2016

# David Larsen, Plaintiff/Appellant, vs. Davis County School District, Defendant/Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

| | |
|---|---|
| DAVID LARSEN,<br><br>Plaintiff/Appellant,<br><br>vs.<br><br>DAVIS COUNTY SCHOOL DISTRICT,<br><br>Defendant/Appellee. | PUBLIC<br><br>Case No. 20160099-CA |

# REPLY BRIEF OF APPELLANT

Appeal from the Second Judicial District Court
Davis County, State of Utah, Honorable John Morris
Case No. 150700222

**UTAH ATTORNEY GENERAL**
PEGGY E. STONE (6658)
160 East 300 South, Sixth Floor
Salt Lake City, UT 84114
Telephone: (801) 366-0100

Counsel for Defendant/Appellee
Davis County School District

**GRIDLEY, WARD & HAMILTON**
ERIK M. WARD (3380)
LINDY W. HAMILTON (8402)
ROBERT W. GIBBONS (13221)
635 25th Street
Ogden, UT 84401
Telephone: (801) 621-3317

Attorneys for Plaintiff/Appellant
David Larsen

IN THE UTAH COURT OF APPEALS

| | |
|---|---|
| DAVID LARSEN,<br><br>Plaintiff/Appellant,<br><br>vs.<br><br>DAVIS COUNTY SCHOOL DISTRICT,<br><br>Defendant/Appellee. | PUBLIC<br><br>Case No. 20160099-CA |

# REPLY BRIEF OF APPELLANT

Appeal from the Second Judicial District Court
Davis County, State of Utah, Honorable John Morris
Case No. 150700222


**UTAH ATTORNEY GENERAL**
PEGGY E. STONE (6658)
160 East 300 South, Sixth Floor
Salt Lake City, UT 84114
Telephone: (801) 366-0100

Counsel for Defendant/Appellee
Davis County School District

**GRIDLEY, WARD & HAMILTON**
ERIK M. WARD (3380)
LINDY W. HAMILTON (8402)
ROBERT W. GIBBONS (13221)
635 25th Street
Ogden, UT 84401
Telephone: (801) 621-3317

Attorneys for Plaintiff/Appellant
David Larsen

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES



RULES

## REPLY ARGUMENT

## WHETHER LARSEN'S INJURY AROSE OUT OF IMMUNE CONDUCT IS A QUESTION OF FACT, NOT RESOLVABLE ON A PRE-DISCOVERY 12(b)(6) MOTION.

The District focuses its entire opposition on the sexual component of Larsen's complex relationship with Altice, interprets that sexual component as irrefutable assault and battery, then alleges that all of Larsen's harm arose from assault and battery, thereby making the government immune. This limited analysis ignores the law, including recent clarifying case law, and ignores the specific facts of this case as properly pled in Larsen's Complaint.

### A. Under the New Standard Given in *Barneck v. Utah Dept. Of Transp.*, a Determination of Whether Larsen's Injury "Arises out Of" Immune Government Conduct Is a Question of Fact That Should Be Left to a Jury.

The Governmental Immunity Act (GIA) provides immunity for the District if an "injury arises out of, in connection with, or results from" assault and battery. Utah Code Ann. § 63G-7-301(5)(b) (2008). Given the Utah Supreme Court's recent ruling in *Barneck v. Utah Dept. of Transp.*, the question of whether an injury "arises out of" immune conduct is a question of fact that needs to be answered by a jury. 2015 UT 50, ¶ 57, 353 P.3d 140 (reversing summary judgment that had been granted in favor of the government because genuine issues of material fact existed as to whether immune conduct proximately caused the plaintiffs' harm.)

The District claims that Utah's use of the word "injury" instead of "claim" in the GIA makes Utah's statute unique from the Federal Tort Claims Act and other jurisdictions, such as Idaho and Hawaii, which patterned their immunity statutes on the federal act, and which have allowed claims to proceed even where the assault and battery exception of an immunity act were implicated. *Doe v. Durtschi*, 716 P.2d 1238, 1244-45

(Idaho 1986); *Doe Parents No. 1 v. State Dept. of Educ.,* 58 P.3d 545, 579 (Hawaii 2002). Yet, omitted by the District is the fact that Utah's GIA was also "patterned after the Federal Tort Claims Act," *Carroll v. State By & Through Rd. Comm'n*, 496 P.2d 888, 891 (Utah 1972). Consistently, Utah courts also look to federal courts to help interpret the Act's various provisions. In fact, in *Wagner v. State*, when defining the term "battery" in the very section of the GIA at issue in the present case, the Utah Supreme Court looked to the federal act and its surrounding case law, referring to the "federal courts' analysis of the *parallel provision* in the federal immunity statute." *Wagner v. State*, 2005 UT 54, ¶ 38, 122 P.3d 599 (emphasis added).

