1984

Mary Doe, Guardian Ad Litem for Jane Doe v. Roberto v. Arguelles, et al. : Brief of Appellant

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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MARY DOE, Guardian ad Litem for JANE DOE,	:	
Plaintiff-Appellant,	:	
-vs-	:	Case No. 19061
ROBERTO V. ARGUELLES, et al.,	:	
Defendants-Respondents.	:	

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BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
HONORABLE PHILIP R. FISHLER, JUDGE

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TABLE OF CONTENTS

CASES CITED

TEXTS CITED

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- - - - - - - - - - - - - - - - - - -

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an action by the Plaintiff-Appellant to recover damages against the Defendants for injuries received by the ward of the Plaintiff-Appellant as a result of a violent sexual assault upon her person by the Defendant Roberto Arguelles. The Plaintiff-Appellant contends that the Defendants were grossly negligent, reckless, wilfull, and negligent in their confinement, treatment and release of the Defendant Roberto Arguelles from the Youth Development Center (Y.D.C.).

DISPOSITION IN THE LOWER COURT

The Third District Court, Judge Philip R. Fishler presiding, granted the Defendants' Motion for Summary Judgment dismissing Plaintiff-Appellant's Complaint on two grounds:

1. The acts complained of were discretionary functions for which the State Defendants have Statutory Immunity; and

2. The State Defendants have Quasi-Judicial Immunity for decisions made by and pursuant to paroling authority.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks to have the District Court Order dismissing Plaintiff's Complaint reversed and have the case remanded to the Third District Court for trial.

STATEMENT OF FACTS

The defendant Roberto V. Arguelles' arrest record, found on Page 178 of the Record on Appeal, reveals, in addition to various crimes against property, that on 10/6/78, he was arrested for sexual abuse; on 11/9/78, he was arrested for sodomy; and on 2/26/79, he was arrested for two counts of rape. It should be noted that the sexual abuse charge and the sod-

charge were against 10-year-old and 6-year-old girls respectively. All of these crimes occurred prior to the vicious assault on the plaintiff-appellant's ward, which is the basis of this lawsuit.

Without exception, the health care professionals who examined the defendant Arguelles make reference to his propensity for violence and, specifically, sexual violence. On March 27, 1979, Spencer Wood, M.S., a psychologist employed at the Utah State Hospital, conducted a psychological evaluation of the defendant. Mr. Wood's report states in part:

> "The sexual acting out represents a serious social problem, but since Robert is not emotionally disturbed, he should be held accountable for his behavior. Unfortunately, the lack of motivation and characterlogical traits combine to make him a poor treatment candidate." (emphasis added)
> (Page 339, Record on Appeal)

On March 29, 1979, Kenneth Slaugh, Psychiatric Social Worker, and Cantril Nielsen, M.D., Director - Youth Services, employees of the State Mental Hospital, conducted evaluations of the defendant Arguelles. Their summary was as follows:

> ". . . his emotional stability was such that he could and should be held accountable for his behaviors.

> Our evaluations also revealed that Robert is mainly characterlogical in nature and that his reactions and interactions were mostly on an adult level. He is an extremely sophisticated, smooth individual who is capable of manipulating his environment for his own satisfaction and pleasure and uses such mechanisms as anger and violence to achieve these ends.
>
> Our recommendations of clinical staff at the Youth Center was that Robert be returned to the court and held accountable for his behaviors and also indicated that we saw him as a dangerous individual who is in need of a secure 24 hour residential setting." (emphasis added)
> (Page 343, Record on Appeal)

Further, under "Recommended Therapeutic Modalities" in the s Report, it was stated:

> "As was previously mentioned we feel quite strongly that Robert is a dangerous individual and is in need of a 24 hour residential setting. We feel that he can be held responsible for his behaviors and should be and that in the future he may benefit from some counseling efforts if he can be controlled to the extent that he does not sabotage or manipulate the counseling efforts."
> (Page 344, Record on Appeal)

In the July 16, 1979, report prepared by Marga Wilburn, Ph.D., psychologist at the Utah State Hospital, defendant admitted to killing another individual who had struc

him in the face. Dr. Wilburn drew the conclusion: "He is unmotivated for treatment and not appropriate for the Sexual Offenders Program." (Page 347, Record on Appeal)

In a letter dated March 27, 1979, from Kenneth Slaugh, Psychiatric Social Worker, and Cantril Nielsen, M.D., Director - Youth Services (Page 199, Record on Appeal) on evaluation was written to the Honorable Regnal W. Garff, Jr., the sentencing judge of the defendant, which stated, among other things, that the reason for the defendant Arguelles being at the State Hospital Youth Center was because of the defendant's "recent sexual acting-out and his potentially violent behavior".

> "We recognize that Robert's sexual deviancy is an extremely serious problem but cannot justify or conclude that it is a direct result of any major mental illness. We feel quite strongly that the actions Robert took against the younger girls was out of anger, and that he acted with full knowledge and control of his behavior.
>
> Our clinical staff finds that Robert is mainly characterological in nature and that his reactions and interactions are on an adult level. We have been able to easily ascertain that Robert is an extremely sophisticated, smooth individual who is capable of manipulating his environment for his own satisfaction and pleasure. We are quite convinced that the anger and violence that Robert shows are results of Robert not being able to manipulate his environment and are ways in which he can usually end up getting what he wants.

