1986

Mary Doe, Guardian Ad Litem For Jane Doe v. Roberto v. Arguelles, et al. : Appellant's Response To Defendants' Petition For Rehearing

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/Petitioners.	:	

APPELLANT'S RESPONSE TO DEFENDANTS' PETITION FOR REHEARING

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The appellant, Mary Doe, by and through her counsel George M. Haley, of Haley & Stolebarger, and Carman E. Kipp and Heinz J. Mahler, of Kipp and Christian, P.C., hereby submits, pursuant to Rule 35 of the Utah Rules of Appellate Procedure, the following reply to the respondents' Petition for Rehearing.

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 appellant hereby incorporates by reference the Statement of the Case contained in the petitioners' Brief.

STATEMENT OF FACTS

The appellant hereby incorporates by reference the Statement

of Facts contained in the appellant's Brief [See pp. 2-19 of Appellant's Brief].

SUMMARY OF ARGUMENT

The issues decided by this Court in its opinion filed December 27, 1985, were properly before the Court and appropriately decided.

This case is simply one where the petitioners do not like the decision of the Court and are using the provisions of Rule 35 to attempt to get the Court to change its mind. All of the arguments contained in the Petition for Rehearing were before the Court prior to its filing of the December 27, 1985, opinion. The petitioners fail to show how any of the issues raised were as a result of this Court misconstruing or overlooking some material fact, statute or decision which materially affected the results. Therefore, this Court should deny the Petition for Rehearing; and the opinion, as drafted, should stand.

ARGUMENT

POINT I

THIS COURT PROPERLY CONSIDERED THE ISSUE OF STROMBERG'S NEGLIGENT IMPLEMENTATION OF THE DISCRETIONARY FUNCTION.

The petitioners allege, "Even a cursory review of the Trial Court record evidences the fact that plaintiff's theory of liability did not include negligent implementation of the release decision," and, as a result, the Court improperly issued its ruling. Taking a cursory review of the record in this case, one

finds that said issue was properly before the District Court, as well as on appeal.

Paragraphs 3 and 4 of the First Claim for Relief of plaintiff's Complaint states:

> Ronald Stromberg and Ralph Garn were directors of the Utah State Youth Development Center at all times relevant hereto, and Russ Van Fleet and Jeff McBride were the treatment plan and release coordinators for the Utah State Youth Development Center at all times relevant hereto, were responsible for the management, **supervision**, and control over Arguelles' confinement, **treatment** and **release**. [Emphasis added] [Record on Appeal, p. 4]
>
> 4. Said individuals were negligent in their conduct as superintendents and treatment plan and release coordinators respectively, as said conduct relates to the confinement, treatment and decision to release and/or parole Roberto V. Arguelles from the Youth Development Center. [Record on Appeal, p. 4]

This Court held, in Blackham v. Snelgrove, 280 P.2d 453 (Utah, 1955), that a complaint is required only to "... give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved."

The appellant would urge the Court to review pages 12, 13 and 14 of the appellant's Memorandum submitted in the District Court, found at pages 312, 313 and 314 of the record on appeal. A review of that argument clearly sets forth that the appellant argued before the Trial Court that the defendants/petitioners should be held liable for failing to follow their own release requirements. At page 12 [Record on Appeal, p. 312], the appellant's Memorandum states:

> Therefore, it was a requirement for his release that he attend counseling sessions with a professional counselor. This never occurred. [Record on Appeal, p. 312]
>
> U.C.A. §64-6-8 gave to defendant Stromberg the full power to retake the defendant [Arguelles] 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. [Record on Appeal, p. 313]
>
> It is clear that if the facts as stated in the respective Statements of Fact are taken in the light most favorable to the non-moving party, or the plaintiff, that said facts could support a determination that the defendants failed to follow the criteria, rules, regulations and order for placement of the defendant Roberto Arguelles outside of the YDC, and therefore, the defendants' Motions for Summary Judgment should be denied. [Record on Appeal, p. 318]

