

1986

Mary Doe, Guardian Ad Litem for Jane Doe v. Roberto v. Arguelles, et al. : Petition For Rehearing

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARY DOE, Guardian ad Litem
for JANE DOE,

Plaintiff-Appellant,

-v-

ROBERTO V. ARGUELLES, et al.,

Defendants-Petitioners.

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:

Case No. 19061

PETITION FOR REHEARING

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Defendants-Petitioners. :

Petitioners, State of Utah and Ronald Stromberg hereby submit the following Petition for Rehearing to the Supreme Court of the State of Utah.

STATEMENT OF ISSUES

1. Whether this Court improperly addressed issues not presented to the trial court or briefed on appeal.
2. Whether this Court overlooked the far-reaching and certain impact which its decision will have on the discretionary function exception of the Governmental Immunity Act.

STATEMENT OF THE CASE

The Third District Court, the Honorable Philip R. Fishler presiding, granted the state defendants' motion for summary judgment on the following grounds:

1. The decision to release the defendant Roberto Arguelles from the Youth Development Center (hereafter YDC) was a discretionary function for which the state defendants are immune from suit; and
2. The decision to release the defendant Roberto Arguelles from the YDC was a quasi-judicial function for which the state defendants are immune from suit.

(A copy of the Order is attached as Appendix A).

The plaintiff appealed from the judgment of the Third District Court and in Doe v. Arguelles, No. 19061 (Utah, December 27, 1985), this Court affirmed that portion of the trial court's ruling which held that the decision to release Roberto Arguelles from the YDC was a discretionary function and therefore, the state defendants were immune from suit. However, this Court went on to find that the implementation of the release decision was ministerial in nature and therefore, the defendants were not immune from suit under the discretionary function exception. (A copy of the full opinion is attached as Appendix B).

STATEMENT OF FACTS

Petitioners hereby incorporate by reference the statement of facts contained in Respondents' Brief. (Respondents' Brief, pp. 1-18).

SUMMARY OF ARGUMENT

Rule 35 of the Utah Rules of Appellate Procedure provides that a petition for rehearing "shall state with particularity the points of law or fact which the Court has overlooked or misapprehended." In Cummings v. Nielson, 42 Utah 157, 129 P. 619 (1913), this Court stated:

...a rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result....

42 Utah at 172-173, 129 P. at 624. These authorities establish that a petition for rehearing should be granted where the petitioner has identified a specific point of law or issue of fact which the Court has neglected or misconstrued or which materially affects the outcome of the case. Petitioners submit that in the present case, this Court overlooked a basic principle of judicial review and addressed issues which were not properly before the Court on appeal. In so doing, the Court failed to consider the dramatic affect which its decision will have on the Utah Governmental Immunity Act and on governmental programs generally. Petitioners submit that these omissions satisfy the rigorous standard established by this Court for granting a petition for rehearing and that said petition is properly before the Court and should be granted.

ARGUMENT

POINT I

THIS COURT IMPROPERLY CONSIDERED ISSUES WHICH WERE NOT PRESENTED TO THE TRIAL COURT OR BRIEFED BY THE PARTIES ON APPEAL.

It is a fundamental principle of appellate review that issues not contained in the record shall not be considered for the first time on appeal. Corbet v. Corbet, 472 P.2d 430 (Utah 1970); Reliable Furniture Co. v. Fidelity & Guaranty Insurance Underwriters, Inc., 14 Utah 2d 169, 380 P.2d 135 (Utah 1963).

In the context of a motion for summary judgment, the trial court should be accorded the first opportunity to rule upon issues and theories advanced by the litigants. Issues which were not presented to nor ruled upon by the trial court in granting a

summary judgment cannot be raised by the parties for the first time on appeal to secure reversal of the judgment. Nielson v. Vashon Island School District No. 402, 558 P.2d 167 (Wash. 1976); Crook v. Anderson, 565 P.2d 908 (Ariz. Ct. App. 1977).

This Court has repeatedly held that it will not consider points and contentions not raised in the trial court. State v. Theison, 19 U.A.R. 14, No. 20598 (Utah, Sept. 26, 1985). Yet in the present case, this Court has done the very thing which it forbids litigants to do.

In the Arguelles decision, this Court concluded that defendant, Ronald Stromberg's "decision to place Arguelles fell into the category of functions designed to be shielded under the discretionary function exception, and his decision should not be questioned in a court of law." Arguelles at p. 3. This issue was the only issue properly before this Court on appeal. However, the Court's opinion does not end there. The Court went on to hold that if the plaintiff's ward's injuries were proximately caused by Stromberg's "negligence in monitoring the prescribed treatment" after making the discretionary decision to release Arguelles, he would not be immune from suit under the discretionary function exception. Arguelles at p. 4. This point of law was never raised by the pleadings, in discovery or in the legal arguments advanced by the parties. The first time that the issue was ever raised by plaintiff was in her Reply Brief on appeal.