Further, the words "injury" and "claim" have been used synonymously in Utah and other jurisdictions when addressing the GIA. *See, e.g. Ledfors v. Emery County School. Dist*, 849 P.2d 1162, 1165-66 (Utah 1993) ("[P]laintiff's negligence *claim* arises out of battery and false imprisonment and is therefore not the sort of claim for which immunity has been waived") (emphasis added) (citing *Maddocks v. Salt Lake City Corp.,* 740 P.2d 1337 (Utah 1987).)

The District also asserts that because the factually similar Idaho case cited by Larsen, *Doe v. Durtschi*, was decided before *Ledfors*, the *Ledfors* decision would have referenced and relied on *Durtschi* if the law in Idaho were similar to the law in Utah. There are two principal flaws with this argument. First, the two cases were factually different, with the *Durtschi* case involving a teacher who sexually molested multiple fourth graders, *Doe v. Durtschi*, 716 P.2d at 1241, and *Ledfors* involving a student who was beaten and injured by fellow students. *Ledfors*, 849 P.2d at 1163. Second, *Ledfors* was decided pre-*Barneck,* and was determined under a "but-for" analysis. It was not until *Barneck* that Utah finally adopted the proximate cause analysis—the same analysis that

was used in the Idaho and Hawaii cases. Accordingly, while cases from these jurisdictions which have followed this proximate cause analysis for years may not have been applicable in Utah GIA cases prior to *Barneck*, they are certainly applicable now.

The District further claims that Larsen is attempting to "evade the statutory categories by recharacterizing the supposed cause of the injury." *Taylor v. Ogden City Sch. Dist.*, 927 P.2d 159, 164 (Utah 1996). In *Taylor* (which was a summary judgment case, not a 12(b)(6) case), and other cases where the Utah Supreme Court has made this criticism, the plaintiffs always acknowledged that assault and battery had directly resulted in injury, but they had pled government negligence separate from that assault and battery. The Utah Supreme Court ruled that regardless of what the government allegedly did or did not do, it was the undisputed "assailants' violence" that made the government immune in those cases. *Id.* at 163-64. Here, not only has Larsen not pled that an assailant's violence caused his harm, but there are no facts that can be gleaned from the Complaint that would allow a court to find, without any discovery, that any assault and battery occurred at all. In actuality, it is the *District* that has recharacterized the cause of Larsen's injury by inferring facts not in evidence and misconstruing the law on what constitutes assault and battery in a civil case. *See also Thayer v. Washington Cty. Sch. Dist.*, 2012 UT 31, ¶¶59-60, 285 P.3d 1142 (Lee, J., dissenting in part) (noting that older cases criticizing attempts to evade governmental immunity through pleadings that avoided mention of undisputed assault and battery "cannot properly be read to foreclose an evaluation of the legal cause of injury.")

Accordingly, under the proximate cause standard adopted in *Barneck*, Larsen's claims should not have been dismissed by the trial court, but should have been allowed to proceed to discovery.

B. The Trial Court Failed to Properly Apply the *Barneck* Standard on Proximate Cause and Improperly Assumed Facts In Its Analysis.

The District cannot dispute that the trial court applied the outdated but-for test in its ruling, relying on pre-*Barneck* GIA cases. (R. 142-143, 147). The District attempts to defend the court's use of that overturned standard by claiming that because those prior cases arguably would have come out the same under *Barneck*, the trial court was correct to use the same standard that was applied in those earlier cases to dismiss Larsen's claims.

There are two major weaknesses to this argument. First, as stated in the holding of *Barneck*, the presence of immune conduct in the underlying facts of a case no longer automatically makes the government immune from suit. Instead, courts must examine, on a case-by-case basis, what proximately caused a plaintiff's injury. *Barneck,* ¶ 44. The statement in *Barneck* that prior cases "arguably would have come out the same way" made reference to *undisputed* facts in those cases that left little room for interpretation as to what proximately caused the plaintiff's harm. *Id.* at ¶¶ 45-48. Yet by stating that those cases "arguably would have come out the same way," the Utah Supreme Court demonstrated that it was not completely confident, even acknowledging in the *Hoyer v. State* case that further facts would have to be developed before a determination could be made. *Id.* at ¶ 48 (citing *Hoyer v. State,* 2009 UT 38, ¶¶ 2-3, 24, 32, 212 P.3d 547).

