

2003

Tracy Wagner and Robert W. Wagner v. State of Utah, Utah Department of Human Services, and Utah State Development Center : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TRACY WAGNER and ROBERT W.
WAGNER,

Plaintiffs/Appellants,

v.

STATE OF UTAH, UTAH DEPARTMENT
OF HUMAN SERVICES, and UTAH
STATE DEVELOPMENT CENTER,

Defendants/Appellees.

CASE NO. 20030106-CA

BRIEF OF DEFENDANTS/APPELLEES

Appeal from an Order of Dismissal of the Fourth Judicial District Court in and for
Utah County, State of Utah, Honorable Anthony Schofield

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ORAL ARGUMENT REQUESTED

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PRIOR AND RELATED APPEALS

There are no prior or related judicial appeals in this case.

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CASE NO. 20030106-CA

BRIEF OF DEFENDANTS/APPELLEES

JURISDICTION

Plaintiffs filed their complaint in this action under the Utah Governmental Immunity Act (the "Immunity Act"), alleging that defendants were negligent in failing to supervise one of their patients who became violent and struck plaintiff Tracy Wagner (R. 5-1). The trial court granted defendants' motion to dismiss under Utah R. Civ. P. 12 (b)(6), based on immunity for injuries arising out of assault or battery pursuant to Utah Code Ann. § 63-30-10(2) (R. 72-71, 75-73). Plaintiffs filed a timely notice of appeal from the trial court's order (R. 86). This Court has appellate jurisdiction over this appeal under transfer from the Utah Supreme Court pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2002).

ISSUE PRESENTED UPON APPEAL

Contrary to plaintiffs' statement that there are two issues presented, there is only one issue for this Court to address on this appeal. That issue is stated as follows:

Did the district court correctly dismiss plaintiffs' complaint, based on statutory immunity for liability arising out of an assault or battery, where the assault or battery was committed by a mentally incompetent person?

Defendants raised this issue in their motion to dismiss (hereafter the "Motion", R. 25-24) and their supporting memorandum (R. 38-26), as well as in their reply memorandum (R. 61-51). The district court granted defendants' Motion on this point (R. 72-71).

Plaintiffs also raise the issue of whether their complaint properly stated a claim for relief, and argue that the trial court should not have dismissed the case under Rule 12(b)(6). In doing so, plaintiffs mis-perceive the State's Motion. The State assumes, for purposes of its Motion, that the plaintiffs' complaint did properly state a claim of negligent supervision. Its Motion is based solely on the fact that the four corners of plaintiffs' complaint reflect that plaintiffs' injuries arose out of an assault or battery, thereby giving rise to governmental immunity pursuant to Utah Code Ann. § 63-30-10(2). That is the only issue that needs to be addressed on this appeal.

Standard of Review:

"Because the propriety of a dismissal under Utah Rule of Civil Procedure 12(b)(6) is a question of law, we give the trial court's ruling no deference and review it under a correctness standard. In our review of a decision dismissing a case under Rule 12(b)(6)

we accept the factual allegations in the complaint as true and consider all reasonable inferences to be drawn from those facts in a light most favorable to the plaintiff.” *Snow Flower Homeowners Ass’n v. Snow Flower, Ltd.*, 2001 UT App 207, ¶ 7, 31 P.3d 576 (citations omitted). *See also Ho v. Jim’s Enters., Inc.*, 2001 UT 63, ¶ 6, 29 P.3d 633.

Moreover, whether or not plaintiffs’ claim falls within the assault or battery exception to the general waiver of governmental immunity for negligence claims “is a question of law to be reviewed for correctness.” *Malcolm v. State*, 878 P.2d 1144, 1146 (Utah 1994).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Ann. § 63-30-10(2) provides as follows:

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 employment except if the injury arises out of, in connection with, or results from:

(2) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights[.]

Utah Code Ann. § 63-30-10(2) (2001).

