

1993

Mary Day v. The State of Utah : Response to Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Debra J. Moore; Carol Clawson; Jan C. Graham; Larry R. Keller; Keller & Lundgren; Craig L. Boorman; Attorneys for Appellant.

Allan L. Larson; Anne Swensen; Snow, Christensen & Martineau; Attorneys for City Appellees.

Recommended Citation

Legal Brief, *Day v. State*, No. 930135 (Utah Court of Appeals, 1993).
https://digitalcommons.law.byu.edu/byu_ca1/5006

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

MARY DAY, individually and as
sole surviving heir to BOYD K.
DAY, deceased,

Plaintiff/Appellee,

vs.

Case No. ~~930135~~

THE STATE OF UTAH, by and
through THE UTAH DEPARTMENT OF
PUBLIC SAFETY; THE UTAH
HIGHWAY PATROL; KEN COLYAR;
SALEM CITY CORPORATION, a
municipal corporation of the
State of Utah; BRAD JAMES;
SPANISH FORK CITY CORPORATION,
municipal corporation of the
State of Utah; ED ASAY; and
Public Entities 1-3; and JOHN
DOES 1-8,

Defendants/Appellants.

Priority No. 15

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
HFU
5

DOCKET NO.

930135-CA

RESPONSE TO PETITION FOR REHEARING

APPEAL FROM A FINAL ORDER ENTERED IN THE THIRD DISTRICT
COURT FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE RICHARD H. MOFFAT, PRESIDING

ALLAN L. LARSON
ANNE SWENSEN
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Attorneys for City Appellees

DEBRA J. MOORE
Assistant Attorney General
CAROL CLAWSON
JAN C. GRAHAM, Attorney General
330 South 300 East
Salt Lake City, Utah 84111
Attorneys for State Appellees

LARRY R. KELLER
KELLER & LUNDGREN, L.C.
257 East 200 South, Suite 340
Salt Lake City, Utah 84111

Attorneys for Appellant

CRAIG L. BOORMAN
434 North Main Street
Salt Lake City, Utah 84101

FILED
Utah Court of Appeals

OCT 28 1994

Marilyn M. Branch
Clerk of the Court

IN THE UTAH COURT OF APPEALS

MARY DAY, individually and as
sole surviving heir to BOYD K.
DAY, deceased,

Plaintiff/Appellee,

vs.

Case No. 920438

THE STATE OF UTAH, by and
through THE UTAH DEPARTMENT OF
PUBLIC SAFETY; THE UTAH
HIGHWAY PATROL; KEN COLYAR;
SALEM CITY CORPORATION, a
municipal corporation of the
State of Utah; BRAD JAMES;
SPANISH FORK CITY CORPORATION,
municipal corporation of the
State of Utah; ED ASAY; and
Public Entities 1-3; and JOHN
DOES 1-8,

Priority No. 15

Defendants/Appellants.

RESPONSE TO PETITION FOR REHEARING

APPEAL FROM A FINAL ORDER ENTERED IN THE THIRD DISTRICT
COURT FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE RICHARD H. MOFFAT, PRESIDING

ALLAN L. LARSON
ANNE SWENSEN
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Attorneys for City Appellees

DEBRA J. MOORE
Assistant Attorney General
CAROL CLAWSON
JAN C. GRAHAM, Attorney General
330 South 300 East
Salt Lake City, Utah 84111
Attorneys for State Appellees

LARRY R. KELLER
KELLER & LUNDGREN, L.C.
257 East 200 South, Suite 340
Salt Lake City, Utah 84111

CRAIG L. BOORMAN
434 North Main Street
Salt Lake City, Utah 84103

Attorneys for Appellant

Table of Contents

	<u>Page</u>
INTRODUCTION AND STATEMENT OF CASE	1
LACK OF CAUSATION WAS PROPERLY DETERMINED AS A MATTER OF LAW	3
CONCLUSION	7

Table of Authorities

Page

Cases

<u>Apache Tank Lines, Inc. v. Cheney</u> , 706 P.2d 614 (Utah 1985)	7
<u>Boyer v. State</u> , 594 A.2d 121 (1991)	5
<u>Brown v. City of Pinellas Park</u> , 557 So.2d 161 (Fla. App. 2 Dist. 1990)	5
<u>Fiser v. City of Ann Arbor</u> , 339 N.W.2d 413 (Mich. 1983)	6
<u>Jensen v. Mountain States Tel. & Tel Company</u> , 611 P.2d 363 (Utah 1980)	7
<u>White v. Deseelhorst</u> , 245 UAR 4 (S.C. 8/16/94)	7
<u>Williams v. Melby</u> , 699 P.2d 723 (Utah 1985)	7