Even a cursory review of the trial court record evidences the fact that plaintiff's theory of liability did not

... negligent implementation of the release decision. Plaintiff's complaint alleges that the YDC was charged with the responsibility of confinement, treatment and rehabilitation of the defendant Roberto Arguelles. (R. 4). The complaint further alleges that defendants, Ron Stromberg, Ralph Garn, Russ VanVleet and Jeff McBride, who were employees of the YDC, were responsible for Arguelles' confinement, treatment and release. (R. 4). The complaint then alleges that the conduct of these employees as it related to the confinement, treatment and decision to release and/or parole Roberto Arguelles was negligent, grossly negligent and in reckless disregard for the lives and safety of plaintiff's ward and other members of the public. (R. 4-6). Thus, from the outset of this lawsuit, plaintiff's theory was that the employees of the YDC did not properly rehabilitate Arguelles while he was confined at the YDC and therefore, the decision to release him was unreasonable. Plaintiff never alleged that the supervision of Arguelles after his release was negligent or was the proximate cause of plaintiff's injuries.

The extensive discovery conducted during this case further substantiates petitioner's claim. The record is virtually devoid of any discovery which indicates the manner in which the release decision was implemented. Plaintiff deposed defendants Stromberg, Garn and VanVleet, all YDC officials and employees, who consistently testified that the responsibility for implementing the release decision rested with the parole officer. The testimony of these witnesses also specifically identified the parole officer assigned to Roberto Arguelles and identified the

parole officer's two immediate supervisors. (See Deposition of Ron Stromberg, pp. 71-73; Deposition of Ralph Garn, pp. 44-45; Deposition of Russell VanVleet, p. 51, copies of those portions of the depositions are attached as Appendix C). Yet, interestingly enough, none of these individuals were ever named as defendants in the complaint or deposed by the plaintiff during the lengthy discovery process. Thus, there is absolutely no testimony on the record from anyone who had personal knowledge of how the release decision was actually implemented.

This omission from the record is significant for two reasons. First, it establishes conclusively that the question of negligent post-release supervision was not at issue in the case.

Second, without any evidence on the record as to the specific activities which the parole officer performed, it is impossible for this Court to determine as a matter of law that implementation of the release decision was ministerial in nature. The availability of immunity does not depend on the formal description of the official's activities or the importance of the position held by a public official, but rather on the functional nature of the activities which that official performs. Butz v. Economou, 438 U.S. 478 (1978). Numerous state and federal jurisdictions have extended the doctrines of discretionary function and quasi-judicial immunity to a variety of activities performed by probation and parole officers even when those activities did not involve a release decision. Thompson v. County of Alameda, 614 P.2d 728 (Cal. 1980) (post-release supervision constitutes a discretionary function); Larson v. Dartnell,

448 N.W.2d 249 (Ill.App.Ct. 1983) (parole supervision held to be a discretionary function); Trotter v. Klincar, 748 F.2d 1177 (7th Cir. 1984) (participation in a parole revocation procedure held to be a quasi-judicial function); and Hall v. Schaeffer, 556 F.Supp. 539 (E.D. Penn. 1983) (request by a parole officer for issuance of a warrant is a quasi-judicial function).

This Court presumably attempted to overcome this deficiency in the record by assuming that because the YDC had legal custody of students who had been discharged from the school, the YDC and its employees were responsible for supervising the students upon their release. (Arguelles at p. 4). However, at the time Arguelles was released from the YDC, the controlling legislation provided that a student at the YDC may be conditionally released from residency within the center to live outside the center "under the supervision of an officer of the center or other person designated by the superintendent..." (Emphasis added). Utah Code Ann. § 64-6-1.1. Another section of the act entitled "Community Placements" provided that students placed in the community would remain in the legal custody of and under the supervision of the Division of Family Services. Utah Code Ann. § 64-6-10. (A copy of these statutes are attached as Appendix D). In the present case, Stromberg, as the Superintendent of the YDC and in accordance with applicable law, delegated responsibility for Arguelles' supervision in the community to a parole officer. The parole staff, at that time, was under the direction of the Division of Family Services not the YDC. The Division of Family Services, by statute, had legal

responsibility for supervising youth in community placements. Therefore, the Court's assumption that Stromberg was responsible for post-release supervision is not supported by the controlling legislation at that time.

Moreover, this conclusion reflects a basic misunderstanding of the operation of the criminal and juvenile justice systems. In Utah, the state courts, by statute, have legal custody of probationers. Utah Code Ann. § 77-18-1(1). The courts retain jurisdiction over probationers and have the authority and power to issue warrants for the arrest and detention of any probationer who violates the conditions of probation. Yet, the court is not legally responsible for implementing the release decision or ensuring that a probationer complies with the conditions of his release. That responsibility is delegated to the Department of Corrections' probation office.