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

On July 25, 2002, plaintiffs filed a complaint in this action (R. 5-1). The complaint set forth a claim for relief based on the alleged negligence of the Utah State Development Center (“USDC”) in failing “to properly supervise the activity of” a

mentally incompetent patient who was in its care (R. 4, ¶ 11). Tracy Wagner asserted a claim for damages suffered when she was attacked by the patient (R. 3-2); her husband, Robert Wagner, asserted a claim for loss of consortium (R. 2, ¶ 21).

Defendants moved to dismiss the complaint under Utah R. Civ. P. 12(b)(6) on the ground that, based on the allegations of the complaint, plaintiffs' injuries arose out of an assault or battery, thereby entitling the defendants to immunity, as a matter of law, under the assault or battery exception to the waiver of immunity for negligence claims pursuant to Utah Code Ann. § 63-30-10(2) (R. 25-24, 38-26). Plaintiffs filed a responsive memorandum opposing the Motion (R. 50-39). Defendants then filed a reply memorandum (R. 61-51) and submitted the Motion for decision (R. 64-63).

A hearing on the Motion was held on November 14, 2002 (R. 69). On December 20, 2002, the trial court issued a Ruling granting the Motion (R. 72-71). The trial court held that the deliberate acts of the USDC patient constituted an assault or battery, and thus that plaintiffs' "action is barred by the Governmental Immunity Act" (R. 71). An Order of Dismissal was filed on January 10, 2003 (R. 75-73). Plaintiffs filed a timely Notice of Appeal on January 28, 2003 (R. 86).

B. Statement of Relevant Facts

On October 16, 2001, plaintiff Tracy Wagner was attacked by a patient of the USDC while shopping at the K-Mart store in American Fork, Utah (R. 4, ¶ 8). Plaintiff described this attack in her Complaint as follows:

Plaintiff Tracy D. Wagner was doing business at the K-Mart store located at 175 North West State Road in American Fork, Utah on October 16, 2001, at approximately 12:30 p.m., and was standing in line with others at the customer service desk near the front of the store. Unknown to Tracy D. Wagner, a patient of the Utah State Development Center was in the store somewhere behind her. *The patient became violent, took Tracy D. Wagner by the head and hair, and threw her to the ground and otherwise acted in such a way as to cause serious bodily injury to her.*

R. 4, ¶ 8 (emphasis added).

The patient, Sam Giese, was a 28-year-old, profoundly mentally retarded man (R. 4, ¶ 10; 49).¹ At the time, Mr. Giese was in the custody of the USDC and was taken on a trip to the K-Mart as part of his treatment; employees of the USDC were present in the K-Mart with Mr. Giese (R. 3, ¶ 15). Plaintiffs assert claims of negligence by USDC, all of which arise out of the attack by Mr. Giese upon Tracy Wagner. (R. 5-1).

The USDC operates under the Utah Department of Human Services, Division of Services for People with Disabilities. *See Utah Code Ann. § 62A-5-102 (1997).* The Department of Human Services is an agency of the State of Utah. *See Utah Code Ann. § 62A-1-101, et. seq. (1997).* All defendants are governmental entities (R. 49).

SUMMARY OF ARGUMENT

This case arises out of an attack upon plaintiff Tracy Wagner, whereby she was taken by the hair and thrown to the ground. Because that attack constituted an assault or

¹ Although defendants admit Mr. Giese's mental incompetence, they disagree with plaintiffs' assertion in their "Statement of Facts" that due to this mental deficiency, "Mr. Giese lacked sufficient understanding or capacity to be responsible, as a matter of law, for breaching any standard of care relating to any negligent or intentional tort." *Aplt. Br. at 3-4.* That is not a fact, and is not a correct statement of the law as discussed *infra*.

battery, defendants, all of whom are governmental entities, are immune from suit pursuant to Utah Code Ann. § 63-30-10(2).