The most logical takeaway from *Barneck* is that going forward, there must be, at the very least, facts on record by which a court can make a determination as to what proximately caused a plaintiff's injury. In most cases, this will require a fact-finder to make the ultimate determination, although in some rare circumstances, where there are undisputed facts, a court may be able to determine on *summary judgment,* post-discovery,

that immune conduct proximately caused the harm.[1] Under no circumstances, however, should a trial court be able to make a ruling on a Rule 12(b)(6) motion that the proximate cause of a plaintiff's harm was an assault and battery which does not even appear in the Complaint.

The second problem with the District's argument is that like the trial court's analysis, it assumes key facts not in evidence. For instance, it assumes that the sexual intercourse between Altice and Larsen was the source of all of Larsen's harm. It also assumes that the district's negligence preceded the sexual intercourse.

The District's assumptions are inaccurate. There is no one-to-one correlation between the sexual intercourse and Larsen's harm. For example, Larsen did not receive a sexually-transmitted disease or any physical impairment as a result of sexual intercourse. Instead, his harm was derived from trauma associated with embarrassment, ostracization, and ridicule, that flowed from a multitude of factors related to his relationship with Altice. Moreover, the District's negligent hiring, negligent retention, and negligent supervision, were not a collective one-time action that preceded the sexual intercourse. Instead, the district's negligence was ongoing. The District had numerous opportunities to prevent misconduct between Altice and her students, both prior to Altice engaging with Larsen, as well as during the course of the relationship with Larsen. If there had simply been one act of sexual intercourse between Larsen and Altice, with no publication, the harm to Larsen may have been nonexistent. The District's negligent retention made the problem worse, however, by allowing an ongoing series of interactions, both sexual and non-sexual, between Larsen and Altice.

---

[1] There are no such undisputed facts here at the Rule 12(b)(6) stage, where even the District's argument demonstrates disputed facts regarding whether the District's negligence preceded, succeeded, or superseded Altice's interactions with Larsen.

And while the sexual component of the relationship did contribute indirectly to the overall harm suffered by Larsen, the fact that sex was a part of it cannot in itself defeat the entire claim. To hold otherwise would be to cut off a great many additional causes of action not listed as immune conduct under the GIA.

For example, if a government employee negligently runs over a pedestrian, then proceeds to intentionally hit that pedestrian with her fist for getting in the employee's way, there would be a portion of harm caused by the negligence and a portion of harm caused by the intentional battery. The government would not be deemed immune simply because the plaintiff pled that a portion of his harm arose from the government employee hitting the pedestrian with her fist.

Here too, even if it *were* assumed that the sex between Larsen and Altice constituted assault and battery (which Larsen disputes), the result cannot be that Larsen's entire case is dismissed. Instead, at the *most*, a jury would have to determine what portion of Larsen's harm arose out of allegedly immune conduct (i.e. sexual intercourse between Larsen and Altice) vs. the undisputed non-immune conduct (i.e. the remainder of the harmful relationship as allowed by the District's negligence and causing Larsen to incur hundreds of thousands of dollars in counseling). But to categorically state that because Altice and Larsen had sex, *all* of Larsen's harm must have arisen from the immune torts of assault and battery is clearly unsupportable.

The District cites to several cases where courts determined that assault and battery were the cause of a plaintiff's injuries even when the plaintiff attempted to plead separate negligence against the district—*Ledfors,* 849 P.2d at 1166 *Taylor,* 927 P.2d at 163, *and S.H. v. State*, 865 P.2d 1363, 1364-65 (Utah 1993). All of those cases are easily distinguishable. First and foremost, all three cases were summary judgment decisions and

involved undisputed facts as to what actually *caused* the injury or harm, (as well as undisputed facts demonstrating that the alleged governmental negligence preceded assault and battery). For instance, in *Ledfors*, there was no dispute that students had assaulted the plaintiff requiring him to be hospitalized. The injuries directly stemming from the assault caused the plaintiff's harm, and the alleged governmental negligence preceded it. In *Taylor*, there was no dispute that an unwanted contact caused the plaintiff's hand to go through a window, causing direct physical damage to the hand, with the government's negligence in failing to maintain a safe window preceded the injury. In *S.H.*, there was no dispute that the cab driver sexually assaulted a young deaf student, with the resulting harm being directly connected to the sexual assault, and the government negligence in hiring the cab company preceding the one-time injurious act.

