

1982

Jonathan Little and Hannah Little v. Utah State Division of Family Services : Brief of Appellants

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Little v. Utah State Division of Family Services*, No. 18113 (Utah Supreme Court, 1982).
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IN THE SUPREME COURT OF THE
STATE OF UTAH

JONATHAN LITTLE and
HANNAH LITTLE,

Plaintiffs-Respondents,

-vs-

UTAH STATE DIVISION
OF FAMILY SERVICES,

Defendants-Appellants.

Case No.
18113

BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE
OF UTAH, THE HONORABLE KENNETH RIGTRUP, JUDGE

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FILED

MAR 31 1982

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IN THE SUPREME COURT OF THE
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:
JONATHAN LITTLE and
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Plaintiff-Respondents, :

Case No.
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-vs- :

UTAH STATE DIVISION
OF FAMILY SERVICES, :

Defendants-Appellants. :

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

This was a wrongful death action brought by the natural parents of Jennifer Little, a child who died while in foster care. Judgment was entered against the Utah Division of Family Services and damages awarded in the amount of \$20,000. The Division of Family Services appeals that judgment.

DISPOSITION IN LOWER COURT

The Third District Court, Judge Christine Durham, presiding, denied a motion to dismiss as to the Division of Family Services on July 13, 1979. Trial was held August 12 and 13, 1981, in the Third District Court before Judge Kenneth

Rigtrup. Judgment was entered against the Division of Family Services and \$20,000 damages awarded.

RELIEF SOUGHT ON APPEAL

The Appellant Division of Family Services seeks reversal of the denial of the Motion to Dismiss, and reversal of the judgment entered by Judge Rigtrup.

STATEMENT OF FACTS

Jennifer Little, the 2 1/2 year-old daughter of the respondents, was removed from the custody of her parents by the Juvenile Court on April 6, 1977 (R. p. 101). The child was placed in the custody of the Utah Division of Family Services and placed first in a shelter home, then in a foster home in late April, 1977 (T. pp. 7, 20). The foster parents, Russell and Pearl Meik, were trained for therapeutic foster care, with emphasis placed on children with handicaps or special behavioral or emotional problems (T. pp. 15,16,69,70).

Jennifer Little had a history of behavioral and physical difficulties (T. pp. 47), and had been characterized as having autistic tendencies. One symptom exhibited by Jennifer was "head-banging," or the habit of hitting her head against stationary objects (T. p. 21).

The Meiks had several other foster children in their home, including Floyd Hooten, a 17 year-old, mildly retarded boy (T. p. 17). Floyd had, on several occasions, been asked

to babysit for both the Meik's children and their neighbors' children (T. pp. 261). A neighbor, Scott Lang, testified that Floyd was very responsible and gentle with the younger children, and had never been known to hit them or to exhibit any other violent or aggressive behavior toward the children (T. p. 262).

Connie Cowley, an experienced foster care worker, was assigned by the Division of Family Services to supervise the foster children placed in the Meik home, including Jennifer Little (T. p. 45). She arranged for medical and psychological testing of Jennifer, as well as specialized treatment and training through Project Pitch and the Developmental Disability Program (T. p. 54). When Mrs. Meik discussed Jennifer's head-banging with Connie Cowley, explaining that she always kept Jennifer nearby and held her during head-banging episodes so she would not hurt herself, the worker did not instruct Mrs. Meik to take any further action (T. p. 52). However, Jennifer had recently been medically examined, at the arrangement of Mrs. Cowley, and was scheduled for further medical and psychological treatment.

On June 4, 1977, two months after placement in the Meik foster home, Jennifer Little died of massive brain hemorrhage caused by sharp blows to the head (T. pp. 945, 119).

On that day, the child had been left for a short time in the care of her foster brother, Floyd Hooten. According to the police reports which were admitted as evidence, Floyd Hooten did inflict several blows to Jennifer Little's head on the day she died.

In December, 1978, Jonathan and Hannah Little, respondents, filed suit against the Utah Division of Family Services, alleging negligent placement and supervision of their child while in foster care. Defendants' Motion to Dismiss (April 5, 1979) based, among other things, on the Governmental Immunity Act, was denied as to the Division of Family Services, the lower court finding that the discretionary function exception did not apply to this case (R.pp.62,64). The State appealed the denial of the Motion to Dismiss (R. p. 83), but the interlocutory appeal was rejected by this Court (R. p. 103).

The State brought a Motion for Partial Summary Judgment in April, 1981, which was granted, dismissing the Second and Fourth claims in the complaint (R.p. 136). The first and third claims were remaining for trial which was set for August 12, 1981. After a two-day trial, judgment was entered for plaintiffs-respondents, and damages were awarded in the amount of \$20,000.

POINT I

IT WAS ERROR TO DENY THE APPELLANT
DIVISION OF FAMILY SERVICES' MOTION
TO DISMISS BASED ON THE UTAH
GOVERNMENTAL IMMUNITY ACT.

The Division of Family Services brought a Motion to Dismiss in April, 1979, on the basis that plaintiffs' claims, which were founded upon the alleged negligence of the State in selecting and supervising the foster care placement of Jennifer Little, were barred by the Utah Governmental Immunity Act. Although granted in part, the Motion was denied as to the major issues and defendants in this action. The defendants/appellants asserted that governmental immunity should apply to this action because the foster care worker assigned to Jennifer Little necessarily was performing a "discretionary function" for which immunity is retained pursuant to Utah Code Ann. § 63-30-10(1). The district court held that the decisions relating to the placement, care and supervision of a child in a foster home are not discretionary. The appellants urge this court to very carefully consider the immunity question presented here. If governmental immunity is not retained for a program such as foster care, there could be serious consequences to the continued existence of individualized foster care. The State simply cannot

afford to be put in the position of an insurer, guaranteeing that nothing will ever happen to a foster child. If decisions regarding particular placements, care and treatment are to be continually at risk, those decisions will simply no longer be made. The State would have to protect itself and its workers by returning to institutionalized foster care, where the children can be watched around the clock.