Plaintiffs do not dispute that if the attack had been committed by a mentally competent person, their claims would be barred by Utah Code Ann. § 63-30-10(2). However, plaintiffs argue that because the attack in this case was committed by a mentally retarded man, § 63-30-10(2) does not apply – purportedly because the assailant lacked the requisite intent to commit an assault or battery. In making this argument, however, plaintiffs have ignored dispositive authority on this very issue. Both this Court (in *Wright v. University of Utah*, 876 P.2d 380 (Utah App. 1994)) and the Utah Supreme Court (in *Higgins v. Salt Lake County*, 855 P.2d 231 (Utah 1993)) have expressly upheld immunity in cases involving assaults, even though they were committed by persons who were mentally deficient. Plaintiffs’ argument is neither novel nor persuasive and should be rejected.

In support of their argument that mentally incompetent persons cannot form the requisite intent to commit an assault or battery under the Immunity Act, plaintiffs have misstated the applicable intent standard. The trial court found the attack was a deliberate one, i.e., done with the intent *to cause contact with* the plaintiff. That is the standard set forth in the Restatement (Second) Torts § 21, which was adopted by the Utah Supreme Court in *Tiede v. State*, 915 P.2d 500, 503 (Utah 1996), a case that similarly involved assault or battery immunity. Plaintiffs ignore this standard and instead argue that in order to constitute an assault or battery, the assailant must have acted with an intent *to cause*

harm. They rely on two cases, both of which pre-date *Tiede* and neither of which involved the issue of assault or battery immunity.

Plaintiffs' arguments disregard the standard set forth in *Tiede*, and are inconsistent with both the *Wright* and *Higgins* decisions. For these reasons, as more fully explained below, this case arises out of an assault or battery entitling the defendants to governmental immunity. Accordingly, this Court should affirm the district court's order of dismissal.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THE STATE IMMUNE FROM LIABILITY FOR INJURY ARISING OUT OF AN ASSAULT OR BATTERY.

A. Under the Governmental Immunity Act, Assault or Battery Immunity Is To Be Broadly Applied.

In order to bring suit against the State, plaintiffs must show a waiver of immunity in the Governmental Immunity Act (Utah Code Ann. § 63-30-1 through -38 (2001), hereinafter "the Immunity Act"). The State assumes, for purposes of this Motion, that there has been such a waiver of immunity here for plaintiffs' claims of negligence under Utah Code Ann. § 63-30-10 (2001).² Utah Code Ann. § 63-30-10, however, sets forth the

² Plaintiffs state, in passing, that the trial court barred plaintiffs' claims because they arose out of an intentional tort, "even though the complaint only alleged negligence on the part of the State." Aplt. Br. at 4. Under § 63-30-10(2), however, the State is immune for *any* claim for injuries that "arises out of" an assault or battery. The Utah Supreme Court has held that the phrase "arises out of" is "very broad, general and comprehensive" and requires "only that there be some causal relationship" between the plaintiff's injury and the assault or battery. *Taylor v. Ogden City School Dist.*, 927 P.2d

circumstances under which there are exceptions to that waiver (i.e., under which the State retains its immunity), including the circumstance where plaintiffs' claims for injury arise out of an assault or battery. In relevant part, that statute provides as follows:

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 employment *except if the injury arises out of, in connection with, or results from:*

(2) *assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights[.]*

Utah Code Ann., § 63-30-10(2) (2001) (emphasis added).