Statutes

Utah Code Ann. §63-30-7(2)	1
Utah Code Ann. §63-30-10	1

Rules

Rule 35, Utah Rules of Appellate Procedure	2
--	---

INTRODUCTION AND STATEMENT OF CASE

This case involves a claim for damages suffered by the appellant when her automobile was struck by a driver (Floyd) who was fleeing from a Utah Highway Patrolman. Suit was brought against both the State of Utah and the municipalities of Salem City and Spanish Fork City, and their employees. The District Court of Salt Lake County granted summary judgment in favor of all defendants on the grounds, inter alia, that §63-30-7(2) provided absolute immunity to the defendants from damages resulting from an accident caused by a fleeing driver. Summary judgment was also granted the municipal defendants, because there was no showing that any act or omission of those defendants caused or contributed to the high speed pursuit and the ultimate collision.

Plaintiff appealed and this Court affirmed (247 UAR 19) in all respects, holding that §63-30-7(2), Utah Code Ann., was constitutional and operated to bar plaintiff's claims against the defendant law enforcement officers and their employers. As to the municipal defendants, the Court also affirmed on the basis that "our review of the record reveals an insufficiency of alleged facts to establish causation on the part of the cities or their employees, as a matter of law," 247 UAR at 20.

Appellant filed a Petition for Rehearing, arguing that §63-30-7(2) violated various constitutional rights of the plaintiff, that the governmental entities were not immune from suit under the discretionary function exception of §63-30-10, and that

a determination of lack of causation cannot be decided as a matter of law.

As to the last point, the appellant fails to "state with particularity the points of law or fact which the petitioner claims the Court has overlooked or misapprehended . . .", as required by Rule 35 of the Utah Rules of Appellate Procedure, and simply reargues the same points made in her original briefs.

The municipal defendants were entitled to summary judgment based upon the Utah Governmental Immunity Act and well-established principles of common law. In addition, and more fundamentally, the municipal defendants were entitled to summary judgment because the appellant simply failed to develop any evidence that any act or omission of those defendants caused the "high speed chase" and/or the collision between the fleeing driver and the plaintiff. Thus, regardless of whether the Court decides to grant the appellant's Petition for Rehearing, same should be granted only on the constitutional issues which relate peculiarly to the State defendants and the Petition should be denied as to the municipal defendants.

Accordingly, the municipal appellees incorporate by reference and adopt the arguments set forth in the State's Response to the Petition for Rehearing as they relate to Points I, II, III

and IV of Appellant's Petition for Rehearing.¹ The municipal appellees will thus respond only to the causation argument set forth in Point V of Appellant's Petition.

LACK OF CAUSATION WAS PROPERLY DETERMINED
AS A MATTER OF LAW

Petitioner's fundamental complaint is that it was inappropriate for the Court to conclude that the municipal defendants could not be liable because Floyd "simply went around the municipal officer's vehicles, did not see them again after passing them prior to the collision, and was attempting at all times during the pursuit to elude only Trooper Colyar" (247 UAR 20), and complains (without citation of authority) that same was improper under Utah law.

It must be kept in mind that the plaintiff does not claim that the police officers themselves ran into her vehicle. Her fundamental complaint is that a high speed chase was initiated and continued under circumstances where it was unreasonable to do so and it was foreseeable that Floyd would, while fleeing from the police, drive in an even more reckless fashion and collide with some innocent third party. The negligence on the part of the police officer would, obviously, have to consist of some

¹These appellees would, however, venture the observation that none of the cases cited by appellant stand for the proposition that, at common law, an officer could be liable for the reckless acts of a fleeing miscreant. Our forefathers, unaccustomed to the recent trend of expanding tort liability, would likely have been astonished by the notion that the policeman should pay for injuries caused by the lawbreaker.

overt affirmative act, such as turning on his lights and sirens and chasing the fleeing driver, all of which thus presumably motivates him to drive yet faster and more recklessly. One could hardly make such a claim against a police officer whose police car was only observed parked by the side of the road, even if the mere presence of that police officer made the fleeing suspect nervous, for in that instance there would be nothing that the officer could do to avoid liability other than to suddenly make himself and his police car invisible. Surely, neither the law, public policy, nor common sense would impose even the potential of liability on the officer for merely being in the neighborhood when the fleeing driver drove by. Yet, that is essentially what the Petitioner argues as against these defendants.

There is no dispute that the only thing that Floyd knew about Officers Brad James and Ed Asay was that he drove past their police cars, leaving them behind and never to be seen by him again. Granted, the officers made their presence known by activating their overhead lights, but Floyd did not know that they did anything more than that. Floyd was fleeing no one other than the highway patrolman, although at the end of the chase he was also being pursued by a Utah County Sheriff's vehicle.²

²Oddly, plaintiff has not seen fit to sue the County, even though its involvement was much more direct than that of the municipalities.