Two questions need consideration by the court:

1. Although not raised below, it ~~must~~ be determined whether maintenance of a foster care program is a governmental function within the meaning of the Utah Governmental Immunity Act.

2. Does the discretionary function exception to the general waiver of immunity for negligence apply to this case?

A

THE DIVISION OF FAMILY SERVICES
IS IMMUNE FROM SUIT FOR INJURIES
WHICH RESULT FROM THEIR EXERCISE
OF A GOVERNMENTAL FUNCTION.

Utah Code Ann. § 63-30-3 reads:

Except as may be otherwise provided in this act, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility.

Utah Code Ann. § 63-30-3 (1953).

Respondents based their claims on the alleged negligence of the Division of Family Services in the placement and supervision of Jennifer Little in foster care. However, the placement and supervision of foster care children is a governmental function conducted by the Division of Family Services for the State of Utah pursuant to statutory mandate, Utah Code Ann. § 55-15b-1, et seq., and therefore comes within the purview of Utah Code Ann. § 63-30-3. Traditionally courts have analyzed the nature of activity in which a governmental entity is engaged to determine whether it is a governmental function or a proprietary function. In Standiford v. Salt Lake City Corporation, 605 P.2d 1230 (1980) the Utah Supreme Court described several factors used by Utah courts in the past to determine whether a governmental function was involved. These included whether the activity was furnished for the general public good, whether there was pecuniary profit involved, and whether the activity was of such a nature as to be in real competition with free enterprise. The Court in Standiford, however, decided that a new test would be more appropriate and applied a test adopted by the Michigan Supreme Court. This test calls for determining whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency or that is essential to the core of governmental activity. Although this test

breaks abruptly with past precedent and is criticized vigorously by the dissenting judges, its application to the Division of Family Services' duties involved here still results in their categorization as governmental functions, as does the application of previous, more established tests. The Division of Family Services provides a service which is furnished for the general public good, it derives no pecuniary profit from its activities, and is not in real competition with free enterprise. The legislature has given the Division of Family Services the statutory duty to provide foster care, which indicates that the legislature considers this as an essential governmental function. The placement and supervision of foster children is in no way comparable to the operation of a golf course which the Court found in Standiford to be a non-essential governmental function. Similarly, foster care does not compare to the maintenance of a sewer system (Thomas v. Clearfield City, No. 17338, filed February 24, 1982) or a sledding hill in a park, Johnson v. Salt Lake City Corp., 629 P.2d 432 (Utah, 1981). Accordingly, this duty performed by the Division of Family Services should be considered a governmental function, and due to Utah Code Ann. § 63-30-3 the Division of Family Services is immune from suit for injury resulting from the exercise of this function.

B

THE DIVISION OF FAMILY SERVICES
IS IMMUNE FROM SUIT FOR INJURIES
RESULTING FROM THE PERFORMANCE
OR FAILURE TO PERFORM A DISCRETIONARY
FUNCTION.

Utah Code Ann. § 63-30-10(1) specifies certain exceptions to the general waiver of governmental immunity for injuries proximately caused by negligent acts or omissions committed by a governmental entity.

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 his employment except if the injury:

(1) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused. . . .

Utah Code Ann. § 63-30-10(1) (1953) (emphasis added).

To determine whether a governmental activity is discretionary or non-discretionary many courts now apply the planning-operational test. 35 Am.Jur. Federal Tort Claims Act § 19; Carroll v. State Road Commission, 496 P.2d 888 (Utah, 1972).

To apply such a test to particular conduct, a court need only determine to what stage or level of decision-making the alleged negligent activity belongs. If the conduct pertains to the planning level it is discretionary, and if it pertains to the operational level it is non-discretionary. However, this neat dichotomy is not always helpful or accurate in determining whether a certain activity is discretionary or not.

The planning-operational level test may be workable when building a highway or designing a flight pattern, but it is simply inapplicable to a situation where the decisions at both the superior and subordinate levels deal with the care and needs of a particular person. It is very difficult to define an "operational level" in terms of the care of a human being.

For example, in the Carroll case, supra, the Utah Supreme Court gave some general guidelines as to what constitutes operational level decision-making. "[O]perational level acts are those which concern routine, everyday matters, not requiring evaluation of broad policy factors." 496 P.2d at 891.

The Court further stated:

. . .the decision of the road supervisor to use berms as the sole means of protection for the unwary traveler was not a basic policy decision essential to the realization or accomplishment of some basic government policy, program or objective. His decision did not require the exercise of basic policy evaluation, judgment, or expertise on the part of the Road Commission.

496 P.2d at 891.

In the present case, on the other hand, the decisions of Family Service employees regarding the placement, care and supervision of Jennifer Little or any other foster child are far from everyday, routine matters. They

do require the exercise of basic policy evaluations, judgment, and expertise on the part of the foster care worker. The realization and accomplishment of the foster care program rests upon the ability and freedom of foster care workers at any level to evaluate the needs of a particular child and the services that can be provided to that child by a particular foster family, and make whatever placement seems to be in the best interests of the child.

Subsequent to its decision in Carroll, supra, the Utah Supreme Court applied the discretionary function exception in a case factually much more similar to the present case. In Epting v. State, 546 P.2d 242 (Utah, 1976), the State of Utah was sued by a family of a person killed by a prisoner who had escaped from a work release program conducted by the Utah State Prison. The court held that the handling of a particular prisoner "arises out of the exercise of a discretionary function for which subsection (1) of Section 63-30-10 quoted above has retained sovereign immunity." 546 P.2d at 244.