Similarly, the Board of Pardons has legal responsibility for establishing when and under what conditions inmates at the Utah State Prison are released on parole. Utah Code Ann. § 77-27-5. The Board retains jurisdiction over parolees once released and has the power and authority to issue warrants for their arrest and detention when they violate the terms of their conditional release. Utah Code Ann. §77-27-11(3). Yet the Board has neither the ability or authority to "implement" its release decisions. The responsibility for parole supervision has been delegated to the Department of Corrections.

Accordingly, in Arquelles, the mere fact that the YDC had legal custody of and retained jurisdiction over a student who

had been released from the school, did not establish legal responsibility for supervision of that student after release. The record evidences that, even though the YDC, like the courts and the Board of Pardons had the ability to issue process for the arrest and detention of individuals who violated the terms of their conditional release, the YDC was entirely dependent on the parole staff to report any violations and to implement the conditions of release. Thus, this Court's determination that defendant Stromberg was responsible for implementing release decisions does not comport with the applicable legislation or the facts contained in the record. Rather, the law and the facts establish that Stromberg was not legally responsible for implementing the release decision and that the conduct of those who were responsible was never before the trial court and therefore, improperly considered by this Court.

Finally, the legal arguments advanced by both parties at the trial court level and on appeal establish that the only issue properly before this Court for resolution under the Governmental Immunity Act was whether the decision to release Arguelles from the YDC was a discretionary function. Defendants' memorandum in support of their Motion for Summary Judgment states:

Thus, the only real issue was whether the decision to release Roberto Arguelles on December 19, 1979 was proper.

(R. 130). Plaintiff's memorandum in opposition to defendants' Motion for Summary Judgment identifies the same issue. (R. 314).

At the oral argument in district court on defendants' Motion for summary judgment, both parties agreed that the issue

before the Court was whether the decision to release Arguelles from the YDC was a discretionary function (R. 339, 412). Plaintiff did not advance nor was there any discussion concerning the theory that the defendants' supervision of Arguelles after his release was ministerial. No legal authority was cited in support of or contrary to such a theory.

On appeal, the docketing statement submitted by plaintiff and on file with this Court identified the only issue for resolution under the Governmental Immunity Act as follows:

a. Whether or not Judge Philip R. Fishler was correct in ruling as a matter of law that the decision of Ronald Stromberg, individually and on behalf of the Utah State YDC, to release defendant Roberto Arguelles from YDC was a discretionary function and, therefore, would have immunity from suit pursuant to U.S.C. § 63-30-10(1);....

Finally, as evidenced by the briefs on file with this Court, the sole issue presented for resolution under the Governmental Immunity Act was whether the decision to release Arguelles was a discretionary function; Not whether the implementation of that decision was a discretionary function. (See Appellant's brief, pp. 25-32 and Respondents' brief, pp. 18-27). Neither party submitted the issue of post-release supervision to this Court in their original briefs. Nor did the parties cite any legal authority in support of or contrary to that theory, despite the wealth of instructive case law which exists on this issue. It was not until the plaintiff filed her Reply Brief on appeal that the issue of post-release supervision was raised. Thus, even though neither the trial court nor the defendants had the opportunity to address the issue, the Court's decision turned on this single point.

Petitioners submit that given the existing record in this case and the fact that neither the trial court or the defendants had the opportunity to address the issue upon which this case was ultimately decided, this Court should affirm the summary judgment on the issues presented by the parties or alternatively, grant petitioners' request for a rehearing to fully brief and argue the question of whether post-release supervision in this case was a ministerial act.

POINT II

THE DECISION IN ARGUELLES EFFECTIVELY ELIMINATES APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION TO ALL GOVERNMENTAL ACTIVITIES, CONTRARY TO THE INTENT AND PURPOSE OF THE UTAH GOVERNMENTAL IMMUNITY ACT.

When courts take it upon themselves to raise, argue and decide legal questions not addressed by the parties, they risk overlooking important facts, legal considerations and practical consequences which may result from a decision rendered without benefit of a complete record and thorough briefing. See New Mexico Department of Human Services v. Tapia, 642 P.2d 1091 (N.W. 1982). As petitioners set forth above, this Court's decision in Arguelles turned on a point of law not addressed by the parties. By going outside of the record and beyond the briefs submitted by the parties, this Court overlooked the devastating and certain impact its decision would have on the discretionary function exception of the Utah Governmental Immunity Act and the practical effect its decision would have on the many and varied operations of state and local government.

