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

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IN THE SUPREME COURT OF THE

STATE OF UTAH

MARY DOE, Guardian ad Litem for JANE DOE,

Plaintiff-Appellant,

-vs-

Case No. 19061

ROBERTO V. ARGUELLES, et al.,

Defendants-Respondents.

BRIEF OF RESPONDENTS

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

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IN THE SUPREME COURT OF THE

STATE OF UTAH

MARY DOE, Guardian ad Litem for JANE DOE, Plaintiff-Appellant, -vs- ROBERTO V. ARGUELLES, STATE OF UTAH, UTAH STATE DEPARTMENT OF SOCIAL SERVICES, ANTHONY W. MITCHELL, Executive Director of Utah State Department of Social Services, UTAH STATE YOUTH DEVELOPMENT CENTER, RONALD STROMBERG, RALPH F. GARN, Superintendents of Utah State Youth Development Center, RUSS VAN VLEET, Treatment Plan and Release Coordinator for Utah State Youth Development Center, Defendants-Respondents.	Case No. 19061

BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

This action was brought by Plaintiff seeking damages against the State of Utah for injuries she sustained due to a criminal act by Roberto Arguelles. The Plaintiff alleged that the decision of Defendant Stromberg, the paroling authority, to release Mr. Arguelles from the custody of the Youth Development Center, was improper.

DISPOSITION IN THE LOWER COURT

The Third District Court, Judge Philip R. Fishler, presiding, granted the State Defendants' Motion for Summary Judgment, dismissing the action on the following 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 their paroling authority.

RELIEF SOUGHT ON APPEAL

The State Defendants (Respondents) request this Court to affirm the Order of the District Court, dismissing this action, with prejudice.

STATEMENT OF FACTS

Appellant's statement of facts does not accurately represent the circumstances surrounding the decision to release Mr. Arguelles, which is the only issue raised by

this action and by this appeal. Therefore, the State Defendants submit the following statement of facts. References are made to the Record on Appeal and to the original exhibit or document as presented to the District Court.

1. Robert Arguelles was born February 14, 1962 (birthdate on all Juvenile Court Records).

2. In 1977, Arguelles came before the Second District Juvenile Court on two charges of car theft and one charge of gas theft. He was placed on probation (R. 175; Juvenile Court Record Sheet, Exhibit 1).

3. On October 13, 1978, a petition was filed in Second District Juvenile Court, charging Arguelles with taking indecent liberties with a ten-year-old girl. The incident allegedly took place on October 5, 1978 (R. 177, Exhibit 2). This was the charge of which Arguelles was eventually found guilty and which was the basis for his ultimate commitment to the Youth Development Center (R. 394, Garff Deposition, p. 8, l. 18-25).

4. On October 6, 1978, Arguelles was placed in the Salt Lake County Detention Center on the indecent liberties charge, but was released on house arrest on October 25, 1978 (R. 394, Garff Deposition, p. 6, l. 2-16).

5. On November 27, 1978, a petition was filed in Second District Juvenile Court charging Arguelles with

sodomy, the incident allegedly occurring September 15, 1978 (R. 179, Petition, Exhibit 3). A trial was held on that petition on January 15, 1979. The charges were dismissed for insufficient evidence (R. 181, Minutes of Trial, Exhibit 4; R. 183, Findings of Fact and Decree, Exhibit 5). Such dismissal is equivalent to an acquittal in the adult court system (R. 394, Garff Deposition, p. 10, l. 7-13).

6. From October 25, 1978, to February 23, 1979, Roberto Arguelles was at home, not held in custody by the court. However, on February 23, 1979, Arguelles was placed in detention pursuant to a pick-up order (arrest warrant) based on allegations that he was involved in a rape occurring February 21, 1979 (R. 185, 187, Affidavit for Taking Child Into Custody, Exhibit 6; Order for Detention, Exhibit 7). Arguelles continued in custody at various institutions from February 23, 1979, until December 19, 1979 (R. 391, Stromberg Deposition, p. 34; R. 189, Summary of Placements from Stromberg Deposition, Exhibit 8).

7. A petition charging Roberto Arguelles with the rape of a 16-year-old girl was filed in the Second District Juvenile Court on February 28, 1979 (R. 191, Petition, Exhibit 9). This charge was dismissed in the interests of justice on August 24, 1979 (R. 175, Record Sheet, Exhibit 1; R. 193, Motion and Order of Dismissal, Exhibit 10).

8. Trial was held on the indecent liberties

charge (R. 177, Petition, Exhibit 2), on March 2, 1979. Arguelles was found guilty as alleged in the amended petition, to-wit: taking indecent liberties with a ten-year-old girl by having her fondle his genitals (R. 195, Minutes of Trial, exhibit 11). This is the only sexual offense of which Roberto Arguelles was ever found guilty by the Juvenile Court (R. 175, Record Sheet, Exhibit 1; R. 394, Garff Deposition, p. 15, l. 18-23).

9. Following conviction on the indecent liberties charge, Roberto Arguelles was placed in the custody of the Utah State Hospital, Youth Center, for observation and evaluation (R. 197, Order for Short-Term Confinement, Exhibit 12).

10. The Youth Center at the State Hospital returned Roberto Arguelles to the Juvenile Court on March 28, 1979, saying he was inappropriate for their program (R.199-200, see letter dated March 27, 1979, Exhibit 13; R. 394, Garff Deposition, p. 21, l. 5-8).

11. Roberto Arguelles stayed in detention until April 4, 1979, when he was sent to the Youth Development Center for short-term observation and evaluation (R. 202, Order for Short-Term Confinement, Exhibit 14).

12. While on short-term commitment to the Youth Development Center, Roberto Arguelles was evaluated three times by Dr. Benjamin Taylor, a psychiatrist. His reports

are attached as Exhibits to his Affidavit, which is Exhibit 15 to the Memorandum in Support of State Defendants' Motion to Dismiss or for Summary Judgment (R. 204-219). Roberto Arguelles was sent back to the court following the observation period with the reports from Dr. Taylor and a report from Donald Tatton, the Coordinator of the Observation Unit at the Youth Development Center (R. 220-224, Tatton Report, Exhibit 16).