The courts of this state have consistently granted immunity to governmental entities for injuries that arise out of an assault or battery. *See Taylor*, 927 P.2d 159 (Utah 1996) (barring a claim against a school district by a child pushed into a window by another student while at school); *Tiede*, 915 P.2d 500 (Utah 1996) (barring claims against the State from an action brought by the family members of two women who were shot and killed by walkaways from a state-owned halfway house); *Malcolm v. State*, 878 P.2d 1144 (Utah 1994) (barring a claim brought by a sexual assault victim against the State for having paroled the assailant); *S.H. v. State*, 865 P.2d 1363 (Utah 1993) (barring claims against the State School for the Deaf and Blind for hiring a cab driver who molested a student); *Higgins*, 855 P.2d 231 (barring a claim by a ten-year-old girl who was stabbed

159, 163 (Utah 1996). Thus, any claim of negligence, including a claim for negligent supervision, is barred based on Mr. Giese's attack upon Tracy Wagner.

by a Salt Lake County Mental Health mental patient); *Petersen v. Davis County School District*, 855 P.2d 241 (Utah 1993) (barring a claim by a spectator at a basketball game arising out of a fight with the game announcer); *Ledfors v. Emery County School District*, 849 P.2d 1162 (Utah 1993) (barring a claim against a school district by a student who was beaten by two others while in school); *Wright*, 876 P.2d 380 (barring a claim by a student who was struck by a University employee).

In broadly upholding immunity in cases that arise out of assault or battery, the Utah Supreme Court has stated that the status and attributes of the assailant are irrelevant to determining whether or not to apply § 63-30-10(2): “Because it is the negligence of the governmental employee upon which any claim of liability must rest, it would make no sense to engraft upon that waiver a limitation based upon the status of the assailant.” *Higgins*, 855 P.2d at 240. Accordingly, it makes no difference whether the assailant is a governmental employee. *Id.* See also *Taylor*, 927 P.2d at 163-64; *S.H.*, 865 P.2d at 1364-65. Similarly, it makes no difference whether the assailant is mentally competent. See *Wright*, *Higgins*, *supra*.

B. Immunity Under Section 63-30-10(2) Applies Even Where an Assault is Committed by a Mentally Incompetent Person.

Two cases that are directly on point have expressly upheld governmental immunity despite the mental deficiency of the assailant. In *Wright v. University of Utah*, this Court upheld assault or battery immunity despite the assailant’s “questionable mental condition.” *Wright*, 876 P.2d at 384. Plaintiffs try to distinguish *Wright* by pointing out

that the Court, in the first instance, upheld assault or battery immunity because plaintiff's complaint alleged (and thus admitted) that an assault took place. While that is true, the Court then went on to deny the plaintiff an opportunity to amend her complaint to reflect the questionable mental state of the assailant because such an amendment "would be a fruitless, albeit creative, attempt to circumvent the clear language of section 63-30-10."

Id. at 386. The Court held:

Nothing in the [Immunity] Act or in our case law indicates that the distinction [plaintiff] champions was contemplated by the legislature to determine whether immunity exists under section 63-30-10(2). The focus is on the result, not the circumstances leading thereto.

Id. at 387. The Court also supported its decision with similar cases (involving assaults committed by insane individuals) decided under analogous sections of the Federal Tort Claims Act. *Id.* at 386-87.

Plaintiffs argue that the Court's ruling in *Wright* was dicta because the Court did not need to reach this issue. That, however, is not the case; any time a court addresses a motion to amend, it needs to determine whether the proposed amendment is "legally insufficient." *Wright*, 876 P.2d at 387; *Otsuka Elec's. (USA, Inc.) v. Imaging Specialists, Inc.*, 937 P.2d 1274, 1278 (Utah Ct. App. 1997). Thus, the proposed amended complaint was properly before the Court in *Wright*, and the Court's reason for rejecting it – because it would still be deficient due to the immunity afforded under § 63-30-10(2) – is persuasive legal precedent.

Moreover, the Utah Supreme Court unanimously reached the same conclusion in *Higgins v. Salt Lake County*, which plaintiffs failed to address in their brief. There, a ten-year old girl was stabbed by a patient of Salt Lake County Mental Health. The patient claimed that she “heard voices telling her to stab someone” which led to the stabbing. *Higgins*, 855 P.2d at 234. The court applied assault or battery immunity to bar plaintiff’s claims for injuries arising out of the stabbing, even though the assailant was found “guilty and mentally ill” of charges stemming from the attack (*id.*) and “had been diagnosed as a paranoid schizophrenic with organic brain dysfunction and marginal intelligence.” *Id.* at 233.