Therefore, we as a staff at the Youth Center, feel that Robert is not appropriate to the adolescent program and that he can and should be held accountable for his actions. We see him as a potentially dangerous individual and concur with the recommendation of Mr. Smith from the Kearns Probation Unit that Robert should be placed in a secure, 24-hour residential setting."
(Defendants' Exhibit 13) (emphasis added)
(Page 341, Record on Appeal)

Mark Smith was the Probation Officer of the defenda Arguelles and it was his desire that Arguelles should serve the Sex Offender Program at the State Mental Hospital. The Sta Mental Hospital refused to accept the defendant Arguelles due his refusal to cooperate in the treatment and due to the fa that it was their professional opinion that his problem w characterological rather than psychotic. It was felt that t defendant should be placed in a penal-type institution, such the Y.D.C. Mark Smith therefore recommended that the defenda be placed in a secure, residential setting for long-term tre ment. (Page 351, Record on Appeal). Mr. Smith was the mov force behind trying to get defendant Arguelles in the Sex fender Program at the State Mental Hospital. This was due to fact that he felt that the defendant was dangerous enough tha had to be in a "basically lock-up situation where the pat does not have the ability to run away", (Mark Smith deposit

page 101), and that the "State Hospital Sexual Offenders Program was the best appropriate facility". (Smith deposition, page 102). He felt, however, that since the Sex Offenders Program refused to accept him, "he had to consider the community and had to recommend commitment."

> "I had reviewed the reluctance of other facilities to accept, and I had reviewed the recommendations from 5 or 6 psychological and psychiatric institutions and I think I made it very clear that he was a threat to the community." (emphasis added)
> (Smith deposition, page 103)

The defendant Arguelles was, therefore, "committed to the custody of the Superintendent of the State Youth Development Center for secure care, education and training for a minimum of six months and until legally discharged as provided by law." U.C.A. 64-6-12 states:

> "Every person committed to the school shall remain until he shall arrive at the age of 19 years, or be legally discharged. . . ."

Judge Garff was so concerned about the circumstances of Arguelles' commitment to the Y.D.C. that in addition to the Commitment Order, he also sent a letter to the Y.D.C. (Page 353, Record on Appeal). In the Judge's deposition, he stated that he

had only written three of such letters in all of his years on the Bench; he did so to articulate his grave concerns about the defendant Arguelles. The sentencing order gave the Y.D.C. Superintendent some flexibility as to the actual release date.

> "It would give you some flexibility as to his release date and would make it possible for him to be released prior to a 6-month period from this date. However, it is also explained that this is not something he should expect because it can also mean that he can be at the institution until he is 21 years of age. . . . I would hope at this point since this is an outright commitment that the Youth Development Center would be able to pull together a treatment program for his particular needs.
>
> As you read the information in the Social File, you will see that there was grave concern by those experts who have evaluated him, that he constitutes a danger to the community because of his sexual aggressiveness and acting-out behavior. I think it is imperative that he have a treatment program that is effective for him and that he responds to before he is released back to the community, whether this takes a few months or a few years. I don't believe that anyone else should be jeopardized by his behavior until the state has met its responsibility to treat the problem; or that if that is impossible, to hold him in custody." (emphasis added)
> (Page 353, Record on Appeal)

In Judge Garff's deposition, he stated his reasons for writing the letter as follows:

"Because I was incensed at the - - you know, it is obvious from the procedures that I had used that I was struggling to find what I thought would be an appropriate program for this young man; but I considered him to be dangerous and that he needed some psychotherapy to deal with the problem. I felt like I had been given the run-around at any possible treatment facilities the state had, and so, out of desperation, he was sent to the YDC. I was angry and I wanted to appraise him of the fact that I considered this young man to be dangerous." (emphasis added)
(Garff deposition, page 33).

Judge Garff's deposition reflects the following dialogue:

"Q: Did you ever have an anticipation that Mr. Arguelles would be kept at the Youth Development Center for a few years?

A: Yes, that crossed my mind because I didn't know if they could put a treatment program together for him and I really felt that he was the kind of person that if they couldn't do that, then he needed to be held as long as possible."
(Garff's deposition, page 37)

Mark Smith, in his deposition, had concern about sending the defendant Arguelles to the Youth Development Center because he felt he could "manipulate the system" and "float through the system". (Smith deposition, page 117). He stated:

"I had some concern that with the Youth Development Center's program, is basically a behavior and modification type, earn points and have home visits type of situation, have privileges and be able to earn your release, I think Robert would very quickly figure out what he would have to do and how fast he would have to do it and take care of it very quickly."

Mark Smith further stated:

"Usually subsequent behavior of a serious nature will catch you off-guard a little bit by surprise and you can kind of have to go after the fact. The unusual nature with Robert's case was that he was red-flagged way early in the system. He probably had more psychological and psychiatrists and evaluations done than any client I have worked with, and I have never heard any one of my clients having any more done than he did in terms of predicting possible future behavior. . . .

