2011

Jon Van De Grift v. Utah : Reply Brief

Utah Supreme Court

No. 20110994

IN THE UTAH SUPREME COURT

JON VAN DE GRIFT, et al.,

Plaintiffs – Appellants,

vs.

STATE OF UTAH, et al.,

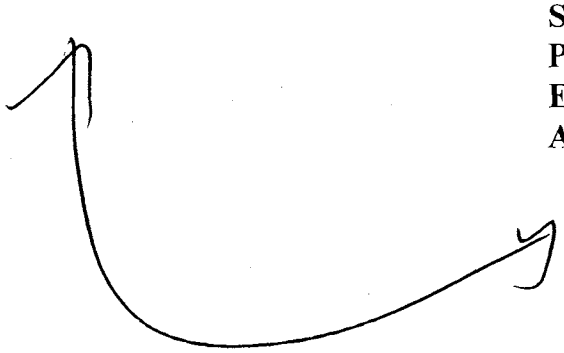
Defendants – Appellees.

APPELLANTS' REPLY BRIEF

Appeal from a final judgment and order of the Third Judicial District Court
Honorable Paul G. Maughan, Presiding

Marcus R. Mumford (12737)
MUMFORD RAWSON LLC
15 West South Temple, Suite 1000
Salt Lake City, UT 84101
Phone: (801) 428-2000
Attorney for Appellants

PEGGY E. STONE (6658)
Assistant Utah Attorney General
MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, UT 84114-0856
Phone: (801) 366-0100
E-mail: pstone@utah.gov
Attorney for Appellees



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PEGGY E. STONE (6658)
Assistant Utah Attorney General
MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, UT 84114-0856
Phone: (801) 366-0100
E-mail: pstone@utah.gov
Attorney for Appellees

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I. The State cannot obtain immunity by recharacterizing Appellants' plain-stated negligence claims

The State admits, as it must, that Appellants' suit is "**for damages allegedly caused by the State's negligence** in supervising a parolee and in failing to warn them about [the parolee]." State Br. at 1-2 (emphasis added). Nevertheless, the State argues that the Governmental Immunity Act immunizes it from Appellants' suit – arising from **the negligence of state employees** – because the State has recharacterized the injury at issue as also arising from a third party's "deceit." State Br. at 2.

Three points in response: First, this is not, as the State states, an argument resting in the "plain language" of the statute. The Governmental Immunity Act plainly waives immunity for lawsuits seeking recovery from the State for injuries arising from the negligence of a governmental "**employee** committed within the scope of employment." Utah Code Ann. § 63G-7-301(4). By implication, the plain reading of the following subsection of the code excepts from that waiver only those injuries arising out of "deceit" ***by that governmental employee***. Utah Code Ann. § 63G-7-301(5)(b). The State eventually acknowledges that its argument rests not on the plain reading of the statute, but on an unprecedented extension of the *Taylor* and *Ledfors* line of cases, which only concern assault and battery, and on the very same argument the Supreme Court rejected in *State v. Francis*, 2010 UT 62 ¶ 17, 248 P.3d 44 (rejecting the State's argument that "governmental immunity attaches when the injury has any causal connection to the

exception claimed regardless of the status of the actor directly responsible for the injury"). State Br. at 13.

Second, the State's argument rests in its recharacterization of Appellants' claims. The State asserts, falsely, that Appellants "do not dispute that their injuries resulted from the tort of deceit." State Br. at 11. No, that is exactly the point of this appeal. Appellants brought suit against the State for "damages allegedly caused by the State's negligence." State Br. at 1-2. In its Rule 12(b)(6) motion, the State recharacterized Appellants' claims as if they were brought against the State for deceit – seeking to shoehorn Appellants' allegations into an exception to the State's waiver of governmental immunity that does not apply. But it is well-established that the Governmental Immunity Act does not immunize the State from its negligence simply because there may be another proximate cause of the harm suffered. *See Day v. State*, 1999 UT 46 ¶ 21, 980 P.2d 1171, 1178 (Utah 1999) (rejecting the argument that the State was not responsible for the harm caused by the suspect in a high-speed chase on the grounds that the pursuing officer "had a duty of care to other users of the highways and streets," and that officer's "conduct could be found to be a proximate cause of the [plaintiffs'] injuries if they were reasonably foreseeable").[1] Thus, the district court should not have dismissed Appellants' claims for negligent supervision and failure to warn simply because the parolee was also