At page 32 of appellant's Trial Court Memorandum, after quoting §64-6-1.1, the appellant states:

> The above-quoted language placed on the YDC and the superintendent the duty to see that the "student" is meeting the conditions of his placement; that is, to see that the defendant Arguelles was receiving the adequate treatment as required by his placement agreement and as recommended by both Taylor, Judge Garff and Janet Warburton. By the defendant's own admission, they became aware through the officer of the supervisor, as referred to in §64-6-1.1(5), that the requirement of the release were not being met and that the terms of the treatment were not being carried out. This placed on the superintendent the duty to see that either the treatment was carried out as per the release agreement or that the defendant Arguelles was returned to the YDC. He did neither. The YDC, through their

> agents, allowed the defendant Arguelles to continue in his non-conforming conduct; the defendant Arguelles, therefore, did not receive the treatment that was necessary and required by the release agreement; and at no time was the defendant seeing a "professional counselor" as required by the release agreement. The failure of the YDC through either the superintendent Stromberg or his agent, the parole officer, Craig Berthold, to act to require the defendant either to obtain "professional counseling" as contemplated by Judge Garff, Dr. Taylor and Janet Warburton, or to see that he was returned to custody was not a discretionary function, it was clearly an operational function. [Record on Appeal, p. 332-333]

Finally, the Conclusion of the Memorandum states:

> At trial, the plaintiff will prove that the attack by the defendant Arguelles on the plaintiff's ward was caused directly and proximately by the failure by the State of Utah, the YDC, and the State defendants to comply with the Judge's order and with their own release requirements, and by their failure to see that defendant Arguelles engaged in meaningful therapy. [Record on Appeal, p. 336]

In the State's Petition for Rehearing, the Attorney General makes the assertion that the first time that the negligent implementation of a discretionary function issue was raised was in Point III of the appellant's Reply Brief. However, a review of the original Brief filed by appellant will show that this issue is addressed in pages 16, 17, 18, 29, 30, 31 and 38. In fact, at page 18 of the Brief of the respondent, the Attorney General complains that, "Contrary to the implications in appellant's Brief, there are not issues raised concerning the amount of supervision 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."

Appellant sees the Attorney General's confusion being caused by two problems: (1) semantics; and (2) the evolution of language used by this Court in defining the "discretionary function exception". At the time of the Motion for Summary Judgment before Judge Fishler, and at the time of the drafting of appellant's Brief, this Court had not yet issued the decision of Little v. Division of Family Services, 667 P.2d 49 (Utah, 1983). In Little, this Court greatly clarified the law in the state of Utah concerning the discretionary function exception. At the Trial Court and Brief on Appeal, petitioner was basically relying upon the cases of Frank v. State, 613 P.2d 517, and Bigelow v. Ingersoll, 618 P.2d 50 (Utah, 1980). Both of those cases basically defined a discretionary function as involving broad, policy-making decisions. The appellant argued that the decision to release Arguelles, the actual release of Arguelles, the treatment of Arguelles by Annette Gilmore, and the failure of Stromberg to take action when he knew Arguelles was not complying with the release agreement were all done on a case-by-case basis and did not involve broad, policy-making factors; and, therefore, they were "operational" and not "discretionary functions". Although the appellant did not use the words "implementation of a discretionary function", the underlying theory was argued.

That issue was clearly before Judge Fishler in the District Court and argued in the original Brief of the appellant. After the appellant filed her Brief, this Court issued the Little

v. Division of Family Services, supra, decision. After that decision came down and after the accusations made against the appellant by the State in their Brief, the appellant's position was clarified in Point III of the Reply Brief.

It is clear that the issue of defendant Stromberg and the State's failure to see that the release criteria were complied with was before the Trial Court and appropriately considered by this Court on appeal, and that the petitioner has failed to state with particularity any point of law or fact which this Court overlooked or misapprehended in arriving at its opinion filed herein.