The court's discussion of the discretionary nature of decisions regarding persons in the State's custody is instructive:

In regard to the problem: whether the placing of a prisoner in a 'work release' program comes within subsection (1) above quoted as 'the exercise. . . [of] . . . a discretionary function, . . .,' we make the following observations: The prison authorities are faced with the dilemma which has always existed in penal institutions: as to what extent they are furnishing an education for further crime, or for the rehabilitation of prisoners into useful citizenship. We think there is not much doubt that the use of work release programs is a worthwhile effort toward the latter objective. But that is within the discretion of the prison authorities to decide. In addition to the exercise of this judgment as to the value and practicability of such a program generally, there are problems about its advisability as to each individual prisoner. In order to weigh the positive values of possible benefit for him in such a program against the negative factors such as the likelihood of his escaping and engaging in more antisocial conduct, it is essential to consider the various aspects of his personality: his intelligence, aptitudes and qualities of character such as honesty, integrity and industry; and whether he has demonstrated a sincere desire to rehabilitate himself so that there is a reasonable probability that he will succeed. Accordingly, we agree with the view of the trial court that the handling of the prisoner Michael Hart was something which 'arises out of the exercise of a discretionary function' for which subsection (1) of Section 63-30-10 quoted above has retained sovereign immunity.

546 P.2d at 244 (emphasis added).

In Epting the court did not attempt to apply the planning-operational level test espoused in Carroll, supra. Human conduct, and the problems of caring for human beings do not lend themselves well to neat definitions or tests.

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Several other courts have recognized that what appears to be conducted at the operational level is in reality a discretionary function. In Evangelical United Breth. Church of Adna v. State, 67 Wash.2d 246, 407 P.2d 440 (1966), the plaintiff Church brought action against the state for the loss of its church which was destroyed by a boy who escaped from an "open program" work detail at a state juvenile correction facility. The Court found that the decision to assign the boy to a program with more relaxed security measures was not operational level conduct but rather purely discretionary.

To this end, it calls into play the exercise of executive expertise, evaluation and judgment in an area involving many variable human, emotional and psychological factors and about which widely divergent opinions can and do exist. The decisions required are not unlike those called for in the legislative and judicial processes of government . . . The decisions involved were, within the framework of necessary executive and administrative processes of government, purely discretionary, if not in fact quasi-judicial in character. (Emphasis added.)

407 P.2d at 447.

Similarly, the Court in Jarret v. Wills, 235 Ore. 51, 383 P.2d 995 (1963), recognized that decisions concerning the amount of supervision required for a particular individual must necessarily be discretionary. Referring to a superintendent of a home for

the mentally deficient the Court stated:

His responsibilities require him to make constant discretionary judgment. Like the Board of Parole and Probation or the Superintendent of the State Hospital, he is required as the State's keeper of these unfortunates and in behalf of the state, to judge and govern human beings and human conduct, a judgment devoid of any of the standard weights and measures available for the decisions made by other public officials. There would be few of his decisions that would not be discretionary. 383 P.2d at 998.

These cases are particularly pertinent to the duties involved in the placement and supervision of Jennifer Little. All three courts recognized that discretion on the part of the employees was necessary for the proper functioning of the program involved. Similarly, the foster care program requires the foster care workers to exercise their discretion concerning their own assessments of the homes, families and children involved. Without this element of discretion a foster care program could not function, for not all foster children and foster parents are alike. Simple operational level decisions cannot possible apply to the program. All foster care decisions are of necessity discretionary.

The Utah Supreme Court recently stated that it had always followed the lead of cases interpreting the Federal Tort Claims Act in using the planning-operational level test to separate discretionary from non-discretionary governmental

functions. Frank v. State, 613 P.2d 517 (1980). However, federal courts have recognized the limitations on the applicability of this test. In a leading case dealing with the meaning of the word "discretion" as used by the Federal Tort Claims Act, the court recognized that the planning level of government action goes farther than the initiation of programs by administrations. (This is contrary to the decision of the district court in the present case.)

. . . [t]he discretionary function or duty . . . includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680(a) would fail at a time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or non-action being directed by the supervisor, exercising, perhaps abusing, discretion. (Emphasis added.)

Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956 (1953),
Id. At 36.

The United States District Court in Sullivan v. United States, 129 F.Supp. 713 (N.D.Ill. 1955) also recognized the necessity for an extension of the ideas of planning level discretionary action. That court held that any activity of a government employee at the operational level performed in accordance

with the official plan or program constitutes performance of a discretionary function since its source is discretionary.

Also, federal courts have shown an unwillingness to apply the test where the performance at the operational level is not clearly spelled out by exact specifications. Recently, the Tenth Circuit Court of Appeals in Barton v. United States, 609 F.2d 977 (10th Cir. 1979), upheld the trial court's decision in dismissing a claim against the Bureau of Land Management for injury caused a rancher in temporarily denying grazing sights. The court found the Bureau of Land Management's decision to be discretionary and thus, the Bureau of Land Management was immune from suit for resulting injury. In assessing what functions constitute discretionary functions the court stated:

Concisely stated, the rule is that if--
a government official in performing his
statutory duties must act without reliance
upon a fixed or readily ascertainable stand-
ard, the decision he makes is discretionary
and within the exception of the Tort Claims
Act.

Id. at 979.

A United States District Court also found that non-specific duties imposed on governmental entities necessarily are discretionary functions. In Gray v. United States, 445 F.Supp. 337 (S.D. Texas 1978), the court found that determining what is "safe for use" is a discretionary function performed by the Federal Drug Administration. The court distinguished this kind of duty from that in Griffin v. United States, 500 F.2d 1059 (3rd Cir. 1974), where the Federal Tort Claims Act discretionary function exception did not bar suit in review of the specific detailed criteria listed in the regulation governing the agency. Gray v. U.S., at 341.