In *Thayer v. Washington Cty. Sch. Dist.*, Justice Lee further distinguished these cases as part of a dissent that advocated the as-of-then unadopted proximate cause analysis that is now the law in Utah. *Thayer*, ¶¶ 29-69. *Thayer* involved a certified question sent from the federal court to the Utah Supreme Court on the issue of whether school officials' allowance of guns loaded with blanks to be used in a school production, constituted "issuance [of a] permit, license, . . . . or similar authorization" which would be immune conduct. *Id.* at ¶ 2. The Utah Supreme Court answered that the conduct of school officials in allowing the guns to be present did not fall within the exception, and therefore the government was not immune from suit. *Id.*

Justice Lee dissented in part, not because the final outcome was necessarily wrong, but because he felt there were issues of fact, such as superseding cause and comparative negligence, that needed to be resolved first "in the federal court." *Id.* at ¶ 66. He reasoned, "the question of immunity . . . turns on questions that are not properly before us.

We should not short-circuit [the] end result . . . " *Id.* at ¶ 68. In addition, Justice Lee distinguished two of the three cases cited by the District, stating:

> *Taylor* and *Ledfors* were easy cases involving uncontroversial fact-patterns in which there could be no question that the alleged acts of negligence did not supersede the causal connection to conduct for which the government was immune. In both cases, the immune acts came *after* the government's alleged negligence . . . In these circumstances, it is easy to the understand why the court so easily concluded that the assault and not the antecedent negligence was the legal cause of the injury

*Thayer v. Washington Cty. Sch. Dist.*, 2012 UT 31, ¶60, 285 P.3d 1142 (emphasis added). In distinguishing the facts of *Thayer*, however, Justice Lee warned, "This case is not so easy . . . . there is a legitimate question." *Id.* at ¶ 62. Justice Lee's reasoning has now been adopted under *Barneck.*

Here, similarly, the trial court should not be allowed to short-circuit the end result by making inappropriate assumptions and determinations of fact regarding the alleged superseding proximate cause of Larsen's harm. As with *Thayer*, and in contrast to the cases cited by the District where all parties stipulated that unwanted physical contact caused the plaintiffs' harm, in the present case there are questions of fact regarding the proximate cause of Larsen's harm. In addition, unlike the District's cited summary judgment cases, the court's ruling in this case was in response to a Rule 12(b)(6) pre-discovery motion. Where Larsen did not plead there was any unwanted physical contact that proximately caused his injuries, the trial court cannot be allowed to assume such a fact to allow immunity. Instead of allowing the trial court's assumptions to govern the outcome of this case, the parties should be allowed to engage in discovery to determine the answer to the fundamental question—what was the proximate cause of Larsen's harm in this case?

C. The Provisions in the Criminal Code Cannot Be Used as a Basis for Dismissal of a Civil Case.

As the District did in its original Rule 12(b)(6) motion, the District continues to rely on the criminal code in arguing that Altice committed civil assault and battery. The District argues that under the criminal code, Larsen lacked the ability to consent to sexual intercourse with Altice, and therefore, the sex meets the definition of "unwanted contact" or contact "to which no reasonable person would consent" (a prerequisite for civil assault in *Wagner v. State*, ¶ 51). Yet, as stated in Larsen's Brief, and completely unresponded to by the District, the criminal code is inapplicable, because it "*does not bar, suspend, or otherwise affect any right . . . to damages* . . . to be recovered or enforced in a civil action, . . . regardless of whether the conduct involved in the proceeding constitutes an offense defined in this [criminal] code." Utah Code Ann. § 76-1-107(3) (1973) (emphasis added.)[2]

While the criminal code defines by statute the circumstances under which a minor can be deemed to have consented or not consented to sexual intercourse for purposes of criminal charges and sentencing, the civil law does not contain any such bright line. Instead, in a case involving alleged assault and battery, a fact-finder must examine whether the contact was wanted or unwanted based on the facts of that case.

