

1993

Mary Day v. The State of Utah : 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.

Jan Graham; Carol Clawson; Debra J. Moore; Allan Larson; Anne Swensnen; Snow, Christensen & Martineau; Attorneys for Appellees.

Larry R. Keller; Keller & Lundgren; Craig L. Boorman; Attorneys for Appellant.

Recommended Citation

Legal Brief, *Day v. State*, No. 930135 (Utah Court of Appeals, 1993).
https://digitalcommons.law.byu.edu/byu_ca1/5007

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 the sole
surviving heir to Boyd K. Day, deceased,

Plaintiff/Appellant,

v.

STATE OF UTAH, by and through the
Utah Department of Public Safety; Utah
Highway Patrol; Ken Colyar; Salem City
Corporation, a municipal corporation of
the State of Utah; Brad James; Spanish
Fork City Corporation, a municipal
corporation of the State of Utah; Ed Asay;
and Public Entities 1-3; and John Does 1-8,

Defendants/Appellees.

**UTAH COURT OF APPEALS
BRIEF**

UTAH
DOCUMENT
FILED

Case No. 930135-CA

DOCKET NO.

930135-CA

Priority No. 15

APPELLANT'S PETITION FOR REHEARING

Appeal from a judgment of the Third Judicial District Court,
Salt Lake County, State of Utah, the Honorable Richard H. Moffat, presiding.

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

Attorneys for State Defendants/Appellees

ALLAN L. LARSON
ANNE SWENSEN
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place #1100
P.O. Box 45000
Salt Lake City, Utah 84145

Attorneys for City Defendants/Appellees

LARRY R. KELLER #1785
KELLER & LUNDGREN, L.C.
257 Tower, Suite 340
257 East 200 South, Mailbox #10
Salt Lake City, Utah 84111

CRAIG L. BOORMAN #0379
434 North Main Street
Salt Lake City, Utah 84103

Attorneys for Plaintiff/Appellant

FILED
Utah Court of Appeals

SEP 29 1994

Marilyn M. Branch
Clerk of the Court

IN THE UTAH COURT OF APPEALS

MARY DAY, individually, and as the sole
surviving heir to Boyd K. Day, deceased, :

Plaintiff/Appellant, :

v. :

Case No. 930135-CA

STATE OF UTAH, by and through the
Utah Department of Public Safety; Utah
Highway Patrol; Ken Colyar; Salem City
Corporation, a municipal corporation of
the State of Utah; Brad James; Spanish
Fork City Corporation, a municipal
corporation of the State of Utah; Ed Asay;
and Public Entities 1-3; and John Does 1-8,

Priority No. 15

Defendants/Appellees.

APPELLANT'S PETITION FOR REHEARING

Appeal from a judgment of the Third Judicial District Court,
Salt Lake County, State of Utah, the Honorable Richard H. Moffat, presiding.

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

Attorneys for State Defendants/Appellees

ALLAN L. LARSON
ANNE SWENSEN
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place #1100
P.O. Box 45000
Salt Lake City, Utah 84145

Attorneys for City Defendants/Appellees

LARRY R. KELLER #1785
KELLER & LUNDGREN, L.C.
257 Tower, Suite 340
257 East 200 South, Mailbox #10
Salt Lake City, Utah 84111

CRAIG L. BOORMAN #0379
434 North Main Street
Salt Lake City, Utah 84103

Attorneys for Plaintiff/Appellant

TABLE OF CONTENTS

Point I

| | |
|---|---|
| MRS. DAY'S RIGHTS GUARANTEED BY THE OPEN COURTS PROVISIONS OF ARTICLE I, SECTION 11 OF THE UTAH CONSTITUTION ARE VIOLATED IF FORMER U.C.A. § 63-30-7(2) IS APPLIED TO BAR HER CAUSES OF ACTION | 1 |
|---|---|

Point II

| | |
|---|----|
| MRS. DAY'S RIGHTS GUARANTEED BY THE EQUAL PROTECTION PROVISIONS OF ARTICLE I, SECTION 24 OF THE UTAH CONSTITUTION ARE VIOLATED IF FORMER U.C.A. § 63-30-7(2) IS APPLIED TO BAR HER CAUSES OF ACTION | 10 |
|---|----|