Petitioner's attempt to impose liability on the municipal officers is both nonsensical and contrary to Petitioner's fundamental theory in this case; that is, that to chase someone and cause them to flee under some circumstances may impose liability because the danger of the fleeing driver colliding with a third person is foreseeable. Floyd knew that the highway patrolman was pursuing him, and he was fleeing accordingly. He did not know that the municipal officers were pursuing him, he was not trying to evade them, and nothing that the municipal officers did, or didn't do, influenced his conduct in any way whatsoever. Indeed, petitioner's attempt to hold those officers liable smacks of overreaching.

The only authorities cited by Petitioner are cases from Florida, Maryland and Michigan, each of which is factually distinguishable, and legally irrelevant.

Brown v. City of Pinellas Park, 557 So.2d 161 (Fla. App. 2 Dist. 1990), involved a number of officers in active pursuit (described as a "speeding caravan"), where it would be impossible to draw any distinctions as to how the fleeing driver was reacting to any particular pursuing police vehicle.

The Maryland case, Boyer v. State, 594 A.2d 121 (1991), involved a high speed chase initiated by a highway patrolman joined by a number of sheriff's deputies. There was no discussion of the exact involvement of the deputies. The Court held only that, as a legal matter, the State and County officers might

be held liable if indeed negligence was established on remand; it does not stand for the proposition that causation may not be determined as a matter of law on undisputed facts.

Fiser v. City of Ann Arbor, 339 N.W.2d 413 (Mich. 1983), held that the involved officers might be liable if after remand it were determined that their pursuit of the fleeing driver was negligent. In that case, the officers in the first police car observed the suspect commit a traffic violation and thereupon initiated and continued a lengthy high speed pursuit. The fleeing driver lost control of his car and it came to a stop. While one of the first officers was approaching his car, he sped off. A few moments later he was observed and chased by another police officer who had heard of the first chase over the radio. While the second chase was under way, the accident occurred involving the plaintiff. In the instant case, of course, Officers James and Asay neither initiated the initial pursuit, nor was the fleeing driver attempting to elude them at the time of the accident. Fiser thus does not support Petitioner's argument.³

It is abundantly clear from the uncontradicted testimony of Floyd himself that his conduct was in no way influenced by the mere presence of the police cars driven by Officers James and

³Indeed, Fiser held that an officer who did not personally operate either of the vehicles involved in the high speed chase could not be held liable as a matter of law.

Asay.⁴ Since the fundamental operative facts of this case are undisputed, it is clearly appropriate for the Court to enter summary judgment in favor of a party whose acts have not been shown to be the cause of the harm complained of. This fundamental proposition is well recognized in Utah. Apache Tank Lines, Inc. v. Cheney, 706 P.2d 614 (Utah 1985); Jensen v. Mountain States Tel. & Tel Company, 611 P.2d 363 (Utah 1980); see also White v. Deseelhorst, 245 UAR 4 (S.C. 8/16/94) (recognizing that summary judgment may be appropriate on the issue of causation if facts are undisputed). Plaintiff cites no authority to the contrary. In absence of causation, both factual and legally (proximately), there can be no negligence action, Williams v. Melby, 699 P.2d 723 (Utah 1985).


CONCLUSION

The facts of the case are undisputed and the law is settled. This Court did not overlook or misapprehend any significant factual or legal issue, the Court's opinion is correct in all respects, and the appellant's Petition for Rehearing should be denied.

⁴Reference should be made to these defendants' main brief at pages 2-7, setting forth verbatim the relevant portions of Floyd's testimony.

RESPECTFULLY SUBMITTED this 28 day of October, 1994.

SNOW, CHRISTENSEN & MARTINEAU

By 
Allan L. Larson
Anne Swensen
Attorneys for Defendants
Salem City Corporation, Spanish
Fork City Corporation, Brad
James and Ed Asay

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing to be mailed, by United States Mail, first class postage prepaid, this 28th day of October, 1994, to:

LARRY R. KELLER, ESQ.
KELLER & LUNDGREN, L.C.
257 Tower, Suite 340
257 East 200 South, Mailbox #10
Salt Lake City, Utah 84111

CRAIG L. BOORMAN
434 North Main Street
Salt Lake City, Utah 84103

Attorneys for Plaintiff/Appellant

DEBRA J. MOORE, ESQ.
Assistant Attorney General
CAROL CLAWSON
Solicitor General
JAN GRAHAM
Utah Attorney General
330 South 300 East 2nd Floor
Salt Lake City, Utah 84111

Attorneys for State Appellees



A handwritten signature, appearing to read "C. Clawson", is written over a horizontal line.