13. After the observation period at the Youth Development Center, the juvenile court's probation officer, Mark Smith, recommended that Arguelles be placed on a stayed commitment to the Youth Development Center and returned home to receive out-patient treatment at Granite Community Mental Health Center (R. 226, Smith Report, Exhibit 17; Smith Deposition, p. 62-66 [Smith Deposition not in appellate record although cited many times by appellant]).

14. On June 26, 1979, following his return from observation at the Youth Development Center, Roberto Arguelles was sent by the Juvenile Court (Judge Garff) to the Sexual Offenders Program at the Utah State Hospital (R. 228, Order for Short-Term Confinement, Exhibit 18).

15. On July 20, 1979, Judge Garff received a report from the State Hospital saying that Roberto Arguelles would not be kept in the Sexual Offenders Program (R. 230-231, letter dated July 19, 1979, Exhibit 19). Roberto

Arguelles was returned to the Salt Lake County Detention Center on July 31, 1979 (R. 233, Detention Order, Exhibit 20).

16. After Arguelles was returned the second time from the State Hospital, Judge Garff was left without any alternatives except to commit him to the Youth Developement Center. The judge did not want to send him to the Youth DEvelopement Center, knowing that the therapeutic program he wanted for Arguelles did not exist at the Youth Development Center (R. 394, Garff Deposition, page 29, l. 17-25; p. 30, l. 1-12).

17. On August 7, 1979, Mark Smith, the juvenile court probation officer, recommended that Arguelles be committed to the Youth Development Center (R. 235-236, Smith Report, Exhibit 21).

18. Roberto Arguelles was committed to the Youth Development Center on August 7, 1979. The order specified that the commitment was nunc pro tunc to April 5, 1979 (R. 238, Findings of Fact and Decree, Exhibit 22). Judge Garff wrote an accompanying letter to the Superintendent at the Youth Development Center expressing his concerns about Roberto Arguelles (R. 240-241, letter dated August 7, 1979, Exhibit 23). Again, the letter specified that the commitment was nunc pro tunc to give the Superintendent "some flexibility as to his release date" and "make it

possible for him to be released prior to a six-month period from this date."

19. Careful consideration was given to all the terms of Judge Garff's letter by the officials at the Youth Development Center (R. 391, Stromberg Deposition, p. 75-76).

20. In August, 1979, when Roberto Arguelles was committed to the Youth Development Center, the Superintendent was Ralph Garn. However, Dr. Garn left the Youth Development Center on December 1, 1979, prior to the release of Roberto Arguelles (R. 392, Garn Deposition, p. 8, l. 9; p. 17, l. 4-24).

21. Ronald Stromberg was the Assistant Superintendent at the Youth Development Center in August, 1979, and became Acting Superintendent on December 1, 1979 (R. 391, Stromberg Deposition, p. 18, l. 1-3).

22. Russell Van Vleet was employed at the Youth Development Center in September, 1979, as Treatment and Release Coordinator (R. 393, Van Vleet Deposition, p. 4, l. 25; p. 5, l. 2).

23. Roberto Arguelles was assigned to Gates Cottage. The Cottage Coordinator of Gates Cottage at the time Arguelles was committed was Dave Fowers (R. 243-248, Fower Affidavit, Exhibit 24).

24. Roberto Arguelles exhibited outstanding behavior in school, at his cottage, in his interactions with

other students and staff, and in his working situation. He showed control in stress situations at the Youth Develoment Center. He worked in close contact with female staff members and had no behavior problems with them. He had no negative incident reports during his commitment period, which is unusual when compared to other students at the Youth Development Center (R. 243-248, Fowers Affidavit, Exhibit 24; R. 391, Stromberg Deposition, p. 37, l. 24-25; p. 38, l. 1-6; p. 39, l. 1-4, 7-15; p. 62, l. 16-25; p. 63, l. 1-22).

25. Roberto Arguelles was evaluated again by Dr. Benjamin Taylor on August 28, 1979. His report of that meeting is attached as Exhibit 4 to his affidavit, which is Exhibit 15 here (R. 218-219).

26. An initial review hearing is held on every student at the Youth Development Center. The purpose of the initial review is to develop a release plan (R. 393, Van Vleet Deposition, p. 9, l. 1-5; R. 250-260, Policy Documents, Exhibit 25).

27. An initial review hearing was held on Roberto Arguelles on September 19, 1979 (R. 262, Exhibit 26).

28. Prior to the initial review, Russ Van Vleet personally talked to Roberto Arguelles (R. 393, Van Vleet Deposition, p. 21, l. 14-25; p. 22, l. 1-2). Russ Van Vleet also read and considered Judge Garff's letter and Dr.

Taylor's reports (R. 393, Van Vleet Deposition, p. 22, l. 3-6). Based upon their expressed concerns and his own, Russ Van Vleet recommended that Roberto Arguelles begin counseling treatment with Janet Warburton, a female clinical social worker and psychologist trainee, while he was at the Youth Development Center (R. 393, Van Vleet Deposition, p. 20, l. 19-24). Roberto Arguelles was one of very few students who had individual counseling or treatment from a psychologist while at the Youth Development Center (R. 393, Van Vleet Deposition, p. 23, l. 14-22).

29. Janet Warburton saw Roberto Arguelles approximately four times during his stay at the Youth Development Center (R. 390, Warburton Deposition, p. 7, l. 7). A summary report from Janet Warburton is attached as Exhibit 27 (R. 264).

30. Janet Warburton felt that Roberto Arguelles needed long-term therapy to resolve his aggressive/sexual feelings. However, she never anticipated that such therapy would take place while Arguelles was at the Youth Development Center (R. 390, Warburton Deposition, p. 13, l. 24-25). Similarly, Dr. Benjamin Taylor felt Roberto Arguelles needed a long-term therapeutic program, but he never felt that such program could have been accomplished at the Youth Develoment Center (R. 205-206, Taylor Affidavit, Exhibit 15, para. 3).