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[1] Similarly, the State's position is contrary to the well-pleaded complaint rule that recognizes that plaintiffs are "masters of their complaint" – having the right to choose who to sue and what claims to bring. *See Lincoln Property Co. v. Roche*, 546 U.S. 81, 94 (2005) (defendants are prohibited from "transforming the action"); *see also Caterpillar, Inc. v. Williams*, 482 U.S. 386, 387 (1987) (plaintiffs could have brought certain claims but "they, as masters of the complaint, chose not to do so.").

responsible for the harm Appellants suffered or because the State recharacterized Appellants' claims as arising solely out of the deceit of the parolee.

Third, the State's analysis is based in a reversal of the applicable burdens in the context of a Rule 12(b)(6) motion. The State's brief alleges that "after learning of Higgins' fraudulent acts, [it] revoked his parole," seeking to excuse its liability on that basis. State Br. at 9. It is assuming, and asking this Court to assume, that it cannot be held liable for the negligent acts and omissions of its employees in supervising Higgins on parole, because the underlying tort of Higgins involved some "deceit": "there is a 'but for' causation between one of the exceptions and plaintiffs' injury," and therefore "immunity is retained." State Br. at 19. But Appellants are simply asking for leave to prove their case: that the State caused their injury by failing to supervise Higgins adequately to ensure that he did not "handle [their] money" while being self-employed, being a principal of a limited liability company, and while traveling extensively outside the state – all in blatant violation of the strict conditions of his parole that were supposed to prevent the harm Appellants suffered. *See Complaint* at ¶ 15 & Ex. A. This case is a clear example of why this Court, in the interests of "sound reason and desirable simplicity," held that governmental immunity "is an affirmative defense which must be proved by the defendant," *Stuckman ex rel. Nelson v. Salt Lake City*, 919 P.2d 568, 574 (Utah 1996) (reversing summary judgment, in part, on ground that the governmental entity failed to prove immunity), and why the tort liability of the State should be analyzed first to avoid, to the extent possible, "difficult decisions regarding sovereign immunity issues." *Ferree v. State*, 784 P.2d 149, 152-53 (Utah 1989) ("Deciding an immunity

question first may lead to unwarranted assumptions and confusion about undecided duty problems.").

II. The deceit exception to the immunity waiver does not apply in this case.

A. The Court's decision in Francis, as well as legislative history, demonstrate that the status of a tortfeasor is relevant for purposes of the deceit exception.

The State attempts to distinguish *Francis* on the grounds that it was limited to the "permit" exception to the waiver of immunity. State Br. at 17. But the Court in *Francis* rejected the precise argument the State is making here: that "governmental immunity attaches when the injury has any causal connection to the exception claimed regardless of the status of the actor directly responsible for the injury." *Francis*, 2010 UT 62, ¶ 17. Precisely because a tortfeasor's status is relevant, the *Francis* decision distinguished *Taylor, Ledfors,* and *Peck*, holding that the State could not claim immunity based on the acts of a third party, the federal government. *Id.* ¶ 22 ("[T]he State cannot claim governmental immunity for actions wholly conducted by the federal government."). Critical to the *Francis* court's decision was the fact that "the State did not perform any act that falls within the scope of the permit exception." *Id.* ¶ 16. Likewise, in this case, Appellants have not based their claim on any act by the State that falls within the scope of the deceit exception. Rather, the State is again seeking to "import provisions of the Governmental Immunity Act at [its] pleasure to shield [itself] from claims of negligence." *Id.* Further, the *Francis* court made an important distinction from those cases in which the State was allowed to claim immunity for the actions of a third party.