The Division of Family Services has no specific detailed criteria on the placement and supervision of foster children. At most, there are general guidelines. Anything more narrow would have to be non-functional because the varying needs of the special problems of the children involved require varying levels and degrees of supervision and treatment. If the case workers for the foster care program were forced to work constrained by a narrow set of operational rules, all foster children would get the same kind of treatment and supervision regardless of their special needs. This would be highly undesirable. The result is that the foster

care program is not run on an operational level but is necessarily discretionary.

The fact that certain programs run by the state are necessarily discretionary is one of the main reasons for the retention of governmental immunity. Because governmental custodial programs are found to be desirable and necessary, whether they be penal or health care programs, it is necessary that they not be threatened by continual civil actions. Twenty-four hour supervision in custodial programs is neither desirable nor feasible in all cases. If governmental immunity is not allowed for these programs their very existence is threatened if there is liability for any accident which might occur.

The policy of allowing governmental immunity to protect the quality and existence of beneficial programs has been upheld by this Court. In Blonquist v. Summit County, 25 Utah 2d 387, 481 P.2d 430 (1971), the Court noted:

It is of great importance to public officials, to the governmental unit they act in behalf of, and even more important to the stability and efficiency of government, that public officials should not be held liable for damages for acts done in good faith in the performance of their duties where the exercise of any discretion is involved even though they may make a mistake in judgment. The general law is quite uniformly to that effect.

* * *It would be quite impractical and unfair to require them to act at their own risk. This would not only be disruptive of the proper functioning of public institutions, but undoubtedly would dissuade competent and responsible persons from accepting the responsibilities of public office. Accordingly, it is the settled policy of the law that when a public official acts in good faith, believing what he does to be within the scope of his authority and in the line of his duty, he is not liable for damages even if he makes a mistake in the exercise of his judgment.

483 P.2d at 434, 436.

Likewise, in Sheffield v. Turner, 2 Utah 2d 314, 445 P.2d 367, 369 (1968), the Court stated that there is:

. . . the imperative need for those able 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. 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.

Whether certain governmental action will be classified as discretionary and thus allowed governmentatl immunity may rest squarely on the decision whether the challenged action is considered operational or planning. For this reason the court in Emch v. United States, 630 F.2d 523, 527 (7th Cir. 1980), concluded that the determination of whether an action should be deemed operational or planning must be made by considering whether governmental immunity is desired for the activity

involved.

. . . [T]he existence of a discretionary function, and thus the potential for governmental liability under the Federal Tort Claims Act, ultimately rests upon the characterization of the challenged behavior as "policy" or operations." In making this determination, relevant considerations include whether or not the nature of the judgment exercised called for policy considerations, Griffin v. United States, 500 F.2d 1059 (3rd Cir. 1974), and whether the Act complained of is "the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability," Ove Gustavsson Contracting Co. v. Floete, 299 F.2d 655, 659 (2d Cir. 1962).

The risk of liability to the Division of Family Services would be too great if it could be held responsible for any accident occurring in a foster home. The only way to protect against such liability, absent governmental immunity, would be to return to institutional child care. Such a solution is obviously contrary to the best interests of children needing foster care.

The compelling need for governmental immunity for the Division of Family Services to allow the continuance of the foster care program requires that the waiver of governmental immunity be read narrowly and that the discretionary acts of the Division of Family Services foster care workers be immune from suit as is the clear intention of the Utah Governmental Immunity Act.

POINT II

THE TRIAL COURT ERRED IN ALLOWING DR.
JANICE SARGEANT TO TESTIFY.

Dr. Janice Sargeant was called by Plaintiffs below to give expert testimony regarding treatment for autistic children, particularly those who exhibit head-banging. The Defendants objected to the admission of Dr. Sargeant's testimony (T. p. 128) based upon Rule 56(2), Utah Rules of Evidence, which states:

If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (a) based on facts or dates perceived by or personally known or made known to the witness at the hearing, and (b) within the scope of the special knowledge, skill, experience or training possessed by the witness.

Rule 56 is concerned with the admissibility of expert evidence and 56(2) in particular is designed to insure that expert evidence that is admitted has a proper foundation. Dr. Sargeant's testimony did not have adequate foundation for two reasons.

First, the facts on which Dr. Sargeant based her testimony were insufficient. It was well established in voir dire that Dr. Sargeant had no personal first hand knowledge of Jennifer or her problems. She had never interviewed or evaluated Jennifer and had seen only one report

where Jennifer had been described as manifesting "autistic behavior." (T. p. 141). Dr. Sargeant then went on to give testimony on treatment for autistic children (T. p. 139). There was no evidence at trial that Jennifer was ever clearly diagnosed as autistic. Therefore, Dr. Sargeant's testimony was not supported by the facts.