Q: So you were not surprised of his rape of Jane Doe?

A: I was not surprised.

Q: Did you feel that that was foreseeable?

A: Yes."
(Smith deposition, pages 127 and 128)

Benjamin Taylor, M.D., psychiatrist, who contracts w
the Youth Development Center, issued a number of repor
defendant Stromberg and the State Youth Development Center.

full text of said reports are found in defendants' Exhibit 15.

In the April 24, 1979, report, Dr. Taylor states:

> "I asked if he had ever seriously hurt anyone and he commented, 'I've messed people up. I've used bats on people. But I've never been busted for that.'
> (Page 208, Record on Appeal)
>
> With some pride, Robert then commented, 'I've stabbed people.'"
> (Page 209, Record on Appeal)

Further, in the April 24th report, Taylor summarizes:

> "I consider that Robert has to be thought of as being dangerous, both in regards to harming women and, for that matter, male persons."
> (Page 210, Record on Appeal)

On April 30, 1979, Dr. Taylor issued another report. He ends that report by stating:

> "I had occasion to talk to Mr. Stromberg about this interview and I have also talked with Mr. Tatten on two occasions in regard to Robert. It is my feeling that Robert very likely will act out again aggressively in a sexual context with girls or women. It is my feeling that if no therapeutic program is brought to bear, that Robert very likely will seriously harm a woman or a girl at sometime in his life or may, in fact, be harmed by them. It is abundantly obvious that his relationship with women is literally associated with aggressive themes and acting out. . . . It would be my feeling

that whatever planning is effected for this young man, that intensive, on-going therapy should be a part of any program. Diagnostically, I do not think that Robert gives evidence of psychosis, diagnostic category would like fall int he area of neurotic and characterological difficulties." (emphasis added)
(Page 214, Record on Appeal)

On June 14, 1979, Mr. Taylor issued the following report:

"The association of sexuality and fighting has been consistent in this young man's life."
(Page 215, Record on Appeal)

Dr. Taylor goes on to actually predict the attack that the defendant Arguelles perpetrated on the plaintiff, that is the basis of this lawsuit, when he stated:

"I think Robert needs to be in a long-term psychotherapy program where he can obtain some understanding of his association of sexuality and aggression and can work with these two things. It is my feeling that if this young man does not get help in this matter, there is a good likelihood that Robert or some woman will find themselves in a very tragic situation at sometime in his life, that is by way of aggressive acting out." (emphasis added)
(Page 217, Record on Appeal)

Of particular relevance is Dr. Taylor's psychiatric note of August 28, 1979, in which he discussed the program that was being set up for the defendant as a treatment program. He states:

> "In any event I was not a bit encouraged by this discussion. It sounded very fly-by-night and perhaps even fictious. My opinion about a therapy program for this young man would be a very substantial therapist, perhaps two or even three times a week."
> (Page 218, Record on Appeal)

They discussed the use of a female therapist and "talked about the evidently mutually aggressive relationship of one of his girlfriends and he assured me, with a pleasant smile, that he had learned now to give up fighting with girls." In summation, Dr. Taylor states:

> "I am still concerned greatly about this young man and other persons with whom he might come in contact. He is good looking, he is quite successful in his way, and more to the point, he has so far been successful in skating through various dangerous situations. . . . I feel that it is certain that this young man will get into further difficulty if there are not very considerable changes effected by way of therapeutic program and other efforts. . . . I have spoken with Mr. Stromberg on several occasions about the letter received from Judge Garff, and hopefully the appropriate group

gathering in regard to a program for Robert can be accomplished soon."
(Page 219, Record on Appeal)

That was the last meeting Dr. Taylor had with the defendant Arguelles, but nothing in any of the reports prepared by Dr. Taylor indicates in any way that he had responded to treatment program. In fact, it refers only to the formulation of a treatment program. Therefore, nothing within Dr. Taylor's reports would indicate that the State had complied with Judge Garff's requirements in his August 7, 1979, letter, or that Arguelles had become in any way less dangerous.

The defendant Arguelles was then interviewed and examined by Janet Warburton, Psychology Trainee at the Y.D.C. She issued a report on November 8, 1979, in which she stated:

"He was seen as characterological and is now thought to be more appropriate for a correctional placement. While testing and mental status exam tend to confirm this, it is of critical importance that Robert deal with his emotional problems with women. He has so closely paired sex and aggression that he is a danger, and if not dealt with in a therapeutic sense will undoubtedly hurt other women. . . . It is strongly recommended that Robert begin long-term out-patient psycho therapy as a condition and as part of his home visits. He should be released only after he is well established in such a therapeutic relationship with a mature female therapist. Until Robert has resolved some of his aggressive/sexual

feelings he must continue to be seen as a danger." (emphasis added)
(Page 264, Record on Appeal)

Again, it is important to note that just one month prior to his release, the psychologist assigned to him still sees him as being a danger toward women in terms of aggressive sexual acting out. There is nothing within this report that indicates he has in any way responded to any type of treatment.