Point III

| | |
|--|----|
| MRS. DAY'S RIGHTS GUARANTEED BY THE DUE PROCESS PROVISIONS OF ARTICLE I, SECTION 7 OF THE UTAH CONSTITUTION ARE VIOLATED IF FORMER U.C.A. § 63-30-7(2) IS APPLIED TO BAR HER CAUSES OF ACTION | 12 |
|--|----|

Point IV

| | |
|---|----|
| THE DEFENDANT GOVERNMENTAL ENTITIES ARE NOT IMMUNE FROM SUIT UNDER THE DISCRETIONARY FUNCTION EXCEPTION IN U.C.A. § 63-30-10(1) | 13 |
|---|----|

Point V

| | |
|--|----|
| LACK OF CAUSATION BY THE DEFENDANT MUNICIPALITIES AND THEIR EMPLOYEES CANNOT PROPERLY BE DETERMINED AS A MATTER OF LAW | 14 |
| CONCLUSION | 15 |
| CERTIFICATION OF COUNSEL | 16 |
| CERTIFICATE OF SERVICE | 16 |

APPELLANT'S PETITION FOR REHEARING

Plaintiff/Appellant, Mary Day ("Mrs. Day"), by and through her counsel of record, Larry R. Keller, Esq., and Craig L. Boorman, Esq., and pursuant to Rule 35 of the Utah Rules of Appellate Procedure, hereby petitions this Honorable Court for a rehearing of the Court's opinion entered on September 2, 1994. Mrs. Day seeks a rehearing of the issues decided on pages 10-17 of the majority opinion, which specifically involve Mrs. Day's open courts, equal protection and due process arguments under the Utah Constitution. Mrs. Day also seeks rehearing of the majority decision on page 3 of the opinion that the Defendant municipalities and their employee peace officers are not negligent as a matter of law. Mrs. Day submits the following points and authorities in support of her Petition for Rehearing.

POINTS AND AUTHORITIES

POINT I

MRS. DAY'S RIGHTS GUARANTEED BY THE OPEN COURTS PROVISIONS OF ARTICLE I, SECTION 11 OF THE UTAH CONSTITUTION ARE VIOLATED IF FORMER U.C.A. § 63-30-7(2) IS APPLIED TO BAR HER CAUSES OF ACTION.

Pages 10-16 of the majority opinion address Mrs. Day's arguments under the open courts provisions of Article I, Section 11 of the Utah Constitution. The majority opinion concludes that Mrs. Day's rights are not violated because the Utah common law doctrine of governmental immunity, as it had developed to the time of Utah's statehood in 1896, precluded a cause of action against peace officers for their negligent acts during a high-speed police chase. The majority opinion therefore holds that no common law right has been abrogated if former U.C.A. § 63-30-7(2) is applied to bar Mrs. Day's causes of action.

Mrs. Day respectfully submits that the majority opinion has overlooked the controlling law in regard to this issue, and misplaced its reliance on early Utah case law and other authorities which are inapposite to the specific issue of whether peace officers could be sued for their negligent acts in 1896, when Article I, Section 11 of the Utah Constitution was adopted.

The authorities are universally in agreement, and the majority opinion correctly points out, that the American common law which developed during the 1800's provided judicial and legislative officers with absolute immunity from tort liability, and eventually extended qualified immunity to administrative officers for their discretionary acts while exercising judicial or quasi-judicial functions.¹

The authorities are also in agreement that the common law, both as it developed in the 1800's and throughout the 1900's and up to the present time, has always held that peace officers are liable for their negligent acts without regard to any discretionary/ministerial distinctions. Courts have simply not applied discretionary/ministerial distinctions, or have classified police action as ministerial.² The majority opinion on page

¹ See, e.g., K.C. Davis & R.J. Pierce, Jr., Administrative Law Treatise § 19.3, at 209-17 (3d ed. 1994); G.A. Bermann, Integrating Governmental and Officer Tort Liability, 77 Colum.L.Rev. 1175, 1176-78 (1977); F. James, Jr., Tort Liability of Governmental Units and Their Officers, 22 U.Chi.L.Rev. 610, 635-42 (1955); W.P. Keeton, et al., Prosser & Keeton on the Law of Torts § 132 (5th ed. 1984); Restatement (Second) of Torts § 895D (1965); L.L. Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv.L.Rev. 209, 218-22 (1963). Several of these authorities are cited and relied upon by the majority on pages 10-13 of the majority opinion.