31. Both Dr. Taylor and Janet Warburton recommended that an out-patient counseling program for Arguelles should be established prior to his release from the Youth Development Center (R. 264, Warburton Report, Exhibit 27; R. 206, Taylor Affidavit, Exhibit 15, para. 4). It was the parole officer's responsibility to set up out-patient treatment while Arguelles was at the Youth Development Center (R. 393, Van Vleet Deposition, p. 42, p. 43, l. 18-24). Arguelles saw a counselor at Family Health Plan twice prior to his release while he was on home visits from the Youth Development Center (R. 266, Letter from A. Gilmore, dated November 30, 1979, Exhibit 28). The Youth Development Center was informed by a Family Health Plan professional that the program was willing to continue seeing Arguelles as an outpatient (R. 268, letter from Reid Holbrook, Exhibit 29). The treatment and release team was assured by the parole officer that outpatient treatment for Arguelles had been established and would continue (R. 393, Van Vleet Deposition, p. 43, l. 58Z).

32. A pre-release hearing is held on every student at the Youth Development Center when the cottage staff feel the youth has accomplished all he can or should at the Youth Development Center and would like him to be reviewed for release (R. 391, Stromberg Deposition, p. 25, l. 26). The pre-release hearing for Roberto Arguelles was held Decmeber

15, 1979 (R. 270, Pre-Release Report, exhibit 30). The decision at the Pre-Release hearing was that Roberto Arguelles should be released when certain goals had been accomplished (R. 391, Stromberg Deposition, p. 30, l. 6-10).

33. The conditions for release set by the review team at the pre-release hearing were:

1. Meet weekly with Annette Gilmore, counselor.

2. Attend Kearns Community School Monday through Thursday, 6:00 to 10:00.

3. Work regularly at Owens Insulation.

4. Live at home with his mother.

5. Meet weekly with his parole officer.

(R. 270, Exhibit 30).

34. The parole officer, Craig Berthold, attended the pre-release hearing. He reported that Roberto Arguelles had registered for night school, had a job, and was seeing a counselor (R. 270, see Exhihit 30).

35. When all conditions recommended at the pre-release hearing are met, an exit interview is scheduled with the Superintendent (R. 391, Stromberg depsition, p. 30, l. 24-25; p. 31, l. 1-3). The exit interview for Roberto Arguelles was held on December 19, 1979, with Acting Superintendent Ronald Stromberg (R. 391, Stromberg Deposition, p. 31). Arguelles' placement agreement was signed at the exit interview (R. 272, Exhibit 31).

36. The parole agreement conditions and expectations were discussed in detail with Roberto Arguelles. Mr. Stromberg informed Roberto that his parole could be revoked if the agreement was not kept (R. 391, Stromberg Deposition, p. 31, l. 19-23). The conditions of the parole agreement were:

1. Robert will reside with his mother.

2. Robert will attend Kearns Community School Monday through Thursday, 6 to 10.

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 therefter on a schedule set up by Robert and his placement officer.

5. Robert will meet weekly with a professional counselor.

6. Robert will work regularly at Owen's Insulation.

(R. 272, Exhibit 31).

37. 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 counselor see Arguelles himself or supervise Annette Gilmore, the graduate student (R. 391,

Plaement Agremeent, Exhibit 31; R. 272, Stromberg Deposition, p. 77, l. 8-18).

38. Mr. Stromberg did not request a final evaluation of Roberto Arguelles by Dr. Benjamin Taylor prior to releasing Arguelles (R. 391, Stromberg Deposition, p. 59, l. 18-25). It was not within Dr. Taylor's responsibilities to review or approve release decisions regarding any youth at the Youth Development Center (R. 205, Taylor Affidavit, Exhibit 15, para. 2). It was not standard procedure to consult Dr. Taylor regarding release of a student (R. 393, Van Vleet Deposition, p. 54, l. 10-12). However, Mr. Stromberg did have several conversations with Dr. Taylor regarding Arguelles and plans for his release (R. 391, Stromberg Deposition, p. 56, l. 4-8; p. 59, l. 18-20) and Dr. Taylor never disagreed with the release plans (R. 391, Stromberg Depsition, p. 38, l. 18-22; p. 79, l. 17-19; R. 393, Van Vleet Deposition, p. 55, l. 4-9).

39. Janet Warburton was considered the "professional of record" as far as Arguelles' treatment (R. 391, Van Vleet Deposition, p. 54, l. 10-12). Both Mr. Van Vleet and Mr. Stromberg discussed the plans for Arguelles' release with Ms. Warburton (R, 393, Van Vleet Deposition, p. 29, l. 14-17; R. 391, Stromberg Deposition, p. 56, l. 4-8; p. 59, l. 18-20). Ms. Warburton was aware of the release plan (R. 390, Warburton Deposition, p. 14, l. 5; p. 15, l.

3-5), and thought the release was appropriate based on her knowledge and information at the time (R. 390, Warburton Deposition, p. 16, l. 2-3). Ms. Warburton never recommended that Arguelles not be released, even given her report that Arguelles may be dangerous if not treated (R. 390, Warburton Deposition, p. 14, l. 3; p. 15, l. 9, 14-17; p. 16, l. 7-8). Ms. Warburton agreed that Arguelles should be released as long as he was in treatment prior to the release (R. 393, Van Vleet Deposition, p. 29, l. 19-25; p. 47, l. 15-25; p. 48, l. 1). Janet Warburton's agreement to the release was very important to Mr. Van Vleet's recommendation that Arguelles should be released (R. 393, Van Vleet Deposition, p. 30, l. 1-7).

40. Dr. Taylor and Janet Warburton agree that neither a psychiatrist nor a psychologist can predict future behavior or dangerousness (R. 207, Taylor Affidavit, Exhibit 15, pra. 6; R. 390, Warburton Deposition, p. 17, l. 3-6).

41. Ms. Warburton thought Robert Arguelles needed psychotherapy to lessen his dangerousness (R. 390, Warburton Deposition, p. 17, l. 15-21) but acknowledged that such treatment could not guarantee that Arguelles would not harm someone in the future (R. 390, Warburton Deposition, p. 18, l. 12-16).