It should be noted that prior to the defendant's release, the defendant only had one visit, that being on November 30, 1979, with Annette Gilmore, who was a graduate student in social work, working in family counseling for FHP. Nothing in her records would indicate that a "therapeutic relationship had been established." On December 5, 1980, just two weeks prior to the defendant's release, the following notation was made in Janet Warburton's chart:

> "Long-term therapy and a carefully monitored release program . . . I concur [he's too good to be true] watch!
>
> On the basis of my limited observations, he has high potential for being dangerous and needs to be carefully followed up by P.O. for treatment."
> (Page 355, Record on Appeal)

The professional view, again, is that the defendant Arguelles was still a danger to others. In spite of all of the foregoing, the State Youth Development Center entered into a placement agreement with the defendant on December 19, 1979. The placement requirement was:

1. Robert will reside with his mother;

2. Robert will attend community school Monday through Thursday, 6:00 to 10:00;

3. Robert must obey all civil laws;

4. Robert will maintain weekly contact with his placement officer, Craig Berthold, for the first 30 days of his placement and thereafter on a schedule set up by Robert and his placement officer;

5. Robert will meet weekly with Annette Gilmore (Annette Gilmore was crossed out and "a professional counselor" handwritten over her name);

6. Robert will work regularly at Owens Insulation.

(Page 272, Record on Appeal)

It is important to note that in that placement agreement, Annette Gilmore's name was crossed out and "professional counselor" was added. Therefore, it was a requirement for release that he attend counseling sessions with a professional counselor. This never occurred.

The only counselor that defendant Arguelles had any contact with after his release from the Y.D.C. was Annette Gilmore, a graduate student in social work. He met with her prior to his release on November 30, 1979; he met with her again on December 14, 1979; then on December 21, 1979; then on January 4, 1980; and not again until February 18, 1980; and then on February 22, 1980. That was the last occasion on which the defendant met with the student, Annette Gilmore. A review of Annette Gilmore's chart, found at page 357 of the Record on Appeal, indicates the sessions that the defendant Arguelles had with Annette Gilmore could, in no way, be called intensive psychotherapy, or for that matter, any type of therapy. The conversations are light and do not deal with his sexual acting-out problems. It is clear from reading these notes that the sessions were not the type of therapy either contemplated by Judge Garff or required by the release agreement. The August 28, 1979, meeting with Dr. Taylor was, in fact, the last occasion that the defendant Arguelles really spent with a "professional therapist". In paragraph 37 of the defendants' Statement of Facts, it is stated:

> "When Mr. Stromberg was informed at the exit interview that the counselor Arguelles had been seeing at Family Health Plan was a graduate student, he amended the agreement and

> required that the parole officer either make sure that a professional counsel see Arguelles himself or supervise Annette Gilmore, the graduate student."
> (Page 119, Record on Appeal)

U.C.A. §64-6-8 gave to defendant Stromberg the full power to retake the defendant into custody when he found out that Gilmore was treating the defendant. Prior to the date that Arguelles was actually released, the defendant Stromberg was aware that Gilmore was the therapist whom defendant Arguelles would be seeing; and he changed the language of the release agreement as stated above. However, no action was taken to insure that the defendant Arguelles would see a "professional therapist" after his release. There is no evidence to support the fact that Stromberg had determined that the defendant Arguelles was well established in such a therapeutic relationship with a mature female therapist prior to his release. As a result of the State's inability to deal with the problem of defendant Arguelles, and their inability to create a treatment program as required by the letter from Judge Garff and as recommended by all of their professional psychiatrists and psychologists, and further by the gross negligence of the defendant Stromberg in releasing the defendant Arguelles from custody in light of all the foregoing information, on March 6, 1980, less than three

months after defendant Arguelles' release, the defendant Arguelles kidnapped, raped, sodomized, stabbed, lacerated and slit the throat of the ward of the plaintiff. (Page 361, Record on Appeal).

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN RULING AS A MATTER OF LAW THAT THE STATE DEFENDANTS HAVE A QUASI-JUDICIAL IMMUNITY FOR THEIR DECISIONS AS TO WHEN TO RELEASE JUVENILES FROM THE STATE YOUTH DEVELOPMENT CENTER.

The parameters of government employees' liability in the exercise of their governmental function is contained solely within the provisions of the Utah Governmental Immunity Act, U.C.A. 63-30-1. The Honorable Philip R. Fishler ruled, in granting the Defendants' Motion for Summary Judgment, that the State Defendants were operating with a Quasi-Judicial Immunity in making their determination to release the defendant Roberto Arguelles from the Youth Development Center. The trial court, therefore, attempted to adopt a common law principle of Quasi-Judicial Immunity that was contrary to the provisions of U.C.A. 63-30-1 (as amended). The California Supreme Court, in the case

of Drennan vs. Security Pacific National Bank, 621 P.2d (Cal., 1981) ruled that:

> "The common law, which petitioner urges us to apply, is superseded when the Legislature acts."

Further, U.C.A. 68-3-2 states:

> "The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to respect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter, the rules of equity shall prevail."