In the Utah Supreme Court case Day v. Lorenzo Smith and Son, Inc., 17 Utah 2d 221, 408 P.2d 186 (1965), it was held that the trial court did not err in disallowing testimony by a police officer who did not have sufficient first hand knowledge to testify. The officer had been at the scene of the accident but did not personally observe the impact. Officer Sherwood's credentials were not in issue. There was no question that twenty-four years of experience in investigating accidents qualified officer Sherwood to testify as to the general subject of automobile accidents. Similarly, in the instant case, there are no objections to Dr. Sargeant's qualifications to testify about possible ways to treat autistic children. In Day, notwithstanding officer Sherwood's expertise, the Supreme Court held that his testimony concerning conclusions about the impact was not supported by sufficient facts and thus was not admissible. In this case, Dr. Sargeant testified in the area of proper treatment for autistic children when there was no evidence to indicate

Jennifer was ever diagnosed as autistic. Dr. Sargeant testified that a child had serious problems if head-banging started suddenly at age two and one half when there was no evidence whatsoever that Jennifer never banged her head until age two and one-half or that Jennifer fit into the category of children Dr. Sargeant was referring to as "head-bangers." Dr. Sargeant also testified extensively about possible treatment methods for head-bangers, which the trial judge relied upon heavily in making his final decision. However, Dr. Sargeant had never observed Jennifer Little in the act of head-banging, had never examined her, and was not even present in the courtroom to hear other witnesses describe Jennifer's behavior. Dr. Sargeant had no actual knowledge regarding Jennifer's head-banging, and had no idea whether her problem fit into the same category as the serious head-bangers about whom she was testifying. In short, Dr. Sargeant testified as to matters lacking in foundation and unsupported by the facts of the case. Admitting her testimony was error under both Day v. Lorenzo Smith and Son, Inc., and Utah Rule of Evidence 56(2)(a). Defendants continued their objections to this testimony at trial (T. pp. 150-151).

The second reason that there was insufficient foundation for Dr. Sargeant's testimony is that her testimony

was based on what she had been told by the appellee's attorney, Mr. Littlefield. It was established at trial on cross examination that Dr. Sargeant had not been present to hear the testimony of any of the other witnesses and therefore could not have based her testimony on information given by the other witnesses (T. p. 127). Any familiarity she had with the facts of the case she gained outside the court room.

In Edwards v. Didericksen, 597 P.2d 1328 (Utah, 1979), the Supreme Court of Utah held that testimony regarding conclusions of the expert witness from talking to witnesses before trial was properly disallowed. The court explained, "The expertise of the witness, his degree of familiarity with the necessary facts, and the logical nexus between his opinion and the facts adduced must be established." Id. at 133. In his objection to the trial court allowing Dr. Sargeant to testify Mr. Barlow (co-counsel for defendant below) pointed out the hearsay problem involved (T. p. 128). This problem was also recognized by the Supreme Court in Didericksen:

The question posed in the instant case was not limited to testimony which was adduced at trial; it clearly opened the door to hearsay evidence gleaned from talking with persons outside the court room whose testimony may not have been

admitted or admissable at trial. The interjection of such hearsay testimony, cloaked in the form of an expert opinion, would have been impermissible and potentially highly prejudicial.

597 P.2d at 1332.

Therefore, not only was Dr. Sargeant's testimony based on an inadequate factual predicate, but on hearsay as well. The fact that the trial court refused to strike Dr. Sargeant's testimony was not only error, but prejudicial error. The trial judge was obviously swayed by the doctor's list of possible ways to treat a child with a head-banging problem. The judge decided the Division of Family Service's negligence on the basis that the Division had not employed one of the several treatments suggested by Dr. Sargeant (namely protective headgear). The trial judge's substantial reliance on evidence which lacked adequate foundation renders admission of the testimony prejudicial error.

POINT III

THE TRIAL COURT ERRED IN FINDING THAT
THE DIVISION OF FAMILY SERVICES WAS
NEGLIGENT.

In finding that the Division of Family Services was negligent in the care of Jennifer Little, Judge Rigtrup stated that the Division had "a duty to exercise reasonable care in affording protection to the child." (T.p. 273). Later, in further discussing his decision, the Judge characterized the duty as the "duty to protect." (T.p. 274). The court then went on to find that said duty was breached by the failure to provide protective headgear to Jennifer (T. pp. 273,274). Jennifer eventually died, and the Division of Family Services "was held liable for the death although there was no finding or evidence that the "negligence" of the Division in not buying a helmet proximately caused the death (See Point IV, below). The description of duty and the resultant liability in this case set a very dangerous precedent. If the duty is one of blanket "protection," then the State could be found to have breached that duty whenever anything happens to a foster child, regardless of the reasonableness of the actions taken by the foster care workers. In effect, this case, if followed, would create a standard of strict liability.

In announcing his decision, Judge Rigtrup attached "reasonableness" to the standard of care, or duty to protect. (T. p. 273). However, his finding of negligence seems to totally ignore all the evidence of reasonableness. The only finding of negligence was based on the failure of the Division to provide, or instruct the foster parents to provide, protective head gear (a helmet). (T. pp. 273-274). Even that expectation is unreasonable based on the evidence, and the finding of negligence was erroneous. Appellants therefore request the Court to review the evidence and reverse the district court's conclusion that the Division of Family Services was negligent.

The district court only found one instance of "negligence"--the failure to provide a helmet. That finding was based upon the testimony of Dr. Janice Sargeant (see Point II), who suggested a helmet as one possible means of controlling head-banging. The pertinent portion of Dr. Sargeant's testimony follows:

Q. Are there any means available for controlling the head banging behavior?

A. Yes.

Q. What are they?

A. Well, there are a variety. One is selective attention in that you give attention and lose it when he's not head banging, and no attention when he is head banging. That would be the first item. Also, you might proceed from there to do some kind of punishment procedure,

something like using time outs or isolation in a room whenever there's head banging.

Q. Time out?

A. That would be isolation of the child, or some other kind of punishment procedure like overcorrection, which involves having a child repeat a certain series of behaviors many, many times so that eventually the head banging is discouraged.

Q. Are you talking about spanking the child or striking the child in that situation?

A. No. No. For example, telling the child to stand up and sit down, stand up and sit down, stand up and sit down, which is one overcorrection procedure. Another would be the use of light water spray in his face whenever head banging occurs, which is also effective.

In some cases where the head banging is intense in autistic children, they have even used electric shock where there was danger of the child's retina detaching because the banging was so severe.