² See, e.g., Davis & Pierce, *supra* note 1, at 217; Keeton, et al., *supra* note 1, at 1056, 1062-63; Jaffe, *supra* note 1, at 218-19; W.C. Mathes & R.T. Jones, Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions, 53 Geo.L.J. 889, 894-99 (1965); K.C. Davis, Administrative Law Treatise § 26.03, at 520-21 (1958); Annotations, Personal Liability of Peace Officer or His Bond for Negligence Causing Personal Injury or Death, 18 A.L.R. 197 (1922) and 39 A.L.R. 1306 (1925); Annotation, Personal Liability of Policeman, Sheriff, or Other Peace Officer, or Bond, for Negligently

13 appears to recognize that the common law did not extend immunity for discretionary acts to torts committed by police officers, particularly in the course of making an arrest.³ It is very clear that peace officers, especially when attempting to effect an arrest, have never been accorded the same immunity under the common law as accorded to judicial, legislative and administrative officers.

Thus, the critical question for purposes of the instant case, is whether Utah common and statutory law applied the foregoing common law rules at the time of statehood in 1896, and held peace officers liable for their negligent acts, irrespective of any discretionary/ministerial distinction. On page 13, the majority opinion states that "the parties have not cited any Utah case law from near the time of statehood which addresses immunity for police officers, and we have not found any." Mrs. Day respectfully submits that there are in fact early decisions by the Utah Supreme Court which definitively establish that Utah law followed the general American common law rules which held peace officers liable for their negligent acts. Mrs. Day would have presented these cases to the Court pursuant to her motions for reargument and to file a response to the Defendants' Supplemental Brief, but both of these motions were denied by the Court.

An early Utah case in point, which predates statehood in 1896, is Snell v. Crowe, 3 Utah 26, 5 P. 522 (1881). In Snell, the plaintiff sued the defendant town constable for unreasonably excluding plaintiff from his building for several days pursuant to a levy of

Causing Personal Injury or Death, 60 A.L.R. 2d 873 (1958); 80 C.J.S., Sheriffs and Constables § 52; 70 Am.Jur.2d, Sheriffs, Police, and Constables § 90.

³ The majority cites Davis & Pierce, *supra* note 1, at 217; Bermann, *supra* note 1, at 1183-84.

attachment. The Snell Court held that whether the constable was liable to the plaintiff was for the jury to determine, and that it was not error for the trial court to give instructions to this effect. 5 P. at 526. The liability of peace officers in similar situations has been consistently reaffirmed by the Utah Supreme Court.⁴

However, the two Utah cases which most directly address the issue of the liability of a peace officer for his negligent acts under Utah common law, and which are the most analogous to the issue presented by the instant case, are Geros v. Harries, 65 Utah 227, 236 P. 220 (1925), and Jackson v. Harries, 65 Utah 282, 236 P. 234 (1925).⁵ In Geros, the plaintiff filed an action against the Salt Lake County Sheriff and two of his deputies for injuries suffered by the plaintiff when he was shot by one of the deputy sheriffs during the course of searching the plaintiff's restaurant for unlawful intoxicating liquors. The Geros Court rejected the argument of the Sheriff and his deputies that they should not be liable for their negligent acts or omissions, and held as follows:

No doubt the officers of the law should receive the protection of the law in so far as their acts justify protection. The citizen is, however, equally entitled to protection. The law knows no favorites, and an officer, when he offends, stands precisely upon the same footing as the citizen. Nor does the law justify the condemnation of a citizen when it would not, under the same state of facts and under the same quantum of evidence, condemn the acts of the officer. In this case, the defendants were given the full protection of the law, and in one or two instances they were given more than the strict enforcement of the law authorizes.