The Supreme Court, again unanimously, reiterated its holding from *Higgins* the following year in *Malcolm v. State*. There, the State was alleged to have failed to protect the plaintiff from a parolee who sexually assaulted her after he was released. Although that case did not involve a mentally deficient assailant, the court referenced the *Higgins* decision, and said:

We held [in *Higgins*] that the defendants were immune from suit under the assault-and-battery exception in Utah Code Ann. § 63-30-10(2). *We did so despite the fact that the patient was found “guilty and mentally ill” of attempted criminal homicide*
.....

Malcolm, 878 P.2d at 1147 (emphasis added). In other words, the mental status of the assailant is not relevant to an analysis under § 63-30-10(2).

Thus, based on *Wright* and *Higgins*, the law in this State is well-settled: governmental entities are immune from claims for injuries that arise from assaults or batteries, even when committed by mentally incompetent persons.

II. THE DISTRICT COURT APPLIED THE CORRECT STANDARD FOR DETERMINING INTENT TO COMMIT AN ASSAULT OR BATTERY UNDER THE IMMUNITY ACT.

A. The Trial Court Relied on the Correct Standard of Intent.

In its decision, the trial court held that the attack at issue was a deliberate, rather than accidental, act and thus constituted an assault or battery under the Immunity Act (R. 71). The trial court implicitly determined that the intent required to constitute an assault or battery was the intent *to cause contact with another*, not the more rigorous standard advocated by plaintiffs, i.e., the intent *to cause harm*. This is the standard set forth by the Utah Supreme Court in *Tiede v. State*, which, like this case, involved the application of assault or battery immunity. In *Tiede*, the assailants murdered their victims, and the Court held that those attacks fell within the common law definitions of “assault” and “battery.” *Tiede*, 915 P.2d at 502-03. The Supreme Court adopted the standard set forth in the Restatement (Second) of Torts, § 21 (1965), under which the pivotal issue is whether the actor “intend[ed] to cause a harmful or offensive *contact* with the person of the other.” *Id.* at 503, n. 3 (emphasis added). In other words, under *Tiede*, all that is required to commit the intentional tort of assault or battery is the intent to make contact with another, *not* the intent to harm another.

This standard distinguishes between contacts that are deliberate (which rise to the level of an intentional tort of assault or battery) and those that are accidental (which rise only to the level of negligence.) If the contact was intended, it matters not whether the assailant had an intent to cause harm or an ability to comprehend whether harm would result.

In their complaint, plaintiffs alleged that Mr. Giese “became violent, took Tracy D. Wagner by the head and hair, and threw her to the ground and otherwise acted in such a way as to cause serious bodily injury to her.” (R. 4, ¶ 8.) The plain meaning of the complaint reflects an unmistakable intent by Mr. Giese *to make physical contact with Ms. Wagner*. Based on the allegations of plaintiffs’ complaint, the attack by Sam Giese met the definition of an “assault or battery” recognized under the Restatement, *Tiede*, and § 63-30-10(2).³

B. Plaintiffs Rely on an Incorrect Intent Standard.

Appellants include the *Tiede* case in the section of their brief entitled “Determinative Law,” acknowledging that it is “key” for defining the “intent requirement for a civil assault.” Aplt. Br. at 2. Yet, appellants merely pay *Tiede* lip service and ignore its teaching that the intent required is the intent to cause contact. Instead,

³ In their brief, plaintiffs’ argue, for the first time, that Mr. Giese’s actions were “something more akin to a seizure or involuntary action.” Aplt. Br. at 10-11. Such a conclusion, however, is not a tenable interpretation of the event as stated in the plaintiffs’ complaint. Moreover, that contention was never raised below, and should therefore be disregarded. *Olympus Hills Shopping Center, Ltd. v. Smith's Food & Drug Centers, Inc.*, 889 P.2d 445, 460, n. 19 (Utah App. 1994).

appellants ask this court to apply a criminal standard requiring an intent to harm.