In Arguelles, this Court held that Stromberg's decision to release Arguelles from the YDC was discretionary and therefore he was immune from suit. This Court also held that Stromberg's implementation of his own discretionary decision was ministerial, and that he was not entitled to immunity on that basis:

Because a probation officer's policy decisions are discretionary, he is immune from suit arising from those decisions. However, his acts implementing the policy must be considered on a case-by-case basis to determine whether they are ministerial and thereby outside the immunity protections.

Arguelles at 4 (emphasis added). Thus, individuals responsible for decision-making at the policy level may make a decision and be immune from suit, but cannot implement that decision without being potentially liable. This Court thus holds that a government officer's thought processes are protected from suit. He (or she) may ponder, ruminate, consider, evaluate, and come to a decision, write it down or discuss it with colleagues and in committees, without fear of liability because the discretionary function exception of the Utah Governmental Immunity Act (§ 63-30-10(1)(a)), protects the decision, the decision-maker and the decision-making process.

Yet, Arguelles also holds that as soon as the decision-maker attempts to implement that policy decision, its discretionary characteristics disappear. The thought turns to action, the action becomes ministerial in nature and immunity is gone. (Arguelles at 5). In Stromberg's case, he could decide to release Arguelles and be immune from suit but he could not release Arguelles and retain immunity.

This result is, of course, absurd. To hold, as this court has in Arguelles, that a policy-maker is immune from suit for the thought processes involved in the making of a decision, but that the same individual can be liable for the implementation of that decision, is to effectively eliminate any application of governmental immunity for discretionary function. No decision, policy, or thought process, in and of itself, ever caused injury or damage to a potential plaintiff. It is through active implementation of a policy or decision that injury may result.

Every discretionary decision, unless it forever remains dormant and is never implemented or acted upon, will become ministerial at the time of implementation, and, at that time, according to this Court's holding in Arguelles, the immunity, which attached at the decision-making stage, disappears. All a plaintiff need do in a suit against a governmental entity to avoid application of the statute and defeat a summary judgment in favor of the governmental entity, is to plead that a governmental official, no matter his rank, implemented a decision, policy or objective, and that the implementation was negligent. By doing so, plaintiff would effectively thwart the immunity protections of the Utah Governmental Immunity Act. Consequently, the law as it relates to the discretionary activities of government would have no effect, and would be, for all intents and purposes, null and void.

This result is contrary to recent pronouncements from the United States Supreme Court. (See United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 104 S.Ct. 2755, 2765-69 (1984), interpreting the discretionary function exception of the Federal Tort Claims Act). An interpretation that this Court has stated on numerous occasions it would follow. See Little v. State Division of Family Services, 667 P.2d 49, 51 (Utah 1983); Frank v. State, 613 P.2d 517, 519 (Utah 1980).

This result is also contrary to the obvious intent of the state legislature. The legislature enacted the discretionary function exception within the Governmental Immunity Act for a purpose. After Arguelles, the exception has no purpose. As the legislature enacted it, the discretionary function exception has meaning, function and a long history of application and interpretation in federal courts, in other state jurisdictions, and in Utah. This Court is required by its own edict to give force and effect to "every word and phrase" of a statutory provision. Board of Education of Carbon County School District v. Bryner, 57 Utah 78, 192 P. 627 (Utah 1920). The decision in Arguelles does just the opposite. It emasculates the exception, robs it of any force and effect, and eliminates its practical application in every conceivable case where plaintiff properly pleads allegations of negligent implementation of policy. In effect, this Court has repealed the discretionary function exception of the Utah Governmental Immunity Act. This legislative act by the Court violates Article V, § 1 of the Utah Constitution. The state legislature enacted the discretionary

function exception and this Court has no authority to repeal it sub silentio without declaring it unconstitutional. No such declaration is found in Arguelles nor could this Court have intended such a result when it unanimously decided Arguelles. Reconsideration must be given to the far-reaching and drastic impact of the decision. This issue is too important to be summarily treated without benefit of a thorough examination of the legal issues involved and the policy considerations at stake.

CONCLUSION

In Doe v. Arguelles, this Court decided a significant legal issue which had not been presented by the pleadings, the record or the arguments on appeal. The resolution of this issue effectively eliminated the force and effect of the discretionary function exception of the Utah Governmental Immunity Act. Such a drastic result should not attain from issues never properly addressed before either the District or Supreme Court. Therefore, petitioners respectfully request that this Court affirm the summary judgment on the issues presented by the parties or alternatively, grant petitioners' application for rehearing.

Dated this 10th day of January, 1986.

DAVID L. WILKINSON
Attorney General

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Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copies of the foregoing Petition for Rehearing, postage prepaid, to George M. Haley, HALEY & STOLEBARGER, Attorneys for Plaintiff/Appellants, Tenth Floor Walker Center, 175 South Main Street, Salt Lake City, Utah 84111, on this the 10th day of January, 1986.

Carlie Christensen