutional law neither requires nor prohibits retroactive operation of an overruling decision." Loyal Order of Moose No. 259 v. County Board, 657 P.2d 257, . 264 (Utah 1982). A court in its discretion may prohibit retroactive operation of an overruling decision where retroactive operation creates a burden or where the overruled law has been justifiably relied upon. State Farm Mutual Insurance Co. v. Farmers Insurance, 493 P.2d 1002 (Utah 1972).

This Court in Loyal Order of Moose No. 259, supra, refused to apply a decision striking down a rule regarding an organization's exemption for tax purposes because of its charitable activities. This Court said:

We believe the circumstances of this case require that the rules adopted in this decision be applied prospectively with a delayed effective date. The holding in the 1975 B.O.P.E. case has been the law upon which many organizations have operated and upon which tax exemptions have been

granted or denied. Further, the step in the direction of that case was first taken in the Groesbeck case in 1911. Without warning it would be inequitable to correct an interpretation of law that has been relied upon for so many years. Also, if the rule were to be given retroactive effect, the assessment of back taxes on properties affected by this rule might well result in an unreasonable burden upon all those organizations and governmental bodies associated with it. By staying the effective date of our ruling in this case, not only are court and agency resources saved, but time also is allowed for organizations affected to make needed adjustments. 657 P.2d at 265.

See also Timpanogos Planning and Water Management Agency v. Central Utah Water Conservancy District, 690 P.2d 562 (Utah 1984); Rio Algo Corp. v. San Juan County, 681 P.2d 184 (Utah 1984).

Similarly, in Utah County v. Intermountain Health Care, 709 P.2d 265 (Utah 1985), this Court held:

The circumstances of this decision are very similar to those in Loyal Order of Moose, 657 P.2d 257, which gave rise to that case's holding respecting its effective date. The defendants here have relied for many years on a statutory interpretation of a constitutional provision, and this opinion resolves a difficult question of first impression. Because of the substantial delay entailed in the litigation process, retroactive application requiring the assessment of back taxes might well result in an unreasonable burden on the defendants in this case and on other similarly situated entities. Substantial changes in their operating budgets, record-keeping, and admission policies may result from our holding. It may be that adjustments in accounting practices and other policies will enable these defendants and other hospitals to qualify in the future for the constitutional exemption. In order to avoid the unreasonable burden that might otherwise be placed on them, we hold that the ruling of this case shall be applied prospectively only with an effective date of January 1, 1986.

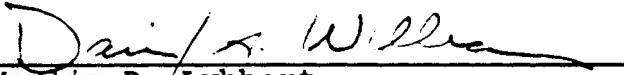
Id. at 279.

These principles are equally applicable in the present case. It would be inequitable and would place an unreasonable burden on the University Hospital to suddenly remove the limitation cap as to those cases arising during the time period it was in effect. Thus, the decision rendered by this Court should be applied prospectively only.

Respectfully submitted this 30th day of May, 1989.

SNOW, CHRISTENSEN & MARTINEAU

By

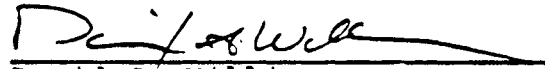

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CERTIFICATE OF SERVICE

I hereby certify that I served four copies of the foregoing Appellee University Hospital's Petition for Rehearing upon the following counsel of record:

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this 30th day of May, 1989, by mailing the same, postage prepaid,
to said counsel.


David G. Williams
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