42. All youths at the Youth Development Center are dangerous either to persons or property (R. 390, Warburton

Deposition, p. 24, l. 2-5). In 1979, over 46 percent of the youths at the Youth Development Center had at least one life-endangering felony on their record. The average student at the Youth Development Center in 1979 had 6.29 felony convictions and 18.528 total convictions, including felonies, misdemeanors, and ordinances. In comparison, Roberto Arguelles had three felony convictions (two of which were much earlier car thefts) and four total convictions. On the offense severity matrix, a system devised by the Juvenile Courts and the Division of Youth Corrections to measure severity of a juvenile offender's offense record, Roberto Arguelles had 113 severity matrix points. The average student in 1979 had 170.5 severity matrix points, and 64.4 percent had more severity points than Roberto Arguelles (R. 274-276, Burnett Affidavit, Exhibit 32).

43. Roberto Arguelles' juvenile court record of convicted offenses, consisted of two car thefts, one gas theft, and one sexual abuse charge (taking indecent liberties) and was extremely light when compared with the records of other youths committed to the Youth Development Center (R. 391, Stromberg Deposition, p. 64, l. 19-25; p. 65, l. 1, 20-25; p. 66, l. 1-2).

44. Arguelles' committed time was approximately nine months, longer than the average length of stay at the Youth Development Center, and much longer than others with

similar records (R. 391, Stromberg Deposition, p. 66, l. 4-19).

45. Arguelles was released from the Youth Development Center on December 19, 1979 (R. 272, Placement Agreement, Exhibit 31).

46. The sole authority for release or parole at the Youth Development Center is the Superintendent (R. 391, Stromberg Deposition, p. 12, l. 18-20). Arguelles was released by authority of Ronald Stromberg as Acting Superintendent (R. 391, Stromberg Deposition, p. 18, l. 16-20). Russ Van Vleet had no authority to release or not release Arguelles. Russ Van Vleet did not sign the release form (R. 393, Van Vleet Deposition, p. 24, l. 7-9).

47. The Superintendent does not have supervisory authority over parole officers. It is not the Superintendent's responsibility to see that parole officers properly execute a parole agreement (R. 391, Stromberg Deposition, p. 72, l. 4-7; p. 73, l. 3-7). The Superintendent has the authority to revoke parole, but has no way of ascertaining parole violations unless notified by the parole officer. The parole officer must submit quarterly reports to the Superintendent. The only quarterly parole report on Roberto Arguelles was submitted after Arguelles was in jail, having been arrested for the assault on Plaintiff's ward (R. 391, Stromberg Deposition, p. 71, l.

11-16; R. 278, Quarterly Report, Exhibit 33).

48. Roberto Arguelles' assault on Plaintiff's ward, out of which this lawsuit arose, occurred on or about March 6, 1980 (R. 3, Complaint, para. 4).

ISSUE ON APPEAL

The only issue on appeal is whether the State Defendants (particularly Ronald Stromberg) may be held liable for the decision to release Roberto Arguelles on parole from the State Youth Development Center. Contrary to the implications in Appellant's Brief, there are not issues raised concerning the amount of superivsion by the parole officer following the release, the parole officer's role in implementing the parole plan, or the failure to retake Arguelles into custody. None of these questions were raised in the complaint and should not be allowed to cloud the only issue properly before the Court: Are the State Defendants immune from liability arising out of the decision to release Roberto Arguelles from the Youth Development Center?

ARGUMENT

POINT I

THE DECISION TO RELEASE ARGUELLES FROM THE YOUTH DEVELOPMENT CENTER WAS A DISCRETIONARY FUNCTION FOR WHICH IMMUNITY IS RETAINED PURSUANT TO THE UTAH GOVERNMENTAL IMMUNITY ACT.

Judge Fishler, in the court below, dismissed this

action against the State Defendants based, in part, upon the discretionary function doctrine of the Utah Governmental Immunity act.

The State of Utah has, with certain exceptions, retained its sovereign immunity from suit "for any injury which results from the exercise of a governmental function." Utah Code Ann. § 63-30-3. Appellant does not dispute that the operation of a state youth corrections system is a governmental function. (For legal arguments on this issue, see State Defendants' Memorandum in Support of Motion to Dismiss or for Summary Judgment, pp. 19-21, R. 126-128).

Because the operation of the Youth Development Center was a governmental function, any suit must be based on a specific waiver of immunity that is found in the Governmental Immunity Act, Utah Code Ann. §§ 63-30-5 through 63-30-10. Though it was never so alleged in the complaint, this action was apparently brought under Section 63-30-10, which generally waives immunity for injuries caused by the negligence of state employees. However, this section has eleven specific exceptions to the waiver of immunity. Immunity is retained for any injury that "arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused." Utah Code Ann. § 63-30-10(1)(a).

Judge Fishler held that the decision to release

Arguelles from the Youth Development Center was a discretionary function for which immunity is retained. Notwithstanding the heavy weight of authority supporting Judge Fishler's decision, Appellant contends that the decision to release an inmate on parole from the Youth Development Center is not a discretionary function for purposes of governmental immunity.

Respondents are not aware of even one case in which a decision to release an inmate on parole has been held not to be a discretionary function for purposes of statutory governmental immunity. There are cases which have found the actions of a parole or probation officer after the decision to release has been made to be ministerial rather than discretionary but even in those cases, the actual decision to release has still been granted immunity.

Utah law supports the finding that in the present case, the decision to release Arguelles must be granted immunity. This Court, in a decision issued one week ago, discussed the discretionary function analysis, as well as its applicability to parole decisions.

In Little v. Utah State Division of Family Services, No. 18113 (July 1, 1983) the Court stated, as it has on other occasions, that it would follow the lead of the federal courts in applying the discretionary function exception of the Federal Tort Claims Act:

> Utah's exceptions to waiver of governmental immunity closely parallel those enumerated under 28 U.S.C., § 2680(a) of the Federal Tort Claims Act. This Court has followed the lead of cases interpreting that act. Frank v. State, Utah, 613 P.2d 517 (1980). Beginning with the two root cases of Dalehite v. United States, 3466 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953) and Indian Towing Co. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), the lines in federal cases have been consistently drawn between those functions ascribable to the policy making level and those to the operational level. State law has followed along analogous lines.