⁴ See, e.g., Spalding v. Allred, 23 Utah 354, 64 P. 1100, 1102-03 (1901); Christensen v. Beebe, 32 Utah 406, 91 P. 129, 132 (1907); Whittler v. Sharp, 43 Utah 419, 135 P. 112, 115 (1913); Higgs v. Burton, 58 Utah 99, 197 P. 728, 730 (1921); Truitt v. Patten, 75 Utah 567, 287 P. 175, 176-77 (1930); Allen v. Holbrook, 103 Utah 319, 135 P.2d 242, 249 (1943).

⁵ Geros and Jackson are cited by the 1925 and 1958 A.L.R. Annotations, *supra* note 2, that a peace officer may be held personally liable for negligent or wrongful acts causing personal injury or death. In fact, Geros is the subject case of the 1925 A.L.R. Annotation. See 39 A.L.R. 1297-1306.

236 P. at 225 (emphases added).

In Jackson, the plaintiff instituted an action against the Salt Lake County Sheriff and three of his deputies for injuries to plaintiff caused by the negligent use of unusual and unnecessary force in executing a search and seizure warrant of plaintiff's private residence. Consistent with its holding in Geros, the Jackson Court held as follows:

Officers, like others, will be protected only so long as they act within the law. The evidence is clearly to the effect that the deputy sheriffs used unusual and unnecessary force in executing the search and seizure warrant which resulted in personal injuries to the plaintiff for which their principal and the surety on his official bond are legally liable.

236 P. at 236-37 (emphasis added).

The peace officers in Geros and Jackson were clearly exercising their discretion and judgment, and were held liable for their negligent acts. Therefore, it is evident that Utah common law in effect at the time of statehood would have allowed Mrs. Day's causes of action in the instant case.

Peace officers continued to be liable for their negligence under Utah common law, even though they were exercising considerable discretion or judgment, clear up until at least the early 1960's. In Benally v. Robinson, 14 Utah 2d 6, 376 P.2d 388 (1962), the widow and daughter of the deceased, who had been fatally injured in a fall down stairs at the city jail after being arrested for intoxication, brought an action for wrongful death against the arresting officer. The principal point urged on appeal against the arresting officer was the refusal of the trial court to allow the case to go to the jury on the issue of his negligence. The Utah Supreme Court reversed the decision of the trial court and remanded for a new trial on the issue of the arresting officer's negligence:

Ordinarily one has no duty to look after the safety of another who has become voluntarily intoxicated and thus limited his ability to protect himself. But that absence of duty ended when Officer Robinson took Benally into

custody. It then became his obligation to measure up to the standard of conduct which the law almost universally imposes: that of using the degree of care and caution which an ordinary reasonable and prudent person would use under the circumstances. The deceased was entitled to have degree of care observed in his behalf, even though he was drunk. . . . Accordingly, it was error for the court to instruct to the effect that the extent of the officer's duty was to refrain from intentional injury to the deceased and to refuse to instruct upon his full duty to exercise reasonable care for his safety.

376 P.2d at 390 (emphasis added and footnote omitted).

Early Utah territorial law and subsequent statutory law codified parts of the common law, and provided that peace officers were liable for their negligent acts.⁶ Early Utah statutory law, which confirms the liability of peace officers for their negligent acts, is important because it supersedes any common law rules which may be in conflict therewith at the time of statehood.⁷ Furthermore, it should be pointed out that many of the early Utah statutes holding sheriffs and other peace officers liable for their tortious

⁶ See, e.g., C.L. 1876: pp. 51-52 (§ 1 of 1874 Act of Congress applicable to Utah Territory - marshal and deputies and their sureties liable for "mis-feasance" and "non-feasance"); § 1320 (marshal liable for escape or rescue of arrested defendant); § 2365 (sheriff liable for safe keeping of his prisoners committed by authority of United States). C.L. 1888: § 112 (sheriff or jailer liable for "neglect" to serve judicial paper on prisoner); § 118 (sheriff liable for safe keeping of prisoners committed by authority of United States); § 3145(2) (two-year statute of limitations for action against marshal, sheriff or constable acting in official capacity); § 3146(4) (one-year statute of limitations for action against marshal, sheriff or other officer for escape of prisoner). R.S. 1898: §§ 549, 578, 585-589, 3250, 3257, 3492 (liabilities of sheriff and other peace officers in performance of their official duties); § 2878(1) (same two-year statute of limitations as in C.L. 1888, § 3145(2), *supra*); § 2879(4) (same one-year statute of limitations for escape as in C.L. 1888, § 3146(4), *supra*).