U.C.A. 63-30-10 states:

> "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, . . ."

U.C.A. 63-30-4 states:

> "Nothing contained in this act, unless specifically provided, is to be construed as an admission or denial of liability or responsibility in so far as governmental entities are concerned. Wherein immunity from suit is

waived by this act, consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person. (emphasis added)

The remedy against a governmental entity or its employee for an injury caused by an act or omission which occurs during the performance of such employee's duties, within the scope of employment, or under color of authority is, after the effective date of this act, exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless the employee acted or failed to act through gross negligence, fraud, or malice.

An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment or under color of authority, unless it is established that the employee acted or failed to act due to gross negligence, fraud or malice."

It is apparent that it was the intent of the Utah State Legislature to abandon the archaic concept of sovereign immunity. Clearly, if a common law Quasi-Judicial Immunity existed, the Governmental Immunity Act supersedes that immunity. The Utah Supreme Court, in the case of State Land Board vs. State Department of Fish & Game, 408 P.2d 707 (Utah, 1965), gave guidelines for statutory interpretation. The Court stated:

> "Further, with respect to the meaning of statutes, it is appropriate to look to the intended purpose and to the meaning of accomplishing it by the proper application of the language used."

U.C.A. §68-3-2 states:

> "The provisions of the statutes of the State are to be liberally construed with a view to effect the objects of the statutes and to promote justice."

It was the intent of the Utah Legislature in enacti the Governmental Immunity Act to define the extent of liabili of governmental employees in the exercise of their offici duties. Waiver of immunity is the rule; the immunity from su which has been retained is specifically defined in §63-30-10(through (11).

The Arizona Supreme Court, in Grimm vs. The Arizon Board of Pardons and Paroles, 564 P.2d 1227 (Ariz., 1977), a cas very similar to the instant action, ruled that public offici acting in other than true judicial proceedings do not have a solute immunity from suit in their discretionary functions. Th was a case arising out of the parole of a known, dangerous cri inal who had killed the decedent in an armed robbery. An acti was brought by the heirs of the decedent against the Arizona

Board of Pardons and Paroles. In addressing the issue of Quasi-Judicial Immunity, the Court stated:

> "It is clear that the policy reasons for official immunity are much weaker than for judical immunity. Thus, logic requires a lesser immunity; for immunity deprives individuals of a remedy for wrongdoing and should be bestowed only when and at the level necessary. We hold that absolute immunity for public officials in their discretionary functions acting in other than true judicial proceedings is not required and, indeed, is improper." (Id. at page 1232)

The Court went further to rule:

> "While society may want and need courageous, independent policy decisions among high level government officials, there seems to be no benefit and, indeed, great potential harm in allowing unbridled discretion without fear of being held to account for their actions for every single public official who exercises discretion. . . . In this day of increasing power wielded by governmental officials, absolute immunity for nonjudicial, nonlegislative officials is outmoded and even dangerous." (Id. at page 1232).

In this case,the position of the State of Utah regarding Quasi-Judicial Immunity is that no claim can vest against the State Defendants, however wrongful their conduct, for the reason that those Defendants are "in this shield of Quasi-Judicial Immunity". This is directly contrary to the specific language of §63-30-4 which states:

> "Nothing contained in this Act, unless specifically provided, is to be construed as an admission or denial of liability or responsibility insofar as government entities are concerned." (emphasis added)

There is, therefore, no basis in Utah law for the concept of Quasi-Judicial Immunity. All State employees, unless they are judges, state prosecutors, or legislators, are liable for their wrongful conduct unless the State can meet its burden of showing that the wrongful conduct is within the immunity from liability retained in §63-30-10.

The Supreme Court of Arizona, in Ryan v. State, 634 P.2d 597 (1982), addressed this issue of the non-accountability of government employees for their wrongful conduct. In the case, the director of the Arizona Youth Center was sued to recover for injuries inflicted by an escapee on the husband of the plaintiff by an individual who had a long history of escape and violent conduct. The Court found that the State of Arizona was liable for the injuries received by the plaintiff, and stated:

> "We think that a sound public policy requires that public officials and employees shall be held accountable for their negligence in the performance of their official duties to those who suffer injury by reason of their misconduct. Public office or employment should not be made a shield to protect careless public officials from the consequences of their

misfeasance in the performance of their public duties."

State employees should not be able to hide behind the outmoded concept of Quasi-Judicial Immunity; they should be held liable for their wrongful conduct. The scope of immunity for governmental employees is contained within §63-30-10(1) through (11). Unless a cause of action is within one of those specifically retained areas of immunity, the plaintiff should have the opportunity to have the case heard by a trier of fact. In this case, the Plaintiff-Appellant's causes of action as stated in her Complaint do not fall within the retention of immunity in the Utah Statute. Therefore, the lower Court's ruling should be reversed and the case remanded for trial.

