

1993

Mary Day v. The State of Utah : Unknown

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 930135-CA

Clerk of the Court
Utah Court of Appeals
230 South 500 East #400
Salt Lake City, UT 84102

RE: Day v. State, Case No. 930135-CA
Response to Supplemental Citation letter from Office of
Utah Attorney General

Dear Clerk of the Court:

The Office of the Utah Attorney General, representing the State of Utah and other State Defendants in Day v. State, filed a letter dated May 11, 1994, to bring supplemental authorities to the attention of the Court pursuant to Rule 24(j) of the Utah Rules of Appellate Procedure. Briefing in this case has been completed and oral argument was heard on March 28, 1994, by a panel consisting of Presiding Judge Billings and Judges Greenwood and Bench. Please distribute a copy of this letter to these panel members.

The letter from the Attorney General's Office points out that this Court recently issued an opinion in the case of Wright v. University of Utah, No. 930217-CA, slip op. (Utah Ct.App. May 6, 1994). However, contrary to the assertions contained in the letter, the majority decision in Wright is not relevant and has no application to Day's constitutional challenges to former U.C.A. § 63-30-7(2).

In Wright, the majority of the panel held that the University of Utah and the State of Utah were immune from suit for an alleged assault and battery committed by a University employee. The plaintiff argued that U.C.A. § 63-30-4(3)(b) denied her a remedy against the University employee, leaving her no alternative remedy and entirely without redress. The plaintiff argued that this constituted a violation of the open courts provisions of Article I, Section 11 of the Utah Constitution. Wright at 14.

The Wright majority refused to address this issue on appeal because the plaintiff failed to join the University employee as a defendant in the case. The majority held, "Wright cannot claim she has been denied a remedy against an individual she has not sued." Id. The majority also stated as follows: "Had Wright joined the individual employee and been denied a right to sue him (as well as the University) under the Act, then her constitutional challenge to section 63-30-4 may have been before us." Id. at 15.

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In the instant case of Day v. State, Day did join the individual law enforcement officers as defendants, and sued them in their individual capacities for negligence. The majority decision in Wright therefore clearly has no relevance or application to Day's open courts argument in the instant case. Furthermore, the assertion that the individual officers in the instant case have been "dismissed" by the trial court is inaccurate. The trial court in fact ruled that the individual officers must remain parties to the lawsuit in a representative capacity, but no personal liability could attach as a result of their representative status pursuant to U.C.A. § 63-30-4. Thus, the individual officers are still parties defendant, and Day's open courts argument is clearly now properly before this Court on appeal. Moreover, the issue argued by the plaintiff in Wright is not the same issue as argued by Day in the instant case. Day is claiming that application of former section 63-30-7(2) violates her rights under Article I, Section 11 of the Utah Constitution, not section 63-30-4.

The letter from the Attorney General's Office implies that the doctrine of *stare decisis* should be applied, citing State v. Thurman, 846 P.2d 1256, 1269 (Utah 1993) (*stare decisis* applies to decisions of multi-panel appellate court). This argument is clearly without merit since the Wright decision does not even address, let alone rule upon, the same questions of law presented in Day v. State. See State v. Thurman at 846 P.2d 1269.

Sincerely,



Craig L. Boorman
Attorney for
Plaintiff/Appellant Mary Day

CLB/edp

cc: Jan Graham, Utah Attorney General
Debra J. Moore, Assistant Attorney General
Allan L. Larson
Ann Swensen