Furthermore, even in relying on the inapplicable criminal code, the District makes incorrect assertions regarding the definition of consent. The District claims that "in the case of minors, society takes the ability to consent away until the child is an adult." (Appellee Brief 20.) In reality, even under the criminal code, 17-year-olds *can* consent to

---

[2] The District also claims, without any authority, that there is no tort of "sexual misconduct," ignoring that this exact tort was successfully pled and discussed in the factually similar *Birkner v. Salt Lake Cty.*, 771 P.2d 1053, 1057 (Utah 1989).

sex with an adult in many circumstances. *See* U.C.A. § 76-5-406(9) (stating that sex with a minor is without consent if the minor is "younger than 14 years of age"). The criminal code simply acknowledges that a teacher-student relationship can be unique, allowing Brianne Altice to be charged criminally. Yet charging Altice with a crime because she held a position of trust when she had sex with Larsen does not automatically mean that Larsen, the 17-year-old who agreed to have sex, was therefore civilly assaulted against his will. Despite the District's assertion that Larsen lacked the ability to consent to sex, the civil law requires that a jury examine the facts surrounding Larsen rather than relying on the criminal code to determine what a "reasonable person" might do under the same circumstances.

More importantly, even if it could be found that Larsen lacked the ability to want or consent to sexual intercourse with his teacher, Larsen's harm did not *arise* from sexual intercourse. As pled in Larsen's Complaint, the relationship between Larsen and Altice was a "romantic relationship" that included "flirtatious conversations with Plaintiff, . . . [visits] during [Altice's] second period preparation class, texting, . . . meeting Plaintiff on or near school grounds, [and] requesting assistance in her employment errands." (R. 2.) Although there were sexual encounters, there was no single sexual act that constituted the source of Larsen's harm. Rather, the cause of injury stems from months of emotional as well as sexual interaction between teacher and student, in addition to months of scorn and ridicule from friends and community. Larsen's harm is not easily defined by a single event of unwanted physical contact, as it was in the cases cited by the District. This complicated history requires that a jury be allowed to determine the proximate cause of Larsen's harm, rather than leaving it to the interpretation of the defendant District.

Accordingly, a jury must be allowed to determine whether, on the whole, the touching between Altice and Larsen was "unwanted" by Larsen himself, and whether that touching was the proximate cause of his claimed harm.

D. The GIA Bars Causes of Action For The Infliction of Mental Distress, Not Damages for Mental Distress.

The District defends the trial court's error in treating a damages category as if it were a separate negligence action by, essentially, indicating the trial court's error was harmless. Yet again, the District is applying the incorrect legal standard. The standard of review on this issue requires the Utah Court of Appeals to review the trial court's decision for correctness. The District's allegation that any error was harmless fails to acknowledge this legal standard, and assumes a scenario with discovery and findings, rather than a 12(b)(6) motion.

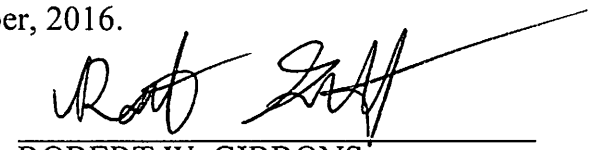
Here, Larsen pled, as a damage, "mental distress." The GIA does not bar an entire claim simply because it pleads as a damage something that has similar wording to a tort. Larsen's claims should not have been dismissed on the basis that he included "mental distress" as a damage.

## CONCLUSION

The District's brief largely ignores the arguments in Larsen's brief. First, the District fails to address the key differences between a Rule 12(b)(6) motion and a summary judgment motion, referencing only summary judgment cases. Second, the District relies on the criminal code to defeat Larsen's claims, in violation of the criminal code's prohibitions against its use in civil cases. Third, and most importantly, the District fails to acknowledge the change in standard that came with the *Barneck* decision, with the District asserting that the standard is essentially unchanged. This assertion by the District allows it to ignore all public policy arguments, which can explain and support an

adjustment to how immunity under the GIA is analyzed. When the new standard is applied to the specific facts of this case, wherein the District hired a teacher with prior known sexual misconduct, then negligently retained that teacher and allowed her to engage in ongoing relationships to the detriment of students, the *Barneck* proximate cause standard results in no immunity to the District. Larsen requests this Court reverse the trial court's order dismissing Larsen's claims and remand this case, allowing discovery on Larsen's claims.

DATED this 13th day of December, 2016.



ROBERT W. GIBBONS
Attorney for Plaintiff/Appellant

## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief complies with the type-volume limitation. The foregoing Brief contains 3,590 words.

DATED this 13th day of December, 2016.

ROBERT W. GIBBONS
Attorneys for Plaintiff

## CERTIFICATE OF MAILING

I hereby certify that on this 13th day of December, 2016, a copy of the foregoing Reply Brief of Appellant David Larsen was served in the manner indicated below upon the following:

Peggy E. Stone
Utah Attorney General
160 East 300 South, Sixth Floor
Salt Lake City, UT 84114

_X_ U.S. Mail
___ Hand Delivered
___ Overnight
___ Facsimile
___ No Service