The use of helmets and tranquilizers or drugs or sedatives has also been used. There are a variety of techniques available for that behavior.

(T. pp. 132-133.)

Use of a helmet is only one of many possible responses suggested by Dr. Sargeant; in fact, it is almost given as an aside at the end of the list. The first method suggested is to ignore the head-banging. At trial, the foster mother, Mrs. Meik, testified that she kept Jennifer in the same room with her at all possible times, and if she became concerned that Jennifer might hurt herself from the head-banging, she would hold Jennifer until she calmed down (T. pp. 39, 228). Thus, Mrs. Meik prevented any serious harm from occurring due to the head-banging. (Although there was some testimony as to some bruises possibly relating to the head-banging, there

was no evidence of serious harm caused by this behavior.)

Based upon Dr. Sargeant's testimony, giving no specific attention to Jennifer's head-banging, except for the efforts of Mrs. Meik in restraining her for protection, was reasonable care.

Dr. Sargeant also suggested isolating a head banging child, spraying water in the child's face, or even using electric shock or drugs in some cases. Surely the Division of Family Services could not be found negligent for failure to utilize any one of the many alternative suggestions offered by Dr. Sargeant, especially when the attraction of that particular method to the Judge seemed to be his experience with a helmet used by his nephew who was not a head-banger (T. p. 273).

The foster mother did take reasonable care to prevent Jennifer Little from harming herself when she began head banging. Furthermore, Connie Cowley had confidence in this foster mother's ability to care for Jennifer in this situation because she had previously had another foster child with similar behavior (T. pp. 51, 76, 80), and Mrs. Cowley, the worker, had seen no indication that Jennifer was seriously injuring herself (T. p. 62). Thus, the finding of negligence based upon the failure to provide a helmet was clearly in error.

In the Findings of Fact and Conclusions of Law (R. pp. 159-162) filed after the trial, to which the Appellants repeatedly objected, (R. pp. 149-153), several other "violations of duty" are cited which were never even mentioned by the Judge in his ruling at trial (See paragraph 10, R. p. 160).

The first finding (objected to by appellants, paragraph 3, R. p. 153) was that the Division of Family Services failed "to adequately train JENNIFER'S foster parents or whoever would take care of the child when the foster parents were gone." On the contrary, the Court specifically found that "the Meiks were qualified parents, were good parents, were conscientious parents . . ." (T. p. 274). The record also shows that the Meiks were thoroughly trained, both as basic and therapeutic foster parents (R. pp. 35, 36, 39). The quality and sufficiency of that training was never questioned by the Judge. The only mention made about lack of direction or training was that the Division of Family Services never told the Meiks specifically that Jennifer should have protective head gear (T. p. 274). As has been previously discussed, that single omission simply cannot be seen as negligence.

The second finding (also objected to by appellants,

R. p. 153) was that the Division of Family Services failed "to make timely evaluations of her condition to prevent potential serious harm and injury." Again, there was absolutely no such finding at trial, and no evidence to support it. Jennifer Little had been evaluated several times before she was removed from her home. (T. p. 57). She had been examined at both the University Hospital and Primary Children's Hospital (T. p. 55). A treatment plan for Jennifer had been developed that would have started that summer with a home-based program participated in previously by the Meiks (PITCH) and would have continued into the fall with another program (Developmental Disability Program), both programs designed to treat children showing autistic tendencies as did Jennifer (R. p. 54). The appellees' expert witness, Dr. Sargeant, testified that she believed these programs were adequate to treat autistic children (R. p. 145). Jennifer's needs were thoroughly evaluated and treatment programs planned. The evidence supports no finding of negligence in this respect.

The third finding of breach of duty (Paragraph 10 (c), r. p. 160) relates to the failure to provide a helmet previously discussed. It is interesting to note that before signing the Findings of Fact, Judge Rigtrup altered this

particular paragraph to state that the helmet would have "reduced the risk of possible serious harm and injury." There is no finding at all that the failure to provide a helmet in fact caused any harm, much less the death.

Finally, the written Findings of Face included the following "violation of duty" (again objected to by Appellant, R. p. 153): "Lack of proper supervision at all times as indicated by allowing the child to be left under the supervision and care of FLOYD HOOTEN, a seventeen (17) year old child who was in the custody of the MEIKS because of his own special problems and who slapped the child around during said care, triggering cerebral hemorrhaging that brought about Jennifer's untimely death." No finding of any kind relating to Floyd Hooten was made at trial.

It would certainly go far beyond reasonableness to expect a Division of Family Services worker to be present or "supervising" at a foster home "at all times." The Division cannot assign a worker to supervise every foster home around the clock. Further, the evidence shows that it was not at all unreasonable to leave Jennifer for a short time in the care of Floyd Hooten. Floyd had no history of violent or aggressive behavior toward children (T. pp. 41, 262), had never been known to strike Jennifer or other smaller children,

(T. p. 41), and had shown himself to be a responsible babysitter (T. p. 262). No amount of supervision by the foster care worker would have changed the reasonableness of leaving Jennifer in Floyd's care.

Again, the only finding of negligence made by the district court judge in his oral ruling was based on the failure to provide a helmet. This and all other written findings regarding breach of duty are not supported by the evidence, and the trial court's finding that the Division of Family Services was negligent was error and should be reversed.

POINT IV

THE NEGLIGENCE, IF ANY, OF THE DIVISION OF FAMILY SERVICES WAS NOT THE PROXIMATE CAUSE OF THE DEATH OF JENNIFER LITTLE.