⁷ See, Utah Constitution, Art. XXIV § 2 (all Utah territorial laws remain in force until they expire by their own limitations, or are altered or repealed by the legislature); R.S. 1898 § 2488 (common law is the rule of decision in the courts of Utah unless it is repugnant to, or in conflict with, the constitution or statutes of Utah).

acts have not changed in a century and are identical to current Utah statutes.⁸

Utah law, in addition to holding peace officers liable for their negligent acts, has maintained a clear distinction between "public officers" and regular governmental employees.⁹ Prior to the 1978 amendments to U.C.A. § 63-30-4, regular governmental employees were not accorded discretionary function immunity for their negligent acts. See Cornwall v. Larsen, 571 P.2d 925, 927 (Utah 1977) (*employee* defendant distinguished from a public official for purposes of applying discretionary function immunity -- Sheffield v. Turner, 21 Utah 2d 314, 445 P.2d 367 (1968), distinguished on the fact that in Sheffield suit was against the warden of the Utah State Prison, and not an *employee*); Payne ex rel. Payne v. Myers, 743 P.2d 186, 188 (Utah 1987) (doctors as governmental *employees* had no immunity from suit for their simple negligence at common law). It is also very significant to note that within a matter of a few months after Cornwall was decided in October of 1977, the Utah legislature amended U.C.A. § 63-30-4 in 1978 to give all governmental employees, including peace officers, immunity from suit for their negligent acts or omissions.

Based upon the foregoing analysis of Utah common and statutory law at the time of statehood, and for many decades thereafter, it is apparent that Garff v. Smith, 31 Utah

⁸ See, e.g., U.C.A. §§ 17-22-6, 17-22-13 thru 18 (liabilities of sheriff); U.C.A. §§ 78-12-28(1) and 78-12-29(5) (statutes of limitation for actions against peace officers).

⁹ See, e.g., Utah Constitution, Art. VI §§ 17-21 (impeachment of officers); Art. XIII, § 8 (public officers - punishment for misusing public monies); Art. IV, § 10 (oath of office for elected and appointed officers); U.C.A. § 77-5-1 et seq. (impeachment of officers); U.C.A. § 77-6-1 et seq. (removal from office of officers not liable to impeachment); U.C.A. §§ 76-8-101(1), 77-1a-1(1), 63-30-2(2), 67-16-3(12), 67-16-3(13) (definitions which distinguish a "public officer" from a "public employee" or "peace officer.").

102, 86 P. 772 (1906), and the other Utah cases cited and relied upon in the majority opinion, are not controlling. Mrs. Day respectfully submits that the majority opinion has misplaced its reliance on Garff and the other cited cases, which simply apply the American and Utah common law rules that administrative officers are not liable for their discretionary acts while exercising quasi-judicial functions. Garff clearly involved the judicial or quasi-judicial functions of an administrative official, a deputy state sheep inspector, and the Garff Court clearly delineated this fact. 86 P. at 774. In support of its holding that the sheep inspector was not liable for his negligent discretionary acts, the Court cites 15 cases as authority. Id. Every one of these 15 cases address the discretionary function immunity of judicial, legislative or administrative officers -- not one of these cases involves the liability of a peace officer.¹⁰ The 1845 and 1896 U.S. Supreme Court cases of Kendall v. Stokes and Spalding v. Vilas involve the Postmaster General, and have universally been cited by authorities for the common law rule that administrative officers are immune from suit when exercising discretionary functions.