The Court then cited Payton v. United States, 679 F.2d 475 (5th Cir. 1982), in which the Fifth Circuit Court of Appeals, applying the same planning/operational level test as has been adopted by this Court, found the decision to release a prisoner on parole to be a discretionary function for which there must be absolute immunity.

The Payton case is basically dispositive of the present case. The circumstances out of which Payton arose were certainly as tragic and disturbing as those in this case. In 1975 and 1976, a parolee from federal custody brutally murdered three women, including the appellant's wife, Sheryl Payton. The murders included rape and "hideous mutilation" of the women's bodies. The murderer's severe mental illness and homicidal aggressive tendencies toward women were well documented in records available to the

paroling authority. The appellants alleged that the Board of Parole was liable for deciding to release a "known homicidal psychotic." 679 F.2d at 477-478. Despite the obvious tragedy involved, the Fifth Circuit recognized the absolute need for immunity for the discretionary function of making almost impossibly difficult parole decisions. Therefore, overuling a three-judge panel of its own court, the Court held that the discretionary function exception of the Federal Tort Claims Act did apply, and the case was dismissed on the basis of governmental immunity. 679 F.2d at 483.

The similarities between Payton and the present case are obvious. As in this case, the plaintiff alleged that the Parole Board "had access to records showing that Whisenhant [the prisoner] was a psychotic with homicidal tendencies land would endanger society if released," and further that "the Board negligently failed to acquire, read, or give adequate consideration to those records." The Court held:

> To withstand a motion to dismiss, an allegation challenging the Board's performance of any ministerial act must be sufficiently distinguishable from a complaint disputing the Board's exercise of its discretionary function. The plaintiff must therefore allege that the Board breached a duty sufficiently separable from the decision-making function to be nondiscretionary and outside of the exception. The plaintiff may not withstand a motion to dismiss by

> alleging that the Board's decision was wrong.

Explaining its holding, the Fifth Circuit said:

> In fulfilling this task, the Board must exercise its judgment by determining the materiality of certain studies and documents and the propriety of relying thereon in reaching its final assessment. Further, the manner and degree of consideration with which the Board examines these materials is inextricably tied to its ultimate decision. This allegation thus addresses the Board's exercise of its discretionary function.

679 F.2d at 482.

In Epting v. State, 546 P.2d 242 (Utah 1976), this Court held that the discretionary function exception applied to give immunity to the State when the children of a murder victim sued the State of Utah alleging that it was negligent in allowing the murderer, a state prison inmate involved in a work-release program, to escape and kill their mother. This Court upheld the dismissal of the action holding that the decision to place an inmate into the community on work-release was within the "discretionary function" doctrine. The Court held that the creation of a work release program was a discretionary decision. Continuing, the Court said:

> In addition to the exercise of this judgment as to the value and practicability of such a program generally, there are problems about its

> advisability as to each individual prisoner. In order to weigh the positive values of possible benefit for him in such a program against the negative factors such as the likelihood of his escaping and engaging in more antisocial conduct, it is essential to consider the various aspects of his personality: his intelligence, aptitudes and qualities of character such as honesty, integrity and industry; and whether he has demonstrated a sincere desire to rehabilitate himself so that there is a reasonable probability that he will succeed. Accordingly, we agree with the view of the trial court that the handling of the prisoner Michael Hart was something which "arises out of the exercise of a discretionary function" for which subsection (1) of Section 63-30-10, quoted above, has retained sovereign immunity.

546 P.2d at 244.

The same analysis applies to the present case. The decision to release Roberto Arguelles from the Youth Development Center inherently involved consideration and weighing of all factors cited in Epting and many others; i.e., the possibility of future violence, the negative effect of further incarceration on the juvenile's attitude, the permanence of the behavior modification achieved at the Youth Development Center, etc. An enormous amount of data, theories and projections had to be integrated and evaluated before a decision could be reached. This Court has said that an inmate's "rehabilitation is the responsibility of professional men, and the manner in which it is accomplished

must be a matter of discretion." Beal v. Turner, 454 P.2d 624, 626 (Utah 1969). Utah law clearly supports a finding that the decision to release Roberto Arguelles was a discretionary function for which the State Defendants are immune from suit. Utah is not alone in holding a release decision to be within the discretionary function exception.

In Cairl v. State, 323 N.W.2d 20 (Min. 1982), a state facility released a mentally retarded juvenile with dangerous propensities on a holiday home leave. While at home, the youth started a fire, as he had done on several prior occasions, which destroyed an apartment building and caused a death. The Supreme Court of Minnesota, which decided the case in August, 1982, first explained the reasons for the discretionary function exemption, which was almost identical to Utah's.

> This exemption from tort liability recognizes that the courts, through the vehicle of a negligence action, are not an appropriate forum to review and second-guess the acts of government which involve "the exercise of judgment or discretion." (Citations omitted.) As stated in Weiss v. Trote, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y./S.2d 409 (1960): To accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts.

Id. at 23.

The Minnesota court then followed the planning level-operational level distinction which is currently accepted by this Court (Carroll v. State Road Commission, 496 P.2d 888 (Utah 1972)), to determine whether the release decision fit within the discretionary function exception. Id. at 23 n. 1. The Court then held:

> The decision to release Tom Connolly, involving as it does the professional evaluation of such factors as the protection of the public, his physical and psychological needs, the relative suitability of the home environment, and the need to reintegrate him into the community, is precisely the type of governmental decision that discretionary immunity was designed to protect from tort litigation by after-the-fact review.

Id. at 23 (emphasis added).

In Johnson v. State, 447 P.2d 352 (Ca. 1968), the Supreme Court of California held that the discretionary function exception of California Gov. Code § 820.2 applied to a juvenile release decision. The Court found:

> The Youth Authority unquestionably makes some decisions falling within the "discretionary function" language of section 820.2, as we have heretofore defined it [planning versus operational levels]. As to the determination of whether to place a youth on parole, for example, the Legislature has specifically granted to the Youth Authority the power to weigh potential risks and benefits and to establisn standards: "When, in the opinion of the Youth Authority, any person committed to or confined in any such school deserves parole according to regulations established for the purpose, and it

> will be to his advantage to be paroled, the Authority may grant parole under such conditions as it deems best. . . (Welf. & Inst. Code § 1176). The decision to parole thus comprises the resolution of policy considerations, entrusted by statute to a coordinate branch of government, that compels immunity from judicial reexamination.