POINT II

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN RULING AS A MATTER OF LAW THAT THE DECISION OF RONALD STROMBERG, INDIVIDUALLY AND ON BEHALF OF THE UTAH STATE YOUTH DEVELOPMENT CENTER, TO RELEASE DEFENDANT ROBERTO ARGUELLES FROM THE Y.D.C. WAS A DISCRETIONARY FUNCTION AND, THEREFORE, WOULD HAVE IMMUNITY FROM SUIT PURSUANT TO UTAH CODE ANNOTATED 63-30-1(1).

The definition as to what action constitutes a discretionary function has been the subject of numerous appellate

decisions. The State of Utah argues that so long as the defendant Stromberg was required to weigh several factors and alternatives in making the decision to release the defendant Argue from incarceration, his decision must be deemed to be "discretionary" within the meaning of §63-30-10(1). This conclusion clearly not supported by recent Utah case law. The definition "discretionary function" was clearly articulated in two rece Utah cases: Frank v. State, 613 P.2d 517 (Utah, 1980); a Bigelow v. Ingersoll, 618 P.2d 50 (Utah, 1980).

The Frank case arose out of a lawsuit against t University Medical Center. The plaintiff's son, Jack Algar, h been a student at the University of Utah, during which time had undergone psychiatric treatment at the University of Ut Medical Center. The plaintiff alleged that prior to his son' death, his son had notified those charged with his care that h had previously attempted suicide. It was alleged that the de fendants failed to take any action to restrain, counsel or assi him. In a short period of time, he was released from the Univer sity Medical Center and permitted to go on his way unsupervise whereupon he committed suicide.

The plaintiff then filed suit, joining the State of Utah and the doctors as defendants, alleging that they had negligently handled his son's case. The defendants moved for summary judgment on the grounds that the State of Utah, as owners of the Medical Center, and the doctor, as an employee thereof, were protected by sovereign immunity as defined in the Utah Governmental Immunity Act. This Motion was granted and the plaintiff's suit dismissed. The plaintiff appealed and the Utah Supreme Court reversed and remanded for trial.

Justice Hall, writing for unanimous Court, held that the actions by the staff at the University Medical Center were not protected by the Governmental Immunity Act, and that even though their conduct required a large amount of discretion, it was not a "discretionary function". The Court adopted a "basic policy level vs. operational" definition of the old discretionary/proprietary exceptions to the Governmental Immunity Act stating:

> "The Court recognizes the high degree of careful observation, evaluation, and educated judgment reflected in any modern medical prognosis, and makes no suggestion that a large measure of "discretion," as commonly defined, is not involved. The exception to the statutory waiver here under consideration, however, was intended to shield those governmental acts and decisions impacting on large numbers of people in a myriad of unforeseeable

> ways from individual and class legal actions, the continual threat of which would make public administration all but impossible. The one-to-one dealings of physician and patient in no way reflect this public policy-making posture, and should not be given shelter under the Act. We therefore hold that immunity is waived by operation of the Act, and that the State of Utah may not escape liability by reason thereof. . . . For this reason, we hold that defendant Erickson's acts in this case were not legally discretionary, but ministerial. . . . The decision of the trial court is reversed and remanded for trial on the merits of plaintiff's claim." (Id. page 520)

This policy level vs. operational analysis of governmental immunity was more thoroughly articulated by this Court in the case of Bigelow vs. Ingersoll, 618 P.2d 50 (Utah, 1980). In that case, Justice Stewart, again writing for the unanimous Court, defined a discretionary function as follows:

> "According to the definition of discretion established in Frank v. State, supra., the discretionary function under 63-30-10(1) is confined to those decisions and acts occurring at the basic policy-making level, and not extended to those acts and decisions taking place at the operational level, or, in other words, those which concern routine, everyday matters, not requiring evaluation of broad policy actions." (Id., page 53)

It is clear that the broad policy-making/operational determination of governmental functions is the standard by which this case must be analyzed. The discretionary function of

State in this instance is the establishment of criteria, rules and regulations under which the detainee may be allowed to be placed outside the facility. The power to adopt such rules and regulations is granted to the Superintendent of the Y.D.C. pursuant to U.C.A. §64-6-8, which states:

> "The Superintendent may, subject to the approval of the Board of Family Services, establish rules and regulations under which any student may be allowed to be placed outside the school."

The Arizona Supreme Court stated in the Grimm case, supra.,:

> "Immunity is granted only for policy level functions because strong public policy arguments apply: for example, there are no reliable criteria for judging a major policy decision and there is a need for fearless decision making at that level."

It is the establishment of these criteria, rules and regulations, which is the act occurring at the "basic policy-making level" and which is protected by the Utah Governmental Immunity Act. The implementation of said rules, regulations and criteria on a case-by-case basis is the operational level, and not protected by the Governmental Immunity Act. Therefore, the decision to release an individual from the Youth Development

Center is not protected by §63-30-10(1). The failure of Ron Stromberg, Superintendent of the Y.D.C., to follow the establi ed rules, regulations and guidelines, and directions from sentencing judge, is a factual determination that need to be m by a trier-of-fact; it was inappropriate and reversible error the District Court Judge to determine the issue on a Motion f Summary Judgment.