Other very early Utah cases, like Garff, applied the common law rule that judicial,

¹⁰ The cases cited in Garff and the particular type of public officer(s) involved are as follows: People v. Bartels, 138 Ill. 322, 27 N.E. 1091 (1891) (Clerk of Probate Court); State v. Meier, 143 Mo. 439, 45 S.W. 306 (1898) (President of City Council); Grider v. Tally, 77 Ala. 422, 54 Am.Rep. 65 (1884) (Probate Judge); Fath v. Koeppel, 72 Wis. 289, 39 N.W. 539 (1888) (City Meat Inspector); Spalding v. Vilas, 161 U.S. 483 (1896) (Postmaster General); Chamberlain v. Clayton, 56 Iowa 331, 9 N.W. 237 (1881) (Trustees of Institution for Deaf and Dumb); Wall v. Trumbull, 16 Mich. 228 (1867) (Supervisor of Township Board); Bailey v. Berkey, 81 F. 737 (C.C., N.D. Cal. 1897) (County Assessor); Ballerino v. Mason, 83 Cal. 447, 23 P. 530 (1890) (County Assessor); Pike v. Megoun, 44 Mo. 491 (1869) (Voter Registration Officers); State v. Thomas, 88 Tenn. 491, 12 S.W. 1034 (1890) (ex officio State Insurance Commissioner); Schooler v. Arrington, 106 Mo. App. 607, 81 S.W. 468 (1904) (County Bridge Commissioner); State v. Hastings, 37 Neb. 96, 55 N.W. 774 (1893) (members of Board of Public Lands and Buildings); Kendall v. Stokes, 3 How. (U.S.) 87 (1845) (Postmaster General); Daniels v. Hathaway, 65 Vt. 247, 26 A. 970 (1893) (Town Selectmen).

legislative or administrative officers, exercising judicial or quasi-judicial functions, were immune for their negligent discretionary acts.¹¹

All of the other much more recent Utah cases relied upon by the majority opinion do not involve peace officers, but rather involve administrative officers exercising quasi-judicial functions.¹² These cases and Garff are simply inapposite to the specific issue of whether or not Mrs. Day had a cause of action in Utah in 1896 against employee peace officers for their negligent acts. Mrs. Day respectfully submits these cases are not controlling and the majority opinion has misplaced its reliance on them. The controlling Utah cases are Snell v. Crowe, Geros v. Harries, Jackson v. Harries, and Benally v. Robinson, *supra*, which clearly stand for the proposition that peace officers were liable for their negligent discretionary acts in 1896 and for over sixty years thereafter.

Therefore, Mrs. Day respectfully submits that the majority opinion's application of former U.C.A. § 63-30-7(2) to bar her causes of action in the instant case, violates her rights guaranteed by the open courts provisions of Article I, Section 11 of the Utah Constitution.¹³

¹¹ See, e.g., Salt Lake County v. Clinton, 39 Utah 462, 117 P. 1075 (1911) (liability of county commissioners).

¹² See Hjorth v. Whittenberg, 121 Utah 324, 241 P.2d 907 (1952) (State Road Commissioners); Sheffield v. Turner, *supra* (Warden of State Prison); Madsen v. Borthick, 658 P.2d 627 (Utah 1983) (Commissioner of State Department of Financial Institutions). See also Logan City v. Allen, 86 Utah 375, 44 P.2d 1085 (1935) (Board of County Commissioners and State Tax Commission members); Utah State University v. Sutro & Co., 646 P.2d 715 (Utah 1982) (University officials and Institutional Council members); Snyder v. Merkley, 693 P.2d 64 (Utah 1984) (County Commissioners and County Clerk Auditor); Spruell v. Snyder, 693 P.2d 66 (Utah 1984) (Mayor and City Council members).

¹³ The court is referred to Point I of Mrs. Day's Reply Brief and Point II of her Opening Brief. In addition to the cases and authorities cited therein, the Court is referred to the recent case of Lee v. Gaufin, 867 P.2d 572 (Utah 1993).

POINT II

MRS. DAY'S RIGHTS GUARANTEED BY THE EQUAL PROTECTION PROVISIONS OF ARTICLE I, SECTION 24 OF THE UTAH CONSTITUTION ARE VIOLATED IF FORMER U.C.A. § 63-30-7(2) IS APPLIED TO BAR HER CAUSES OF ACTION.