The *Francis* court explained that "the plaintiffs' injuries in both *Taylor* and *Ledfors* originated from assaults that occurred on public grounds controlled by Utah governmental entities." *Id.* ¶ 17. The deceit in this case did not occur on public grounds controlled by the State. In fact, the deceit in this case occurred in several states other than Utah, and the Appellants, "are all out-of-state residents." State Br. at 8. The *Francis* court further explained that "the injury in *Peck* was directly related to actions performed by the Utah Highway Patrol." *Francis*, 2010 UT 62, ¶ 17. Unlike *Peck*, the injuries in this case do not arise from any actions of deceit on the part of the State; rather the injuries arise from the State's negligence in failing to adequately supervise a parolee and warn foreseeable victims of that parolee's actions in contravention of the strict conditions of parole designed to prevent the harm Appellants suffered. Therefore, just as they were inapplicable in *Francis*, "*Taylor*, *Ledfors*, and *Peck* are inapplicable" to this case. *Id.*

Alternatively, the State claims that *Francis* does not apply because it construes subsection 301(5)(c) rather than subsection 301(5)(b). State Br. at 17-18. The distinctions made by the *Francis* court should apply regardless of the subsection at issue, but even if the Court finds that *Francis* has limited or no application, it should find the dissent in *Taylor v. Ogden City Sch. Dist.*, 927 P.2d 159 (Utah 1996), very persuasive. There, Justice Durham set forth the legislative history and intent of the Governmental Immunity Act to conclude that "the most reasonable interpretation ... is that the governmental entity retains immunity only where the injury is the result of an assault or battery committed *by a government employee*." *Taylor*, 927 P.2d at 167 (Durham, J.

dissenting). In her thorough examination of the Act, Justice Durham concluded: "[i]t makes very little sense, given the purposes of the statute, to say that the state is immune from suit for its negligence because a private individual has fortuitously committed an assault or battery also contributing to the injury." *Id.* at 169. Further, she appropriately pointed out that "the legislature intended to compensate victims injured by governmental negligence, but not for injuries caused by the intentional torts of government employees. Hence, under the Act, the status of the intentional tortfeasor *does* matter." *Id.* at 168.

The status of a tortfeasor is relevant. Inasmuch as the State argues that cases like *Taylor* and *Ledfors v. Emery Cnty. Sch. Dist.*, 849 P.2d 1162 (Utah 1993), stand for the proposition that all 301(5)(b) exceptions also apply to the actions of third parties, the Court should find now as Justice Durham and Associate Chief Justice Stewart found in the *Taylor* dissent: "[*Ledfors*] was wrongly decided." *Taylor*, 927 P.2d at 165. But the Court need not go there. The Court's recent decision in *Francis*, as well as the legislative history and underlying purposes of the Governmental Immunity Act, demonstrate that the State should not be permitted to claim immunity based upon the deceptive actions of a third party that may have also contributed to the harm. Accordingly, the district court erred when it found that the State retained immunity based upon the deceit exception found in Utah Code Ann. § 63G-7-301(5)(b).

B. The district court's attachment of the deceit exception to the actions of third parties is a violation of the principles of statutory construction.

The State erroneously claims that "[i]f the deceit exception is limited to only circumstances where the government employee commits the tort, subsection (f)'s

exception for misrepresentation by an employee is superfluous and has no meaning." State Br. at 17. The State's claim is unpersuasive, especially because it belies the statutory construction principles upon which it is purportedly founded.

As an initial matter, it bears noting that the position asserted by the State is without precedent. The deceit exception in subsection 301(5)(b) has only been applied to the deceit of a governmental employee. *See Bennett v. Bow Valley Development Corp.*, 797 P.2d 419, 423 (Utah 1990) ("[I]mmunity is not waived for acts or omissions of employees acting within the scope of their employment when a plaintiff's injury arises out of deceit or misrepresentation by the employee.").

Essentially, the State claims that deceit is form of misrepresentation. State Br. at 17 ("Deceit is the 'action or practice of deceiving someone by … misrepresenting the truth.'"). But if deceit is merely a form of misrepresentation, and misrepresentation appears as an exception, then the term 'deceit' is rendered superfluous and without meaning. This is contrary to the rule of statutory construction by which a court "assumes the legislature used each term advisedly." *See* State Br. at 16 (quoting *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863).