Actually, plaintiffs argue that the State must “show that Mr. Giese acted with malice or with knowledge that he was acting illegally.” Aplt. Br. at 10. Such a standard, however, is not supported by *Tiede* or the Restatement, and does not apply here.

In arguing for this different standard, plaintiffs rely on two cases – both of which predate *Tiede*, and neither of which involved the Immunity Act. In *Matheson v. Pearson*, 619 P.2d 321 (Utah 1980), a student threw a tootsie pop from a second story window and hit a school maintenance man in the head. Two years later, plaintiff sued asserting a negligence theory. Defendant obtained summary judgment because the defendants’ actions were deemed intentional torts, subject to a one-year statute of limitations. *Id.* at 322. The Supreme Court reversed on the ground that the statute of limitations would not bar plaintiff’s claims because defendants’ actions may have constituted “reckless misconduct” negligence not subject to the one-year statute. *Id.* at 323. In reversing, the *Matheson* court principally relied on old case law from other jurisdictions,⁴ and never addressed the Restatement section later adopted by the Court in *Tiede*. In any event, *Matheson* was decided sixteen years before *Tiede*, and did not involve a determination under section 63-20-10(2). It does not provide authority to stray from the *Tiede* standard.

⁴ *Matheson* relies heavily on a 1941 California case in distinguishing between a person who acts negligently and “a person guilty of willful misconduct, such as assault and battery, who intends to cause harm.” *Id.* at 322. In doing so, the *Matheson* court appears to have confused two different standards – intentional tort and willful misconduct – which might explain *Matheson’s* inconsistency with the Restatement and *Tiede*.

In the other case cited by plaintiffs, *Doe v. Doe*, 878 P.2d 1161 (Utah App. 1994), the plaintiff sued the defendant for a sexual assault and asserted a claim of negligence. *Id.* at 1162. Defendant obtained a dismissal on the ground that the actions were intentional and not negligent. The Court reversed and remanded to determine whether the actions constituted reckless misconduct. *Id.* at 1163. There, however, the Court relied almost exclusively on the *Matheson* decision, and thus recited the same erroneous legal standard set forth by *Matheson*. In fact, on the day after the Court issued its decision in *Doe*, it issued a decision in *D.D.Z. v. Molerway Freight Lines, Inc.*, 880 P.2d 1 (Utah App. 1994), in which the Court set forth the elements of civil assault and battery claims and stated that the intent requirement was whether the defendant “acted, intending to cause harmful or offensive *contact* with the plaintiff.” *Id.* at 3 (emphasis added). This is the standard recognized two years later in *Tiede*.

None of plaintiffs’ cases involve a determination of the level of intent required to constitute an assault or battery under § 63-30-10(2). On the other hand, *Tiede* does involve such a determination and expressly requires only an intent to make contact.

Plaintiffs argue that the trial court’s ruling will result in cases that arise out of purely negligent conduct being “swallowed up in the immunity statute.” Aplt. Br. at 17. They set forth an analogy where a runner accidentally falls onto another while running around a track, causing injury. In fact, the trial court recognized the precise distinction which would guard against such an overly broad impact of assault or battery immunity – the distinction between accidental and deliberate contact. Under this standard, a claim

that arises due to a runner who accidentally falls onto another does not arise out of an assault or battery because there was no intent to make contact.

In the present case, however, there was not unintentional contact. Mr. Giese grabbed Tracy Wagner by the hair and threw her to the ground (R. 4, ¶ 8). This was no accident; the contact was deliberate. As such, the intent element has been met.