Even if the Division of Family Services was negligent in failing to provide protective headgear to Jennifer Little, there was absolutely no evidence or finding that such negligence was the proximate cause of Jennifer Little's death. In fact, in his oral ruling, Judge Rigtrup stated that the actual cause of death was not particularly important to the court:

Whether or not Jennifer's death resulted from a blow or blows by Floyd Hooten, or whether it resulted from her banging her head on the floor or the wall, whether it resulted from the cumulative effects of a combination of those incidents of trauma, I don't think are really particularly important to the Court.

T. pp. 272-273. Assessing liability against the Division of Family Services with no showing or finding of proximate cause is reversible error.

In an action for wrongful death which is based on negligence, the plaintiff has the burden of showing not only that there was negligence, but also that the negligence was the proximate cause of the death. 22 Am.Jur.2d, Death, § 222. Hall v. Blackham, 417 P.2d 664 (Utah, 1966); Thomas v. Bokelman, 462 P.2d 1020 (Nev. 1970). Negligence and proximate cause are

separate concepts. May v. Baklini, 509 P.2d 1345 (N.Mex., 1973). "Assuming plaintiff made a prima facie showing of showing of defendants' negligence, this was insufficient. A showing of proximate cause was also required." Id. at 1346.

In a recent case this Court recognized that the plaintiff must sustain the burden of proof on both the issue of negligence and the issue of proximate cause. "[W]hile there may have been negligence on the part of the defendants, such negligence does not automatically render them liable." Cooke v. Mortensen, 624 P.2d 675, 676 (Utah, 1981). As to the burden of proof on causation, the court has stated:

It is a fundamental principle of the law of negligence that the person complaining has the burden of showing a causal connection between the negligent conduct complained of and the injury to the plaintiff.

Sumsion v. Streator-Smith Inc., 132 P.2d 680 (Utah, 1943).

[T]he evidence must do more than merely raise a conjecture or show a probability. . . [W]here the proximate cause of the injury is left to conjecture, the plaintiff must fail as a matter of law.

Devine v. Cook, 279 P.2d 1073, 1083 (Utah, 1955).

The plaintiff cannot sustain a case on the mere speculation or possibility that the defendant's negligence was a cause of the alleged injury. On this subject, Prosser stated in Law of Torts, 4th ed., p. 241 that:

On the issue of the fact of causation, as on other issues essential to his cause of action for negligence, the plaintiff, in general, has the burden of proof. He must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

As this Court discussed in Devine v. Cook, supra:

While deductions may be based on probabilities, the evidence must do more than merely raise a conjecture or show a probability. Where there are probabilities the other way equally or more potent the deductions are mere guesses and the jury should not be permitted to speculate. The rule is well established in this jurisdiction that where "the proximate cause of the injury is left to conjecture, the plaintiff must fail as a matter of law." [Cites omitted.] Many cases are cited in support of this proposition and the court quoted with approval from 29 Cyc. 625 where it is stated: "The evidence must, however, do more than merely raise a conjecture or show a probability as to the cause of the injury, and no recovery can be had if the evidence leaves it to conjecture which of two probable causes resulted in the injury, where defendant was liable for only one of them."

279 P.2d at 1083.

Further, negligence is not actionable if an intervening act was the proximate cause of the injury:

But it is the plaintiff's burden to establish that such prior negligence was the proximate cause of the subsequent injury. This entails the requirement that the subsequent injury be one which might reasonably be expected to follow from the original act and injury; and without any new

and independent, unforeseeable occurrence which effectively caused the second injury. If there is such a later causative occurrence, it is deemed to be the intervening, efficient and therefore the proximate cause of such injury.

Skollingsberg v. Brookover, 484 P.2d 1177, 1179-80 (Utah, 1971).

As the Nevada Supreme Court said in another wrongful death action:

Negligence, is not actionable unless, without the intervention of an intervening cause, it proximately causes the harm for which complaint was made. An intervening cause means not a concurrent and contributing cause but a superseding cause which is itself the natural and logical cause of the harm.

Thomas v. Bokelman, supra, 462 P.2d at 1022.

In Cooke v. Mortensen, supra, this Court held that an injury sustained by a tenant while trying to open a window which had been negligently painted shut by the landlord could not be attributed to the landlord's negligence because the tenant's intervening negligence was the proximate cause:

Further, and again assuming defendants' negligence, we concur with the trial court that the landlords' failure to unstick a window could not reasonably be calculated to result in the injury incurred herein. Rather, this injury was caused by the independent and intervenory action of the plaintiff. When there exist two possible causes for an injury, and these causes are independent of each other, the later and intervening cause is generally to be viewed as the proximate cause of the accident.

624 P.2d at 676.

In the present case, there is no evidence at all which shows that the Division of Family Services' negligence (if any) in not providing protective headgear to Jennifer Little was causally related to her death. A helmet may have helped to prevent Jennifer from bruising herself, while head-banging, but there is no affirmative link between the head-banging and lack of headgear and the death.

Plaintiff below attempted at length to show through the testimony of Dr. Serge Moore that Jennifer's death may have been caused by the "aggregate trauma" of continuous episodes of head-banging (T. pp. 99-100). However, Dr. Moore testified that the blow which caused Jennifer's death did not result from her banging her own head against a solid object, such as a wall or toilet (T. p. 105). Further, he testified that the headbanging and aggregate trauma therefrom ought to be considered as a possible contributing factor in the death (T. pp. 117-118). However, a final, significant blow would have been necessary to cause death in any case; "the smaller injuries alone, the bruises alone, would not have caused her death." (T. p. 119). Furthermore, the final single episode could very well have caused the death itself, whether there was aggregate trauma or not (T. p. 119). Dr. Moore also testified that the final blow which caused Jennifer's death was not the result of banging

her head against a solid object, but rather was the result of being hit by a blunt object with a soft structure covering it, such as a hand or fist (T. p. 110).