In fact, the State's pairing of deceit and misrepresentation supports Appellants' argument that the State should not be able to claim immunity for a third party's deceit. If the legislature intended that immunity apply only to the misrepresentations of a government employee, then it logically follows that the legislature intended the same for deceit, a form of misrepresentation. Additionally, if the Court were to allow the actions of third parties to attach to the deceit exception, then the State could never be sued for

negligence that could somehow be tied to the misrepresentations of a non-government employee. The State could always claim that somehow, somewhere, a third party's misrepresentation or deceit was responsible for part of the harm, and therefore, the State is immune. Obviously such a result was not the intention of the legislature that waived immunity for injuries arising from the negligent acts of its employees.

In her dissent in *Taylor*, Justice Durham explained that "the legislature intended to compensate victims injured by governmental negligence, but not for injuries caused by the intentional torts of government employees." *Taylor*, 927 P.2d at 168 (Durham, J. dissenting). The "by an employee" language of subsection (5)(f) was not intended to establish that misrepresentation is the only tort where the tortfeasor's status is relevant. Otherwise, this Court would not have found the exact opposite in *Francis*. 2010 UT 62, ¶ 17 (rejecting the argument that immunity attaches "regardless of the status of the actor directly responsible for the injury."). Rather, the more important language of subsection (5)(f) is: "whether or not it is negligent or intentional." Utah Code Ann. § 63G-7-301(5)(f). The legislature already intended to immunize the government from the intentional misrepresentations of government employees; however, in regards to misrepresentation, the legislature wanted to further immunize the government from the negligent misrepresentations of its employees. By further qualifying subsection (5)(f), the legislature was not saying anything about the deceit exception. The legislature was merely broadening the reach of immunity in the misrepresentation context.

Contrary to the State's position, "[a] narrow construction of the deceit exception" does not violate any of the "basic rule[s] of statutory construction." State Br. at 17. The

legislature's use of "by an employee" in subsection (5)(f) does not somehow expand the deceit exception. The State cannot claim immunity based on its recharacterization of this suit as arising from the deceit of the parolee.

C. The district court erred when it summarily dismissed all of Plaintiffs' claims pursuant to the Governmental Immunity Act.

The State erroneously asserts that "[t]he district court correctly dismissed all of [Appellants]' claims based on the immunity act." State Br. at 18. The State's claim is wrong for at least two reasons: (1) the Governmental Immunity Act does not apply in this case; (2) Appellants have not "attempt[ed] to evade the statutory categories by recharacterizing the supposed cause of injury." State Br. at 19 (quoting *Taylor*, 927 P.2d at 164).

First, as already demonstrated, the State cannot excuse its negligence and claim immunity based on the deceptive actions of the parolee. The State "did not perform any act that falls within the scope of the [deceit] exception." *Francis*, 2010 UT 62, ¶ 16. Appellants' injuries did not result from actions that occurred on grounds "controlled by Utah governmental entities". *Id.* ¶ 17. Appellants' injuries were not "directly related to actions performed by [the State]." *Id.* Lastly, allowing the State to claim immunity based on the deceit of the parolee falls directly within the "absurd and unfair results" of which Justice Durham forewarned in *Taylor*. *Taylor*, 927 P.2d at 166. The Governmental Immunity Act should not have been applied to any of Plaintiffs' claims, and therefore, the district court erred when it dismissed all of Plaintiffs' claims based on sovereign immunity.

Second, even if the Court finds that the Governmental Immunity Act applies to Plaintiffs' deceit claim, Plaintiffs' other claims are not "attempts to evade the statutory categories by recharacterizing the supposed cause of injury." State Br. at 19 (quoting *Taylor*, 927 P.2d at 164). Therefore, Plaintiffs' remaining claims should not have been dismissed pursuant to the Governmental Immunity Act.