C. Utah Statutory Law Supports the State’s Position.

Plaintiffs argue that this Court should follow the plain language of the statute, and that by using the terms assault and battery the legislature “quite plainly referr[ed] to either an intentional tort or a *specific criminal act*.” Aplt. Br. at 16 (emphasis added). In other words, plaintiffs assert that the terms “assault” and “battery” are synonymous in both the civil and criminal context, and so, just as with criminal assault, there must be some *mens rea* requirement in order to commit a civil assault.

Plaintiffs, however, are wrong. The Criminal Code and the Immunity Act treat the issue of mental state very differently. The Utah Criminal Code defines the elements of assault at Utah Code Ann. § 76-5-102 (1999 & Supp. 2002).⁵ It then contains a separate provision that provides “[i]t is a defense to a prosecution under any statute or ordinance that the defendants, as a result of mental illness, lacked the mental state required as an element of the offense charged.” Utah Code Ann. § 76-2-305(1)(a) (1999). The

⁵ The Utah Criminal Code defines assault differently from the way in which the supreme court defined it in the *Tiede* case. This result is consistent with the notion that intentional torts and crimes are different legal concepts, treated differently by the courts.

Immunity Act, on the other hand, does not contain a provision exempting those with a questionable mental state from an assault or battery analysis.

Thus, contrary to the plaintiffs' argument, the legislature *did* intend to treat criminal assaults under the Criminal Code (where there is an exception for an impaired mental state) different from civil assaults under the Immunity Act (where mental state does not come into play). It would be inappropriate to rely on a provision of the Criminal Code to interpret a provision of the Immunity Act, which arises out of different legislation and serves an entirely different purpose. *See Moreno v. Jordan Sch. Dist.*, 926 P.2d 886, 889 (Utah 1996) (“[o]ne of the cardinal principles of statutory construction is that the courts will look to the reason, spirit, and sense of the legislation, as indicated by the entire context and subject matter *of the statute dealing with the subject.*”) (Citations omitted) (emphasis added).

D. Foreign Case Law Likewise Supports the State's Position.

1. Analogous federal law supports the State's position.

In *Wright*, this Court relied on analogous cases decided under the Federal Tort Claims Act (“FTCA”), which has an exception (28 U.S.C. § 2680(h) (1994)) similar to § 63-30-10(2) of the Immunity Act, which grants immunity for injuries arising out of assaults or batteries.

In *Miele v. United States*, 800 F.2d 50 (2d Cir. 1986), a plaintiff brought suit under the FTCA for injuries that arose out of an assault and battery committed by a person who was adjudicated to be insane. Despite plaintiff's argument that the assailant's mental

capacity prevented him from being “capable of forming the intent necessary to commit an assault,” (*id.* at 52) the court upheld immunity in that case and stated: “since [the assailant] could have been liable for civil assault regardless of his sanity his assault and battery perpetrated against the infant plaintiff in this case was an intentional tort. Therefore the § 2680(h) exception to the waiver of sovereign immunity applies.” *Id.* at 53. *See also Spaulding v. United States*, 621 F.Supp. 1150, 1154 (D. Me. 1985) (“a party presenting a claim arising out of an assault and battery may not avoid the subsection 2680(h) statutory exclusion for intentional torts by establishing that the assailant lacked the mental capacity to form the requisite intent, even where, as here, the assailant was found not guilty of the criminal assault charge by reason of insanity”).

These FTCA cases further support the State’s position.

2. Plaintiff’s case law is distinguishable.

Despite the clear statement of the law in *Tiede*, plaintiffs cite four cases from other jurisdictions, purportedly to demonstrate that an intentional tort cannot be committed by a mentally deficient individual. Obviously, none of those cases address the Immunity Act, and so all are irrelevant to this appeal. Moreover, these cases do not support the plaintiffs’ position.