Id. at 361.

The authority of the Superintendent of the Youth Development Center to parole inmates is very similar to those of the California Youth Authority. Utah Code Ann. § 64-6-8, 12. Arguelles was released pursuant to the statutory powers of the Superintendent after careful consideration of all factors involved. The State Defendants are therefore immune from this suit by operation of the retention of absolute immunity for the exercise of a discretionary governmental function. Utah Code Ann. § 63-30-10(1)(a). Appellant cites no cases in which it is held that a parole decision is not a discretionary function for purposes of immunity. The overwhelming authority is that the decision to release a prisoner on parole is a discretionary function to which immunity must apply. The Respondents request this Court to affirm the District Court's dismissal of this action.

[Also, see Thompson v. County of Alameda, 614 P.2d 728 (Cal. 1980); Berry v. State, 400 So.2d 80 (Fla. App. 1981); Papenhausen v. Schoen, 268 N.W.2d 565 (Minn. 1978); Seiss v. McConnell, 255 N.W.2d 2 (Mich. App. 1977);

Adamov v. State, 345 N.E.2d 661 (Ohio Ct. Cl. 1975); and Smart v. United States, 207 F.2d 841 (10th Cir. 1953), all of which are cases in which discretionary function immunity was applied to release or parole decisions.]

POINT II

THE STATE DEFENDANTS ARE IMMUNE ON THE BASIS OF THE DOCTRINE OF QUASI-JUDICIAL IMMUNITY.

The District Court also based its dismissal of this case on the basis of quasi-judicial immunity. As can be seen from the preceding point, and an extensive survey of the cases in this area, the courts around the country are very protective of paroling authorities and their decision-making processes. Because this function is so similar to that performed regularly by judges in criminal courts, most judges recognize the need for immunity, and the serious threat to parole decision making which would arise absent immunity.

The superintendent of the Youth Development Center was the juvenile corrections system's equivalent to the State Board of Pardons in the adult system. The superintendent had the authority to place (parole) a student outside the school. Utah Code Ann. § 64-6-8 (repealed 1981). The superintendent also had the power to discharge (pardon) a student, thereby terminating the state's control over that individual. Utah Code Ann. §§ 64-6-12, 64-4-13 (repealed 1981). This action was an attempt to hold the

superintendent and the State of Utah liable for a parole decision made by this official.

At common law, it has been a long established principle that a judge is immune from suit. Judicial immunity is applied to every judicial officer. Its broad scope and coverage is unaffected by allegations of negligence, recklessness or malice.

Judicial immunity has been extended, at common law, to numerous non-judicial officers. When so extended it is known as quasi-judicial immunity. In McLallen v. Henderson, 492 F.2d 1298 (8th Cir. 1974) the court explained the scope of this immunity.

> Judicial immunity is only granted to non-judicial officials who, like judges, must not be unduly inhibited to exercise discretionary authority by the constant fear of personal liability for damages. Applied to non-judicial officials, judicial immunity is termed quasi-judicial immunity and examples are prosecuting attorneys and parole board members.

Id. at 299-300 (emphasis added).

In Pate v. Alabama Board of Pardons and Paroles, 409 F.Supp. 478 (M.D. Ala. 1976) the court elaborated the policy reasons that support the protections afforded by quasi-judicial immunity. Pate was an attempt to recover damages from the parole board, and its members, that were allegedly suffered when plaintiff's decedent was attacked by a parolee.

> Parole officials bear a more than ordinary responsibility because of the dangerous traits already demonstrated by those with whom they must deal. This responsibility imposes far greater moral burdens and requires far more difficult legal choices than those met by the average administrative officer. The function of the Parole Board is more nearly akin to that of a judge in imposing sentence and granting or denying probation than it is to that of an executive administrator. It is essential to the proper administration of criminal justice that those who determine whether an individual shall remain incarcerated or be set free should do so without concern over possible personal liability at law for such criminal acts as some parolee will inevitably commit, in other words, that such officials should be able to exercise independent judgment without pressure of personal liability for acts of the subject of their deliberations.

Id. at 479.

In a footnote, the court continued:

> The system of rehabilitation practices in this country, involving probation, parole, and pardon, could not be effective if those burdened with the decisions incident thereto were subjected to personal liability for mistakes, the occurrence of which is inherent to the system.

Id. at 479.

The decision to place Roberto Arguelles back in the community was a parole decision. As such, those officials charged with making that decision are covered by quasi-judicial immunity. In Dock v. State of Utah,

C-79-720 (D. Utah, december 1, 1980), the Federal District Court of Utah dismissed an action against the State of Utah's Board of Pardons saying: "The Board of Pardons, in exercising the responsibilities they did, were clothed with quasi-judicial immunity and were not responsible for any error in the method in which the calendaring of his case was handled, lamentable as that may be at this point." Even assuming an error in judgment was made, the defendants in this case would still be immune from this suit. The very purpose of quasi-judicial immunity is to avoid inhibiting the official's functioning in office from fear of lawsuits and personal liability steming from his official actions. When speaking of judicial immunity, the United States Supreme Court said, in Pierson v. Ray, 386 U.S. 547 (1967):

> This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."

Id. at 554.

Appellants cite Grimm v. Arizona Board of Pardons and Parole, 564 P.2d 1227 (Ariz. 1977) as authority for the proposition that quasi-judicial immunity does not apply to paroling authorities (App. Brief, p. 22). The Grimm

decision often combines discussions of discretionary function immunity, quasi-judicial immunity, and the non-immunity issue of public duty. Although it does appear that the Grimm court abolished the doctrine of absolute quasi-judicial immunity for parole authorities in Arizona, it did so over a strong dissent, citing an earlier Arizona case:

> The words of Justice Udall in Wilson v. Hirst, 67 Ariz. 197, 193 P.2d 461 (1948), which the majority overrules, are as true now as they were then:
>
> "[W]e can also say that we are well aware of the fact that in thus shielding public officers, who act strictly within their jurisdiction in a quasi-judicial capacity, against actions of this sort the rule may work hardship and injustice in individual cases. But there is no middle ground to be occupied in the matter; either all of such suits are to be tolerated or none. The court may occasionally be confronted with the not-unusual situation that calls for subordination of the rights of the few to the interests of the whole body of the public. The doctrine of immunity is not for the benefit of the few who might otherwise be compelled to respond in damages. It is for the benefit of all to whom it applies, that they may be free to act in the exercise of honest judgment, uninfluenced by fear of consequences personal to themselves. This again is not for their personal advantage or benefit. It is only that they may be enabled to render a better public services." 67 Ariz. at 202, 193 P.2d at 464.