POINT II

THE COURT'S OPINION IN DOE V. ARGUELLES IS A REITERATION OF THE LAW IN THE STATE OF UTAH CONCERNING THE DISCRETIONARY FUNCTION EXCEPTION WHICH HAS BEEN IN EXISTENCE SINCE 1980.

The petitioner attempts to argue that the Court's opinion in Arguelles eliminates the discretionary function exception to the Governmental Immunity Act. This is plainly incorrect. The holding in the Arguelles opinion is the same legal principle in regard to the discretionary function that this state has had since the Frank v. State, supra, opinion, decided in 1980; i.e., that decisions by State officials concerning broad policy factors are discretionary and, therefore, protected; those actions implementing the decisions on a case-by-case basis are not. This is the Court's holding in Arguelles; i.e., that the decision to

release Arguelles is protected, but once the State official creates criteria by which a discretionary function is to be implemented, they are bound to follow those criteria. This is a correct balance of protecting civil servants in decision making, but holding them responsible to carry out decisions already made.

The flaw in the State's argument is that it presumes that the State official can be held liable for implementing any policy decision. This misstates the Court's holding. A State official is only liable for negligently implementing a policy decision. There is simply no reason to protect a State official who negligently fails to carry out an established decision at the expense of a grievously injured citizen.

The State argues that all a plaintiff need do is plead negligent implementation to thwart the application of the Governmental Immunity Act. This frenetic response to the Court's decision ignores the fact that in order for a defendant to avoid this statute, the plaintiff must not only plead, but must prove, by a preponderance of evidence, that the State official negligently implemented policy. If the facts of a particular case will not support a claim for negligent implementation, then the State would be entitled to a Motion for Summary Judgment under Rule 56. An attorney representing a plaintiff who makes an allegation in a complaint that has no factual basis simply to avoid summary judgment would be in violation of Rule 11 of the Utah Rules of Civil Procedure, and

the State would have the sanctions, under Rule 11, to deal with that problem. Further, the State would have the protection of U.C.A. §78-27-56 for litigation initiated in bad faith.

In reality, the State's objection to this Court's opinion is that this Court, as other Courts all over the country, is increasingly requiring State officials to answer for their wrongful conduct. As this Court stated in Standiford v. Salt Lake City Corp., 605 P.2d 1230 (Utah, 1980):

> Finally, and not the least of our concerns, the standard we adopt today to narrow governmental immunity should allow more innocent victims injured by tortious conduct on the part of public entities access to the courts for redress. Fewer such people will be mercilessly and senselessly barred from recovery for their injuries sustained at the hands of the entities designed to serve them.

The State defendants' denunciation of this Court's unanimous decision is a reflection of the State's archaic position that State employees should not have to answer for their misconduct. This is simply not the law and has not been the law in the state of Utah since the adoption of the Governmental Immunity Act in 1965, and is contrary to Article I, Section 11 of the Constitution of Utah.

The defendants make the accusation that, "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." However, all the concerns raised by the

State in its Petition were argued in the District Court and raised in the Briefs. The parties stipulated to waive oral argument. They cannot now complain that they had no opportunity to argue the matter. The fact that the Attorney General does not like an opinion is not grounds for having the matter reheard. As this Court held in Beaver County v. Home Indemnity Co., 52 P.2d 435 (Utah, 1935):

> We cannot grant a rehearing for the purpose of dropping out of the opinion parts unsatisfactory to counsel and leaving in other parts evidently satisfactory to counsel. If the opinion is to be modified, it should be modified because it fails correctly to state the law, or for some other reason which makes its language or statements improper or inapplicable.