Without exception, each and every health care provid and mental health professional that examined Roberto Arguell stated emphatically that he was a dangerous individual with hi propensity for future violent acts. The scars that the Plai tiff's ward carries on her throat and in her mind attest to t fact that Ronald Stromberg made a mistake in releasing Rober Arguelles. The decision to release Roberto Arguelles from t Y.D.C. was not a discretionary function, it was an operation al/ministerial function. The question for determination i whether that mistake was negligent or grossly negligent.

The only recourse that the plaintiff's ward has recover for her injuries is to exercise her right in Court have her grievances heard before an impartial tribunal. That a fundamental right that should not be taken away from a citi based on some outmoded, archaic concept that "The King Can Do

Wrong". We all know that the king can do wrong, and frequently does.

In Selmar vs. Psychiatric Institute of Washington, D.C., 538 F.2d 121 (1976), a case where plaintiff brought an action against the Psychiatric Institute of Washington D.C. and a Virginia parole officer to recover for the death of her daughter who was killed by a Virginia probationer who had been a patient of the Institute. The plaintiff alleged that probation officer failed to comply strictly with the terms of the sentencing judge's probation order. The probation officer raised the discretionary judgment defense. In response to that defense, the Court of Appeals held:

> "Under Virginia law, a State employee who exercises discretionary judgment within the scope of his employment is immune from liability for negligence. Conversely, he is liable if injury results from negligent performance of a ministerial act. . . . A probation officer's basic policy decisions are discretionary and hence, immune. But his acts implementing the policy must be considered on a case-by-case basis to determine whether they are ministerial." (Id, page 127)

The Plaintiff-Appellant has but one request: the opportunity to have her case heard at trial. If the State Defendants' actions were appropriate in this instance, then they have nothing to fear from a trial. Considering the fact that

there is a reasonable basis in fact and law to support the cl of the Plaintiff-Appellant as contained in her Complaint, should be given the opportunity to have her grievances aga the State of Utah heard at trial; therefore, justice requi that this Court reverse the District Court's Order Dismiss Plaintiff's Complaint and remand this case for trial.

POINT III

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY DISMISSING AS A MATTER OF LAW DEFENDANT RONALD STROMBERG INDIVIDUALLY FROM THE ABOVE-ENTITLED ACTION WHERE THE PLAINTIFF HAD PRAYED A CAUSE OF ACTION FOR GROSS NEGLIGENCE AND THERE WERE SUFFICIENT FACTS BEFORE THE COURT TO CREATE A QUESTION OF FACTS AS TO THAT ISSUE.

Utah Code Annotated 63-30-4 states in part:

"No employee shall be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment or under color of authority unless it is established that the employee acted or failed to act due to gross negligence, fraud or malice." (emphasis added)

The Plaintiff-Appellant alleged in her Complaint t Ronald Stromberg and the Y.D.C. had actual knowledge of violent and dangerous propensities of the defendant Arque

that notwithstanding said knowledge, they released Arguelles from the Youth Development Center in reckless disregard of the health, safety and well-being of society; that the actions of the State Youth Development Center, Ronald Stromberg and Jeff McBride, in the confinement, treatment, and release and/or parole of Roberto Arguelles constituted gross negligence which proximately caused the injuries sustained by the ward of Plaintiff-Appellant. The Plaintiff-Appellant, therefore, properly plead gross negligence against Ronald Stromberg and stands ready to prove the same at trial.

Black's Law Dictionary defines "gross negligence" as follows:

> "The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness.
>
> . . .
>
> Indifference to present legal duty and utter forgetfulness of legal obligations, so far as other persons may be affected, and a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence. [Burke vs. Cook, 246 Mass. 518, 141 N.E. 585].

Section 319 of the Restatement (Second) of Tor
(1965), states:

> "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled, is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."

The Arizona Supreme Court stated in the Grimm ca
supra.:

> "If the entire record of the prisoner reveals violent propensities and there is absolutely no reasonable basis for belief that he has changed, then a decision to release the prisoner would be grossly negligent or reckless." (Id. at page 1234)

The Plaintiff-Appellant has alleged and will prove
trial, if given the opportunity, that Ronald Stromberg was gros
ly negligent and ignored the clear and unmistakable warnings
all of the professional mental health personnel who evalua
Roberto Arguelles.

Roberto Arguelles was indeed a very dangerous indiv
ual who needed to be incarcerated. Judge Garff's letter
Ronald Stromberg, dated August 7, 1979, made it very clear as
his concern. Judge Garff placed on Ronald Stromberg a duty to

> "Have a treatment program that is effective for him and that he responds to it before he is released back to the community, whether this takes a few months or a few years. I don't believe that anyone else should be jeopardized by his behavior until the State has met its responsibility to treat the problem; or if that isn't possible, to hold him in custody." (Judge Garff's emphasis in original letter)
> (Page 353, Record on Appeal)

Judge Garff expressed his concerns about the dangerousness of the defendant Arguelles and clearly instructed the defendant Stromberg that Arguelles was to be treated and respond to treatment or hold him in custody. The Judge was clearly trying to protect the public from just the type of injury that Plaintiff-Appellant's ward sustained as a result of Ronald Stromberg's releasing Arguelles from custody. The Judge stated further in his letter:

> "As you read the information and Social File, you will see that there is grave concern by those experts who have evaluated him, that he constitutes a danger to the community because of his sexual aggressiveness and acting out behavior."