Subpoint 4 of page 16 of the majority opinion holds that Mrs. Day's rights to equal protection under Article I, Section 24 of the Utah Constitution are not violated by application of former U.C.A. § 63-30-7(2) to bar her causes of action, based upon the majority's legal conclusion that Mrs. Day had no cause of action under Utah common law at the time of statehood to sue a peace officer for his negligent acts during a high-speed police chase.. Thus, the majority concludes that Mrs. Day did not have any rights protected by the open courts provisions of Article I, Section 11 of the Utah Constitution, and therefore the majority opinion applies the traditional "rational basis" test and the presumption of constitutionality to rule that Mrs. Day's rights to equal protection are also not violated.

Based upon the arguments set forth in Point I of this Petition, *supra*, Mrs. Day respectfully requests the Court to reexamine its equal protection ruling. Since Mrs. Day did have a cause of action under Utah law at the time of statehood, and her rights under the open courts provisions of the Utah Constitution have been violated, the presumption of constitutionality does not attach to former section 63-30-7(2), the burden of proof is shifted to the Defendants to establish its constitutionality, and the "heightened scrutiny" test should be applied by this Court in its equal protection analysis. See Lee v. Gaufin, *supra*; Condemarin v. University Hospital, 775 P.2d 348 (Utah 1989); Malan v. Lewis, 693 P.2d 661 (Utah 1984).

It is clear from the foregoing Utah Supreme Court decisions that former section 63-

30-7(2) cannot pass "heightened scrutiny" analysis, and the Defendants have completely failed to meet their burden of proof to justify the passage of this section and establish its constitutionality.¹⁴

Moreover, notwithstanding application of the traditional rational basis test, former section 63-30-7(2) violates Mrs. Day's rights to equal protection because it operated to discriminate against individuals injured in police pursuit situations as opposed to all other individuals injured in other police emergency situations and other emergency situations involving fire, paramedic and ambulance vehicles. Former section 63-30-7(2) thus created and singled out a separate class of individuals without any rational justification. This is precisely the type of discrimination prohibited by Article I, Section 24 of the Utah Constitution, even under the traditional rational basis analysis. See Lee, Condemarin, and Malan, supra.

Furthermore, Mrs. Day has established from the legislative history of former section 63-30-7(2), that it was enacted based upon misinformation and untrue statements, and to address a phantom crisis of a "rash of frivolous lawsuits" which has never, at any time, past or present, existed in the State of Utah.¹⁵ Therefore, since enactment of former section 63-30-7(2) had no rational relationship to its legislatively stated purpose of protecting government coffers from frivolous lawsuits arising from high-speed police pursuits, Mrs. Day's equal protection rights have been violated, even under the traditional rational basis test. See Lee, Condemarin, and Malan, supra.

Therefore, Mrs. Day respectfully submits that her rights guaranteed by the equal

¹⁴ Mrs. Day would refer the Court to Points II.A and III of her Opening Brief, and Point II of her Reply Brief.

¹⁵ The Court is referred to Point II.A, pp. 15-23, of Mrs. Day's Opening Brief.

protection provisions of Article I, Section 24 of the Utah Constitution are violated if former U.C.A. § 63-30-7(2) is applied to bar her causes of action.

POINT III

MRS. DAY'S RIGHTS GUARANTEED BY THE DUE PROCESS PROVISIONS OF ARTICLE I, SECTION 7 OF THE UTAH CONSTITUTION ARE VIOLATED IF FORMER U.C.A. § 63-30-7(2) IS APPLIED TO BAR HER CAUSES OF ACTION.

Although subparagraph 4 on page 16 of the majority opinion is entitled "Equal Protection and Due Process," the entire discussion which follows is confined to an equal protection analysis. Thus, the majority opinion does not directly address Mrs. Day's due process arguments.¹⁶ Based upon the arguments set forth in Point I of this Petition, *supra*, Mrs. Day respectfully requests that the Court reexamine its conclusion that Mrs. Day's due process rights have not been violated.

Furthermore, notwithstanding a ruling by this Court that Mrs. Day's rights under the open courts provisions of the Utah Constitution have not been violated, Mrs. Day respectfully submits that her due process rights are still violated if former section 63-30-7(2) is applied to bar her causes of action. Application of this section to bar Mrs. Day's suit makes Mrs. Day not only the only person in Utah, but also the only person on the face of the earth, who will ever be affected by the governmental immunity provisions of this section. Fundamental fairness is the cornerstone of due process of law. It would be difficult to imagine a more fundamentally unfair application of a state law to an individual, especially to one of its own residents.

