2010

Donna Whitney v. Division of Juvenile Justice Services; Utah Department of Human Services; State of Utah; Quest Youth Services; Kyle Lancaster; Dan Maldonado; Jason Kaufusi; Henry Kaufusi; Huy Nguyen; and Barry Howard : Reply Brief

Utah Court of Appeals

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Robert D. Strieper; attorney for appellee.

IN THE SUPREME COURT OF THE STATE OF UTAH

Donna Whitney, Individual and as parent of and heir of Dillon Whitney, deceased,

Plaintiff/ Appellee

v.

Division of Juvenile Justice Services; Utah Department of Human Services; State of Utah; Quest Youth Services; Kyle Lancaster; Dan Maldonado; Jason Kaufusi; Henry Kaufusi; Huy Nguyen; and Barry Howard,

Defendants/Appellants

REPLY BRIEF OF THE APPELLEE

Case No. 20100983-SC

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CERTIFICATION OF QUESTION OF STATE LAW TO THE UTAH SUPREME COURT BY THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Oral Argument Requested and Published Decision Requested

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Utah should not cast out thirty years of precedent by removing the requirement that an incarcerated person needs to be within distinct boundaries to be considered incarcerated in a place of legal confinement. The court assumes that "the legislature uses each term [in a statute] advisedly and gives effect to each term according to its accepted meaning." See *Pace v. St. George City Police Dept.* 2006 UT App. 496, ¶6, 153 P.3d 789 (finding a person under arrest, restrained and escorted to a restroom in the police station was under police control) and *State v. Germonto*, 2003 UT App. 217, ¶ 7, 73 P.3d 978. (Finding a prisoner who had not left the confines of the prison could not be convicted of escape).

The Immunity Act retains the State's sovereign immunity from suit when an injury "arises out of, in connection with, or results from . . . the incarceration of any persons in any . . . place of legal confinement." Utah Code Ann. 63G-7-301(5)(j)(emphasis added). The plain language of this section requires that an incarcerated person would necessarily need to be "in" a "place of legal confinement" at the

time the negligence arises from which the government tries to assert its immunity. *Id.*

In each and every case the touchstones of the incarcerate exception have been applied to a person 1) restrained to a definitive location with distinct boundaries and 2) under the control of the state. See *Madsen v. State*, 583 P.2d 92, 93 (Utah 1978)(finding the incarceration exception applied to a person "*in* prison *and* under the control of the State"); and all of its progeny. (each finding that the incarcerated person was in a distinct location and under state control, as discussed more fully in Ms. Whitney Opening Brief pp 16-17).

The accepted meaning of legal confinement as defined by the Utah Court of Appeals is a place with distinct boundaries. *Germonto*, 2003 UT App. 217, at ¶10. Central to the *Germonto* opinion was the definition of legal confinement. *Id.* The court determining; "any place where a person is legally confined must necessarily be a place with physical barriers where the person is *actually confined.*" *Id* at ¶10.

In the present case, Dillon Whitney was in a community-based placement without any boundaries and was provided with a bus pass so

that he could go anywhere he chose in or even out of the city.[1] Dillon was not confined within any distinct boundaries. The State's entire argument in its Opening Brief rests upon the idea that "a place of legal confinement" does not have to have any boundaries.

Specifically, what the State asserted was that the "[Governmental Immunity] Act does not require actual confinement. Instead, the State is protected from injuries connected to 'legal confinement.'" (see Applt's Opening Brief at p. 12). The State goes on to claim that the "touchstone of incarceration is being 'under the control of the state' [misquoting *Madsen v. State* by leaving off the preceding passage, 'in prison ***and***.'] and unable to be released without some kind of permission." See *Id* at p. 13, and *Madsen,* 583 P.2d at 93. Such a distinction would lead to the absurd rule that a person (meaning everyone) who is under the control of the government (as is everyone), who is voluntarily[2] in the

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[1] The order placing Dillon Whitney in the community-based placement had absolutely no restrictions on places Dillon could go. It only restricted whom Dillon could visit; specifically he was not allowed to have contact with Kaden Casey and Lorenzo Gallegos.

[2] The incarceration exception does not differentiate whether the person voluntarily committed himself or herself to the place of confinement or if they were involuntarily committed. *Emery v. State*, 483 P.2d 1296, 1297 (Utah 1971). (Finding a patient who voluntarily committed herself to a *specific place*, the state mental hospital was incarcerated).

community (as fits most everyone) would meet the description of a person incarcerated in a place of legal confinement.

Prisoners, inmates, mentally ill persons, and/or incarcerated persons are released *into* the community, not *out of* the community. Additionally, the State's proposed rule would include everyone in the community as everyone is under the control of the state to some degree. For example, children in foster care are wards of the State and therefore are under the control of the State and would be considered incarcerated. This Court previously determined that a child in foster care could sue the State for their negligent placement. See *Little v. Division of Family Services*, 677 P.2d 49, 50-52 (Utah 1983). (See Applee's Brief, Equal Protection of the Laws Sec. and Open Court Sec., pp 19-23). Furthermore, children who are subjected to curfew laws are considered under the control of the State and would be considered incarcerated, as would their parents. In particular, see Salt Lake City, Ordinance 11.44.070 (2011) that provides:

> CURFEW FOR MINORS:
>
> A. It is unlawful for any minor under sixteen (16) years of age to remain or loiter on any of the sidewalks, streets, alleys or public places in the city between eleven o'clock (11:00) P.M. and five o'clock (5:00) A.M. the following

morning.

> B. It is unlawful for any minor under eighteen (18) years of age to remain or loiter on any of the sidewalks, streets, alleys or public places in the city between one o'clock (1:00) A.M. and five o'clock (5:00) A.M. the following morning.
>
> C. It is unlawful for any parent, guardian or other person having legal care and custody of any minor dealt with respectively in subsections A and B of this section to knowingly allow or permit any such minor to remain or loiter on any of the sidewalks, streets, alleys or public places in the city, within the times provided in subsections A and B, respectively, of this section, except as provided in subsection D of this section.

Further examples would include any adult who has a restraining order placed against them, as they are again under the control of the state and would be considered incarcerated. Upstanding citizens frequently subject themselves to the control of the state and would be considered incarcerated when: they get in a car thereby subjecting themselves to the Motor Vehicle Act; they work and are subjected to the Tax Code; they obtain a license to practice a profession thus subjecting themselves to the control of the Division of Professional Licensing along with the laws of the state. Most would take offense to learn that the State considers them incarcerated.

Simply put, if the only requirement were that a person is "under the control of the State" and the place of legal confinement does not have distinct boundaries, it would be overly broad and include everyone. The legislature could not intend that a person "in a place of legal confinement" would include a child, like Dillon, to be considered incarcerated when he had free run in and beyond the Salt Lake community.

CONCLUSION

This Court should affirm the district court of Utah's holding that a child in the community is not incarcerated. Ms. Whitney, therefore, respectfully requests that the Supreme Court of Utah find in her favor by confirming thirty years of precedent and that the Governmental Immunity Act does not apply to Dillon Whitney.

Respectfully submitted this 18th day of July 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of July 2011, I mailed via first class postage prepaid two copies of the foregoing Reply Brief and on CD exact copy of the hard copies submitted, to the Clerk of the Supreme Court of Utah to the following:

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