Id. at 1237.

The Grimm case has been called an "aberration in the law" by other Arizona courts, Cody v. Sate, 630 P.2d

554, 560 (Ariz. App. 1981). Although Grimm is upheld by the Arizona Supreme Court in Ryan v. State, 656 P.2d 597 (Ariz. 1982), it is on the issue of public duty, not on the issue of quasi-judicial immunity. The author of the opinion in Ryan, Judge Hays, was the dissenting judge in Grimm, and he specifically states in Ryan that he does not retreat from his dissent in Grimm, and that the Ryan case should not be seen as dispositive on the issue of quasi-judicial immunity. 656 P.2d at 599.

The Grimm case is the only case cited by Appelalnts which suggests that quasi-judicial immunity should not be applicable to paroling authorities. There are a substantial number of federal cases which disagree. See for example, United States v. Irving, 684 F.2d 494 (7th Cir. 1982); Thompson v. Burke, 556 F.2d 231 (3d Cir. 1977); Pope v. Chew, 521 F.2d 400 (4th Cir. 1975). It appears that quasi-judicial immunity is almost uniformly applied to the decision-making role of a parole board or other paroling authority. Respondents urge that Grimm, though relied upon heavily by Appellants, does not and should not represent the law of Utah.

The same policy reasons that have resulted in the creation of an absolute judicial immunity mitigate in favor of an absolute quasi-judicial immunity. Imbler v. Pachtman, 424 U.S. 409 (1976); Lang v. Wood, 92 F.2d 211

(D.C. Cir. 1937). In situations like the present case, though the facts relating to Plaintiff's injuries and suffering are very sad, it is important to recognize the judicial nature of a parole decision and the need for immunity for such decisions. The decision to release Arguelles was not an easy one, nor was it taken lightly by the Superintendent or his staff. But after weighing all factors, and exercising their best professional judgment, it was decided that Arguelles should be released from the institution. That decision has to be made at some point with regard to every juvenile at the Youth Development Center, all of whom have records which include serious felonies. Because of the very difficult nature of these decisions, and the inherent risks to the decision-makers, they must be protected by quasi-judicial immunity. Applying the principle to this case, summary judgment was properly granted in favor of the State Defendants, and this Court is urged to affirm that judgment.

POINT III

THE DOCTRINE OF QUASI-JUDICIAL IMMUNITY IS NOT ABROGATED BY THE UTAH GOVERNMENTAL IMMUNITY ACT.

Appellant raises for the first time on appeal the argument that the doctrine of quasi-judicial immunity is abrogated by the Utah Governmental Immunity Act. Because this issue was not raised below and therefore not ruled upon

by the District Court, it should not be considered on appeal. Lamkin v. Lynch, 600 P.2d 530, 533 (Utah 1979). See also Shayne v. Stanby & Sons, Inc., 605 P.2d 775, 776 (Utah 1980); Villeneuve v. Schammer, 639 P.2d 214, 215 (Utah 1981). Even if this issue is properly before the Court, Appellant's contention is in error.

Nothing in the language of the Governmental Immunity Act suggests that it was ever intended to abrogate all common-law immunities. Rather, the Act retains all sovereign immunity except as specifically waived in the Act. Utah Code Ann. § 63-30-3. In interpreting the Governmental Immunity Act, this Court has held on several occasions that the Act should "be strictly applied to preserve sovereign immunity; and to waive it only as clearly expressed therein." Holt v. Utah State Road Commission, 511 P.2d 1286, 1288 (Utah 1973). See also Sheffield v. Turner, 445 P.2d 367 (Utah 1978); Epting v. State, 546 P.2d 242 (Utah 1976). There is absolutely no waiver or abrogation of common-law judicial or quasi-judicial immunity in the Governmental Immunity Act.

Appellant contends that all immunities meant to be allowed for the State of Utah or its employees are contained within the Governmental Immunity Act, although no authority is cited for such a proposition. At page 24 of her brief, Appellant does beneficiently allow that common-law judicial,

legislative, and prosecutorial immunity still exists despite the Governmental Immunity Act. Appellant gives no basis for the distinction between these common law immunities and the quasi-judicial immunity traditionally granted to paroling authorities. It is particularly interesting that Appellant included prosecutorial immunity as one that remains, since prosecutorial immunity is quasi-judicial immunity, derived from exactly the same source as the immunity granted to parole boards. McLallen v. Henderson, supra.

Appellant cites this Court's ruling in State Land Board v. State Department of Fish and Game, 408 P.2d 707 (Utah 1965) that it is appropriate to look to the intended purposes of a statute in statutory construction. However, that case does not support Appellant's position in the present case. In that case, the plaintiffs were seeking to have sand and gravel included in the phrase "coal and other minerals" in a statute reserving rights to such to the state. The case had nothing to do with an abrogation of common law. Furthermore, if this Court looks to the "intended purpose" of the Governmental Immunity Act, it will find nothing to indicate an intent to abrogate common law quasi-judicial immunity.

Also cited by Appellant's brief is Drennan v. Security Pacific National Bank, 621 P.2d 1318 (Cal. 1981) in which plaintiffs were seeking to have the common-law

prohibition of the "Rule of 78's" method of computing the unearned portion of a finance charge in the event of prepayment applied even though there were at least six or seven statutes specifically allowing the method. The court held that it could not on common-law grounds change the legislatively enacted statutes. This case does not support the proposition that a statute which does not specifically change or abrogate the common law should be construed as doing so.