As explained at length in Appellants' Opening Brief, "[t]his Court has already recognized the viability of claims against the State for negligent supervision of a parolee." Appellants' Opening Br. at 11 (citing *Doe v. Arguelles*, 716 P.2d 279, 282-83 (Utah 1985)). This case is similar to *Arguelles* because the State is claiming immunity for an individual who was released on parole and due to negligent supervision and a failure to require strict adherence to the terms of the parole, the parolee was able to injure another. The *Arguelles* court indicated that even though the State's actions "fell into the category of functions designed to be shielded," a claim of negligent supervision could proceed. *Arguelles*, 716 P.2d at 282. Despite its similarities, the State claims that *Arguelles* should not apply to this case simply because it "did not mention, much less construe, the immunities at issue here." State Br. at 20. Under this logic, however, none of the cases upon which the State has relied are applicable to this case because none of them have mentioned, much less construed, the deceit exception. Simply put, the Governmental Immunity Act does not shield the State from any of Plaintiffs' claims. *Arguelles* provides further reason to conclude that the district court erred in dismissing Appellants' claims for negligent supervision and failure to warn. *Arguelles*, 716 P.2d at 282.

III. The incarceration exception to the immunity waiver does not apply because Richard Higgins was not incarcerated when he deceived Appellants.

The State is correct that the district court "did not reach the incarceration exception." State Br. at 20. But the State is mistaken in its assertion that the Court "may affirm the district court's order dismissing the case on this alternative ground." *Id.* at 24. The parolee at issue, Richard Higgins, was not incarcerated.

The State relies heavily on this Court's recent decision in *Peck v. State*, 2008 UT 39, 191 P.3d 4. The *Peck* case, and other cases relied upon by the State, do not support the State's theory. In *Peck*, the plaintiff was injured "after Peck was arrested and handcuffed". *Id.* ¶ 1. In *Epting v. State*, 546 P.2d 242, 243 (Utah 1976), the injury was caused by an escaped "prisoner in the state prison," not a parolee who had been released. Finally, in *Kirk v. State*, 784 P.2d 1255, 1256 (Utah Ct. App. 1989), the injury was caused by "an inmate at the Utah State Prison" who was being "escorted by two corrections officers…to attend court proceedings." In stark contrast to the parties in *Peck*, *Epting*, and *Kirk*, the parolee here was not incarcerated – he was on parole – and not subject to any kind of "spatial confinement or physical restriction." *Whitney v. Div. of Juv. Justice Servs.*, 2012 UT 12, ¶ 13, – P.3d –.

In *Whitney*, this Court found that when the injury was caused by one who had been placed in a "community-based proctor home," the incarceration exception did not apply. *Whitney*, 2012 UT 12, ¶ 4. This Court rejected the State's broad interpretation of incarceration as occurring "whenever a party is under the control of the State and unable to be released without some kind of permission." *Id.* ¶ 12 (citing *Peck*, 2008 UT 39, ¶ 8).

Rather, this Court held that incarceration must "include an element of physical restriction or spatial confinement." *Id.* ¶ 13. In *Whitney*, the 'prisoner' could "come and go [from the proctor home] at will" and there were "no locks that would have confined the proctor teens inside the home." *Id.* ¶ 4. Similarly, Richard Higgins, though in contravention of his parole, came and went from Utah at will and he was obviously not physically restricted to a certain area. Even if Richard Higgins had limits placed on his travel, so did the proctor teen in *Whitney*, and this Court still found that he was not incarcerated. *See id.* ¶ 5 ("Dillon was not allowed to stay at either of his parents' homes."). Richard Higgins was obviously not under physical restrictions, and it is absurd for the State to argue that the entire State of Utah constitutes a spatial restriction. *See* State Br. at 24 ("his parole prohibited him from leaving Utah").

When the Appellants were injured by Richard Higgins he was not under arrest or handcuffed, he had not escaped from prison, and he was not being escorted by corrections officers. Richard Higgins was arguably less confined than the teenager in *Whitney*. The United States Supreme Court has explained that the purpose of parole is "to help individuals reintegrate into society as constructive individuals as soon as they are able, *without being confined* for the full term of the sentence imposed." *Morrissey v. Brewer*, 408 U.S. 471, 477, 92 S.Ct. 2593, 2598, 33 L.Ed.2d 484, 492 (1972) (emphasis added). Richard Higgins was not confined and he was not physically restrained. Therefore, the incarceration exception is not an alternative ground upon which this Court can affirm the dismissal of Plaintiffs' claims.