The police reports, which were admitted into evidence, show that Floyd Hooten, the 17-year-old foster brother, did strike Jennifer Little with his hand or fist several times. Jennifer's death followed immediately. This evidence is undisputed. Floyd Hooten's actions were the proximate cause of the death. While the aggregate trauma from the head-banging may have contributed to the death, and that is mere speculation, the death would not have occurred without the final blows by Hooten; and, the death might, at least as probably, have occurred as a result of Hooten's blows alone, aggregate trauma or not.

In Widefield Homes, Inc. v. Griego, 416 P.2d 365 (Colo., 1966), the Supreme Court of Colorado held:

In order to make out a prima facie case, the plaintiff's proof was required to show that the alleged defective construction of the drain cover was, to say the least, the probable cause of plaintiff's injuries; in this case, however, it is only one of several possible causes. We have heretofore held that where the state of the record is sufficient to establish only a possible connection between an act or condition and a result, it is not sufficient in law to impose liability. We cannot affirm a judgment based upon mere possibilities as the law deals only in probability and reasonably established fact.

416 P.2d at 366-367.

Similarly, in a wrongful death case, the Alaska Supreme Court held:

A mere possibility of causation is not enough. When the matter remains one of conjecture, as it does here, the trial court must find against the party carrying the burden of proof.

City of Fairbanks v. Schaible, 375 P.2d 201, 204 (Alaska, 1962)

In the instant case, the "negligence" of the Division of Family Service in not providing a helmet to Jennifer Little for protection from head-banging is only a possible contributing factor, certainly not the sole cause, and very probably not even a contributing cause of death. Assessment of liability against the Division of Family Services based upon such "negligence," with no proximate cause, was clear error.

Although the lower court made no finding whatsoever of causation during the oral ruling at the close of trial, and the defendants objected to any such finding suddenly appearing in the written findings several weeks later (R. pp. 150-153), it is instructive to note that, by interlineation, the Judge acknowledged that the death actually resulted from the blows by Floyd Hooten (R. p. 161), and only that protective headgear might have reduced the risk of harm from head banging.

It is clear that the proximate cause of Jennifer Little's death was the actions of Floyd Hooten, which are not attributable to the Division of Family Services (see Point III *supra*). The written Findings of Fact assert that the Division

of Family Services was negligent due to "lack of proper supervision at all times as indicated by allowing the child to be left under the supervision and care of Floyd Hooten. . ." (R. pp. 160-161; Defendants' Objection, R. p. 153). As has been previously discussed, there was absolutely no reason for the Division of Family Services to foresee that Jennifer Little might be harmed if left in the care of Floyd Hooten.

There is a duty to take affirmative action to control the wrongful acts of third persons only where the [defendant] . . . has reasonable cause to anticipate such act and the probability of injury resulting therefrom.

Thomas v. Bokelman, supra, 462 P.2d at 1022.

Further, the duty to supervise a child in placement does not extend to the point of insuring that nothing will ever happen to that child.

In Sly v. Board of Education of Kansas City, 516 P.2d 895 (Kansas, 1973), and Schafer v. State of Montana Department of Institutions, 592 P.2d 493 (Montana, 1979), governmental agencies were held to have the duty to supervise a particular individual or group of individuals. However, in both cases the Supreme Courts refused to find that this duty extended to include the duty to prevent unforeseeable intervening events from occurring. Both courts found in cases where an unforeseeable intervening event is the cause of the

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injury that lack of supervision on the part of the agency is not the proximate cause and the agency is not liable for the resulting injury. Both cases also expressly stated that to hold otherwise would be to place the duty of an insurer on the agency, which was not intended.

In the Schafer case, which involved injuries to a girl committed to the custody of the State Department of Institutions, the court commented on the role of agency supervision in preventing the unforeseen acts of third persons. The injury to the child, caused by the negligence of a third person driving an automobile, "easily could have occurred no matter what type of supervision the State exercised over her, short of locking her in a room somewhere. Such restrictive detention is not the goal of our juvenile institutions and programs." 592 P.2d at 496.

Similarly, no reasonable amount of supervision by the Division of Family Services worker could have guaranteed that Jennifer Little would not be injured by Floyd Hooten. The only way to provide such supervision would be to remove children from individual foster homes and place them in closed institutions where they could be under 24-hour watch.

The lower court not only made no supportable finding of proximate cause, but in fact stated that the cause of death (in a wrongful death action) was of no particular importance. There was no showing that any negligence on the

part of the Division of Family Services was the proximate cause of Jennifer Little's death, and the judgment should be reversed.

CONCLUSION

Based upon the foregoing discussion, the Appellant Division of Family Services requests the Court to reverse the district court's denial of the Motion to Dismiss based upon the substantive provisions of the Utah Governmental Immunity Act. Further, the Appellants request reversal of the final judgment rendered against the Division of Family Services.

Dated this 31st day of March, 1982.

Respectfully submitted,

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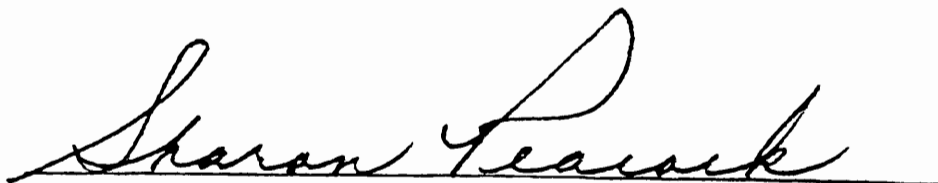
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CERTIFICATE OF MAILING

Mailed two copies of the foregoing Brief of Appellants to Mr. David E. Littlefield, Attorney for Respondents, 425 South Fifth East, Salt Lake City, Utah 84111, this 31st day of March, 1982.

A handwritten signature in cursive script, reading "Sharon Peacock", written over a horizontal line.