The State argues that Stromberg had no authority over the defendant and that he had to rely upon others; i.e., parole staff, to report violations in a quarterly report. Further, the report due from Arguelles' probation officer was not received prior to the incident that gave rise to this lawsuit. However, this position flies in the face of the law of the state of Utah in force at the time of the incident. Section 64-6-8 gave to defendant Stromberg full power to retake the defendant into custody when he found out that the criteria for release were not going to be met or, in the alternative, not to release Arguelles until he could be assured that the release criteria were met. Further, the parole officer who would be submitting the report would be an officer of the supervisor referred to in U.C.A. 64-6-1.1(5).

U.C.A. §64-6-8 gives defendant Stromberg the power to make rules and regulations. If Stromberg had to rely upon others to get the information in order to make the decisions he was obligated to make under the statute, then he had the duty to promulgate such regulations and rules to ensure that he had sufficient data to make the decision. The appellant would submit that requiring a quarterly report on so dangerous an individual as Arguelles is patently absurd.

Stromberg knew that Arguelles was not following the release plan before he left the YDC. The release plan said "professional counselor", and he was lined up to see Annette Gilmore, a graduate student. Dr. Taylor testified in his deposition that he was concerned that Gilmore was not a professional. [See Record on Appeal, pp. 218, 219, 272] As a result of this concern, Annette Gilmore's name, which originally appeared on the release agreement, was stricken and "professional counselor" was inserted.

Stromberg had the power, pursuant to U.C.A. §64-6-8, to take Arguelles off the street if he was not complying with the order, or not to release him at all if appropriate therapeutic services had not been established. It is simply no excuse to say that he relied upon others to get his information. He was the head of the YDC; and under the doctrine of respondeat superior, the negligence of his inferiors is imputable to him.

Even assuming the defendants' argument is correct inasmuch

as the supervision of defendant's therapy is outside Stromberg's control, he still had the obligation to see that the terms of the release agreement were in place before the release occurred. He knew that Annette Gilmore was not a professional therapist, as required by the release agreement. He knew that they were not meeting weekly, and that Arguelles had not responded satisfactorily to treatment before he was released. Arguelles had met only once with Gilmore before release. This is a clear violation of the release criteria. [See Record on Appeal, p. 264, 355, 218, 219]

The petitioner has failed to show that this Court overlooked or misapplied some point of law or fact in its opinion; and the Petition should, therefore, be denied. It has been over six years since the plaintiff's ward, Jane Doe, had her throat slit by Roberto Arguelles. This Court should not delay any further in remanding this case for trial so that she can finally prosecute her civil cause without any further unnecessary delay.

POINT III

THE DEFENDANTS' PETITION FAILS TO STATE ANY REASON AT ALL WHY THE COURT SHOULD REHEAR THE ISSUE OF QUASI-JUDICIAL IMMUNITY.

The defendants' Petition fails to state any reason at all why the Court should rehear the issue of quasi-judicial immunity and the defendant should be entitled to pursue her claim of gross negligence against defendant Stromberg. Therefore, under no circumstances should the Court rehear those issues.

CONCLUSION

It is clear that the defendants pled in their Complaint that State defendant Stromberg and the State of Utah were responsible for the management, supervision, and control over Arguelles' confinement, treatment and release; that said individuals were negligent in their conduct as it relates to the confinement, treatment and decision to release and/or parole Arguelles from the YDC; that the issue was argued, briefed and preserved at the Trial Court, was raised on appeal by the Briefs of the parties, and was appropriately considered by this Court; and that the petitioners failed to demonstrate in any way, pursuant to Rule 35 of the Appellate Rules, that this Court overlooked or misapprehended any point of law or fact. Therefore, the Petition for Rehearing should be denied.

DATED this 18 day of February, 1986.

HALEY & STOLEBARGER

GEORGE M. HALEY
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

HAND-DELIVERED AND/OR MAILED, postage prepaid, this 19th day of February, 1986, four true and correct copies of the foregoing Appellant's Response to Defendants' Petition for Rehearing, to:

Carlie Christensen
Assistant Attorney General
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