In *Edwards v. Stills*, 984 S.W.2d 366 (Ark. 1998) and *Goff v. Taylor*, 708 S.W.2d 113 (Ky. App. 1986), the issue was whether mentally incompetent persons could be held liable for punitive damages, based on the standard for punitive damages in their respective states. Like the case wrongly relied upon in *Matheson*, such a determination

involved a willful misconduct standard, not whether an intentional tort was committed under Utah law. Moreover, in *Edwards*, despite a psychotic disorder, the court affirmed the jury's verdict that defendant committed intentional torts, and held the assailant liable for the injuries he caused, as well as punitive damages. 984 So. 2d at 390. In *Goff*, the court similarly held that despite plaintiff's insanity, he committed intentional torts when he shot and killed his victim. 708 S.W.2d at 114. These citations support the State's position – that Sam Giese's deficiency does not preclude him from having committed an intentional tort.

The two cases from Florida's intermediate courts cited by plaintiffs are likewise unavailing. In one, *Kaczer v. Marrero*, 324 So.2d 717 (Fla. App. 1976), an insane person was held liable for assaulting the plaintiff, an innocent victim. In the other, *Anicet v. Gant*, 580 So.2d 273 (Fla. App. 1991), a mental institution attendant was precluded from suing a mental patient. The purported rationale for this distinction was that the plaintiff in *Kaczer* was "an innocent member of the public" while the plaintiff in *Anicet* was an attendant, capable of protecting himself. *Anicet*, 580 So.2d at 275-76. As applied to this case, Tracy Wagner falls into the first category. Thus, even under this line of cases, Sam Giese, despite his mental state, would be deemed to have committed an intentional tort.

Plaintiffs cite to these cases in support of a public policy argument regarding the liability of mentally incompetent persons. That argument, however, misses the point of the State's argument. The State does not argue that certain claims against either a mentally incompetent person, or those providing supervision, are barred under common

law tort principles. Rather, the State's Motion was based on governmental immunity. The State legislature saw fit to protect the State's treasury by retaining its sovereign immunity in limited circumstances, such as this, where a plaintiff's injuries arise out of an assault. The policy underlying this statute has been set by the legislature. As the Utah Supreme Court stated in *Tiede* "we are bound by the legislature's policy decisions and are constrained by the immunity act to deny recovery against the State." *Tiede*, 915 P.2d at 504.

The district court's ruling embraced the correct legal standard regarding the level of intent required to commit an assault or battery under the Immunity Act. Accordingly, the district court properly held that this case arose out of an assault or battery, and that plaintiffs' claims are therefore barred. As the plaintiffs have provided no reason to disturb the district court's decision, this Court should affirm the district court's order of dismissal.


CONCLUSION

For these reasons, defendants respectfully request the Court to affirm the decision of the district court upholding governmental immunity for the defendants and dismissing this case with prejudice.

REQUEST RE ORAL ARGUMENT

Although defendants believe the dispositive issue in this case has been authoritatively decided, they request oral argument for the sole purpose of clarifying the applicable immunity standard.

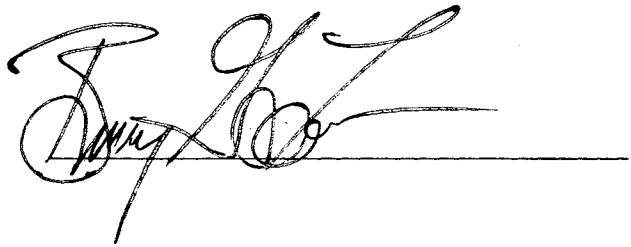
Dated this 11th day of July, 2003.


BARRY G. LAWRENCE
Assistant Attorney General
Attorney for Defendants/Appellees

CERTIFICATE OF MAILING

I hereby certify that on this 11th day of July, 2003, I caused to be mailed, first class postage prepaid, two true and correct copies of the foregoing BRIEF OF APPELLEES to the following:

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A handwritten signature in black ink, appearing to read "D. David Lambert", is written over a horizontal line. The signature is stylized and cursive.