The defendant Stromberg's own expert, Dr. Benjamin Pavlon, predicted the very type of attack that occurred on Plaintiff-Appellant's ward in his June 14, 1979, statement quoted

above in the Statement of Facts. Janet Warburton, the "Psyc... ogist of Record" warned of it. Mark Smith, the defend... Arguelles' probation officer, said in his deposition that ... very attack on Plaintiff-Appellant's ward was foreseeable. fact, Dr. Taylor stated that future violent acts were certain. Arguelles did not receive further treatment. There is absolute... no evidence before this Court, or that was before the Distr... Court in Judge Fishler's ruling, that indicated that Rober... Arguelles had responded to any treatment program or that he ... become any less dangerous prior to his release from the Y.D.... The attack on Plaintiff-Appellant's ward proves that he was, ... fact, dangerous and should not have been released.

If all of the facts are taken in the light most favo... able to the Plaintiff-Appellant and all reasonable inferences a... drawn therefrom, there are sufficient facts to create the que... tion of fact as to whether or not Ronald Stromberg was gross... negligent. It would be manifestly unjust to deny the Plaintiff... Appellant the opportunity to have a trial on the issue of whethe... or not the clear mistake of Ronald Stromberg in releasing Rober... Arguelles rose to the level of gross negligence.

If the trier of fact determines that Ronald Stromberg... actions in this regard were indeed reasonable, then justice ... served. If the trier of fact determines that Ronald Stromberg ...

this instance was grossly negligent and reckless, then justice is served. But if this Plaintiff-Appellant is denied the right and the opportunity to have her case heard at trial, then justice is thwarted.

CONCLUSION

The parameters of the liability of government employees is contained within the Governmental Immunity Act. The Governmental Immunity Act has superseded and preempted any common law Quasi-Judicial Immunity that may or may not have existed. If the defendants are immune from suit, that immunity arises from the Governmental Immunity Act. The Frank and Bigelow cases clearly define the meaning of "discretionary function" within the State of Utah. By applying the rationale of those Courts using the operational vs. broad policy-making definitions, there can be only one conclusion drawn in the instant case: the decision to release Roberto Arguelles was not discretionary but ministerial. Therefore, Ronald Stromberg, the Y.D.C., and the State of Utah cannot hide from their wrongful conduct behind the cloak of immunity.

Justice and public policy demand that the public have some recourse against officers of the State of Utah for their

outrageous and wrongful conduct. The State, the Y.D.C., Ronald Stromberg had a duty to society to protect them f dangerous and violent acts of the defendant Arguelles. defendant's duty was further magnified by the requirements of August 7th letter of Judge Garff to the Y.D.C. There is solutely no evidence to support a finding that defend Arguelles had in any way changed or that an effective treatm program had been established. Without question there is evidence to suggest that the defendant Arguelles had responded an effective treatment program before he was released back to t community. There is not a shred of evidence that points to t fact that Arguelles had in any way become less dangerous. fact, the report of Janet Warburton just two weeks prior Arguelles' release showed that she still considered him to dangerous. The defendants failed to see that Roberto Arguel was not complying with their own requirements for release. was not receiving treatment by a professional counselor; he w only being seen on a bi-weekly basis by a student of soci work. This is clearly not the level of treatment contemplated Dr. Taylor, Janet Warburton, or Judge Garff.

The facts, when taken in the light most favorable the Plaintiff-Appellant, and drawing all reasonable inferen from those facts, clearly support the following conclusio

1. The defendants breached their duty to the public; 2. The position that the type of harm inflicted on Plaintiff-Appellant's ward was a foreseeable result of the State defendants breach of their duty; 3. The proximate cause of the injury to the Plaintiff-Appellant's ward was the action or inaction of the defendants; 4. There are sufficient facts to create a question of fact as to whether or not Ronald Stromberg's decision to release the defendant Arguelles, in light of all of the professional reports concerning his dangerous propensities and his high potential for violent acts, constitutes gross negligence.

Summary Judgment is a harsh remedy and should only be used when reasonable minds cannot differ. Our system of justice is designed to give injured parties an opportunity to have their grievances heard impartially. The Plaintiff-Appellant therefore prays that this Court give her an opportunity to take her case to a trier of fact so she can prove that Ronald Stromberg was grossly negligent, that the attack by defendant Arguelles on the Plaintiff-Appellant's ward was caused directly and proximately by the negligence of the State of Utah and the Youth Development Center, and the gross negligence of Ronald Stromberg.

WHEREFORE, the Plaintiff-Appellant prays that the abo Court reverse the District Court's Order of Dismissal and rem this case to the District Court for trial.

DATED this 26th day of May, 1983.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

DELIVERED, this 26th day of May, 1983, a true a correct copy of the foregoing Brief of Plaintiff-Appellant, the following:

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