In Madsen v. Borthick, 658 P.2d 627 (Utah 1983), this Court ruled that the Governmental Immunity Act was intended "to replace the common law of official immunity and its distinction between discretionary and ministerial acts or omissions with a new standard coordinated with the standard of governmental immunity established in the Governmental Immunity Act." 658 P.2d at 633. This discussion relates to discretionary function immunity which is included in the Governmental Immunity Act, and states that statutory standards rather than common law standards should be applied to this particular type of immunity. Madsen does not suggest that all common law immunities, such as judicial and quasi-judicial immunities, are replaced by the Governmental Immunity Act.

In Pierson v. Ray, supra, 386 U.S. 547 (1967), the leading United States Supreme Court case on judicial

immunity, the plaintiffs asserted that common-law judicial immunity was abolished by the enactment of 42 U.S.C. § 1983, which generally allows civil rights suits against governments and governmental officials. The Court said:

> We do not believe that this settled principle of law was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in Tenney v. Brandhove, 31 U.S. 367 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.

In Jackson v. Wilson, 581 S.W.2d 39 (Mo. App. 1979) the plaintiff argued that the enactment of the State Tort Defense Fund abrogated the common-law doctrine of official immunity. The court responded as follows:

> Jackson strives to convince this court that Section 105.710, supra, as most recently amended and presently existing, retroactively abrogated the doctrine of official immunity with respect to the complained of acts arising out of Wilson's performance of his official duties on the fateful day in question. Jackson's argument fails to wash for the principal reason that the language employed in the statute is unambiguous, conveys a plain and definite meaning, and the legislative intent which prompted its enactment is clearly

> discernable. When such is the case, this court should and will abstain from foraging among various peripheral rules of construction for the purpose of rewriting a statute under the guise of construing it. (Citation omitted.) The language employed by the legislature in Section 105.710, supra, does not so much as hint or suggest that the doctrine of official immunity was even being eroded, much less abrogated, retroactively or otherwise.

581 S.W.2d at 44.

There is absolutely no language in the Utah Governmental Immunity Act which could be construed as abrogating the common-law doctrines of judicial or quasi-judicial immunity. Therefore, quasi-judicial immunity can, and should be, applied in this case.

POINT IV

APPELLANT'S CLAIMS OF GROSS NEGLIGENCE WERE APPROPRIATELY DISMISSED.

In her complaint, Appellant made certain allegations of gross negligence against Defendant Ronald Stromberg, the then Acting Superintendent of the Youth Development Center who, with proper authority, made the decision to release Arguelles from the Center. Appellant now claims that the gross negligence charges were improperly dismissed by Judge Fishler.

The claims of gross negligence must be analyzed on two levels; first, with regard to quasi-judicial immunity.

Quasi-judicial immunity extends even to charges of

gross negligence, recklessness, or maliciousness. Pierson v. Ray, supra. Claims of gross negligence cannot defeat quasi-judicial immunity. Appellant seems to suggest that because something very bad happened after Arguelles was released, the release decision must have been grossly negligent and not entitled to immunity. This is almost a strict liability standard based on a hindsight understanding of what happened after Arguelles or any other inmate, was released. This is totally contrary to the policies and reasons for quasi-judicial immunity for paroling authorities. A similar argument drew strong comment from the dissenting judge in Grimm, supra:

> Beware, oh unsuspecting trial judge, that when your decision to place a felon on probation goes horribly awry, the majority of my brothers sitting in cloistered ivory tower call your action gross and subject you to the consequences thereof. I hasten to concede that the majority opinion does not say this but logic tells me that the discretionary acts of the parole board need no less protection than those of the sentencing judge. There may be boards or commissions, bastions of bureaucracy, which should not be accorded the protection of quasi-judicial immunity, but the parole board is hardly one of these.

564 P.2d at 1237.

Appellant's claims of gross negligence do not defeat quasi-judicial immunity, and Judge Fishler properly dismissed these claims along with the rest of the complaint.

The second prong of the gross negligence analysis concerns the statutory discretionary function immunity. At the time this action was brought, the Governmental Immunity Act provided that the immunities retained therein would apply to state employees "unless the employee acted or failed to act through gross negligence, fraud, or malice." UItah Code Ann. § 63-30-4. (The "gross negligence" language of this section was removed by the 1983 Legislature, indicating its intent that gross negligence claims should not defeat immunity for employees.)

Even though discretionary function immunity may not apply to gross negligence, it does by its own terms apply to abuses of discretion. Utah Code Ann. § 63-30-10(1)(a). Simply by characterizing the acts of Defendant Stromberg as grossly negligent, appellant cannot escape dismissal or summary judgment.

Appellant has painstakingly selected excerpts from paragraphs of certain reports to portray the worst picture possible of Mr. Arguelles. Appellant's statement of facts also includes, as if they were established facts, unproved and dismissed charges against Mr. Arguelles, even Arguelles' own musings to a psychiatrist which certainly cannot be considered established facts.

However, when the circumstances surrounding Arguelles' release are considered fairly and in their

entirety (see Respondents' Statement of facts), even when considered in the light most favorable to Appellant, it is clear that the decision to release Arguelles was far from grossly negligent. The decision-making process was careful, deliberate, and taken very seriously. The decision was not easy, nor was it made lightly or with no trepidation. The fact that Arguelles, three months later committed a terrible crime does not make the decision to release him grossly negligent. Unfortunately, no one, including judges or parole boards, is endowed with the foresight to guarantee that parolees will never again commit a serious crime.

The definition of gross negligence set forth by Appellant (Appellant's Brief, p. 33) requires that an act must be "intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another" to qualify as gross negligence. There is nothing even approaching that standard in the present case.

Appellant has not, and did not in District Court, set forth sufficient established facts to support her claims of gross neligence and preserve the issue for trial. She is not entitled to a trial merely because she alleged gross negligence. Judge Fishler's dismissal of those claims was entirely appropriate and should be affirmed by this Court.

CONCLUSION

Based upon the foregoing discussion, respondent requests this Court to affirm the Order of the District Court, dismissing this action, with prejudice.

Respectfully submitted this 11th day of July, 1983.

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CERTIFICATE OF MAILING

This is to certify that I mailed a copy of the foregoing Brief of Respondents to the following this 11th day of July, 1983:

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