IV. The State's Motion to Dismiss was improperly considered by the district court.

The State claims that the district court properly considered the Motion to Dismiss because "[g]overnmental immunity is an immunity from suit and not just a defense to liability." State Br. at 25. The State's argument, however, is belied by the cases it cites in support of its claim. Therefore, the Court should find that the district court erred when it dismissed Plaintiffs' claims pursuant to rule 12(b)(6) of the Utah Rules of Civil Procedure.

The State has mischaracterized several of the cases that purportedly support its theory. The State claims that "[i]f a complaint alleges facts showing that the State is immune, the case should be dismissed under Utah R. Civ. P. 12(b)(6)." State Br. at 25. As support for this assertion, however, the State cites two cases that had nothing to do with Rule 12(b)(6) motions to dismiss. In fact, the State falsely claims that the *Peck* case was an "interlocutory appeal from denial of a motion to dismiss." *Id.* While the *Peck* court mentioned the standard of review for a motion to dismiss, *Peck*, 2008 UT 39 ¶ 2, it was based on "the district court's denial of a motion for judgment on the pleadings." *Id.* ¶ 7. Similarly, in *S.H.ex rel. R.H. v. State*, 865 P.2d 1363 (Utah 1993), the appeal was "from an order of summary judgment" not a motion to dismiss. In both cases, the State filed a responsive pleading prior to dismissal.

Finally, in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court's discussion about immunity from suit revolved around the government's ability to dismiss a case on summary judgment, not a motion to dismiss. *Mitchell*, 472 U.S. at 526 (explaining that

the qualified immunity doctrine was refashioned "to permit the resolution of many insubstantial claims on summary judgment") (internal quotations omitted). In addition to the State's mischaracterization of case law, it has offered nothing to rebut the many cases in support of Appellants' claim that the district court's consideration of the Motion to Dismiss was "untimely and contrary to Utah case law." *See* Appellants Opening Br. at 24.

This Court has made clear that "[i]mmunity is an affirmative defense which must be proved by the defendant." *Nelson v. Salt Lake City*, 919 P.2d 568, 574 (Utah 1996). Notably, *Nelson* was "an appeal from summary judgment," not a motion to dismiss. *Id.* at 571. Further, this Court has made clear that raising an affirmative defense "for the first time in a 12(b)(6) motion to dismiss is not generally appropriate since dismissal under rule 12(b)(6) is justified only when the allegations *of the complaint itself* clearly demonstrate that the plaintiff does not have a claim." *Zoumadakis v. Uintah Basin Medical Center, Inc.*, 2005 UT App 325, ¶ 10 n.6, 122 P.3d 891 (internal quotation omitted) (emphasis in original). The Complaint does not clearly demonstrate that Plaintiffs do not have claims, and therefore, the district court erred when it dismissed all of Plaintiffs' claims pursuant to rule 12(b)(6) and sovereign immunity.

Immunity is an affirmative defense and was not a proper basis of the State's Motion to Dismiss. While the State may have a right to avoid the "burdens of litigation" (State Br. at 25 (citing *Mitchell*, 472 U.S. at 526)), that right is properly invoked after a responsive pleading has been filed. *See Mitchell*, 472 U.S. at 526 (immunity doctrine avoids "costs of trial or…burdens of broad-reaching discovery" by "permit[ting] the

resolution of many insubstantial claims on summary judgment"); *see also S.H.*, 865 P.2d at 1364 (appealing dismissal based on immunity doctrine "from an order of summary judgment"); *Peck*, 2008 UT 30, ¶ 7 (appealing denial "of a motion for judgment on the pleadings" based on the immunity doctrine). The district court erred by ruling on an affirmative defense raised in the State's Motion to Dismiss. The Court should reverse.

CONCLUSION

For the reasons stated above, and set forth in Appellants' Opening Brief, the Court should reverse the district court's grant of the State's Motion to Dismiss and allow Appellants' suit for damages caused by the State's negligence in supervising a parolee and in failing to warn them about the parolee to proceed.

Dated this 16th day of May, 2012.

MUMFORD RAWSON LLC

Marcus R. Mumford
Attorney for Appellants