Former section 63-30-7(2) was only in effect for one year and six days. The act

¹⁶ The Court is referred to Point IV of Mrs. Day's Opening Brief and Point II of her Reply Brief.

which repealed it was passed by both houses of the legislature approximately three weeks before the devastating accident which killed Mrs. Day's husband and permanently injured Mrs. Day. Moreover, the repealing act was signed and approved by the Governor four days before the accident. However, because the repealing act contained a stated effective date of approximately five and a half weeks after the accident, Mrs. Day has been singled out as the only person to ever be barred from suit under former section 63-30-7(2).

This is fundamentally unfair, and if allowed to stand will result in another immense personal tragedy to Mrs. Day. She will not even get her day in court to seek compensation and redress for the tragic death of her husband and her own serious personal injuries caused by the negligence of the Defendants in this case. Therefore, Mrs. Day respectfully submits that her rights guaranteed by the due process provisions of Article I, Section 7 of the Utah Constitution are violated if former U.C.A. § 63-30-7(2) is applied to bar her causes of action.

POINT IV

THE DEFENDANT GOVERNMENTAL ENTITIES ARE NOT IMMUNE FROM SUIT UNDER THE DISCRETIONARY FUNCTION EXCEPTION IN U.C.A. § 63-30-10(1).

The majority opinion states on page 15 that its holding "does not address whether Trooper Colyar's actions were discretionary or ministerial under any version of Utah's Governmental Immunity Act or cases decided thereunder." Mrs. Day respectfully submits that this issue must now be directly addressed and ruled upon by the Court.

The majority opinion cites Little v. Utah State Div. of Family Services, 667 P.2d 49 (Utah 1983); and Frank v. State, 613 P.2d 517 (Utah 1980); as examples of relevant cases

which address the discretionary/ministerial function issue under U.C.A. § 63-30-10(1). Little and Frank, along with other decisions by the Utah Supreme Court,¹⁷ clearly establish that the Defendant peace officers' actions in the instant case, as well as those of the other as yet unnamed employee defendants, were implemental or operational in nature, and therefore ministerial functions under section 63-30-10(1).¹⁸

Therefore, Mrs. Day respectfully submits that the Defendant governmental entities in the instant case are not immune from suit under the discretionary function exception in U.C.A. § 63-30-10(1), and that this Court must now make a direct ruling on this issue.

POINT V

LACK OF CAUSATION BY THE DEFENDANT MUNICIPALITIES AND THEIR EMPLOYEES CANNOT PROPERLY BE DETERMINED AS A MATTER OF LAW.

The majority opinion rules on page 3 that the City Defendants cannot be liable because Floyd, the fleeing suspect, "simply went around the municipal officers' 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."

Mrs. Day respectfully submits that this is an inappropriate analysis of causation

¹⁷ See, e.g., Cornwall v. Larsen, 571 P.2d 925 (Utah 1977); Doe v. Arguelles, 716 P.2d 279 (Utah 1985); Irvine v. Salt Lake County, 785 P.2d 411 (Utah 1989).

¹⁸ The Court is referred to Point V of Mrs. Day's Opening Brief and Point III of her Reply Brief. The Court is also referred to pp. 16-21 of "Appellees' Supplemental Brief" submitted by Defendants, in which the Defendants themselves admit and establish that clear Utah law, as well as federal law under the Federal Tort Claims Act, holds that the actions of the peace officers in the instant case are ministerial under the governmental immunity provisions making governmental entities liable for the negligent acts of their employees.

under Utah law, and asks this Court to reconsider its decision on this issue.¹⁹

Therefore, Mrs. Day respectfully requests the Court to reconsider its ruling upholding the trial court's grant of summary judgment as to the City Defendants, based upon lack of causation as a matter of law.

CONCLUSION

Based upon the foregoing arguments, Mrs. Day respectfully requests that this Court grant her Petition for Rehearing, and that the majority reconsider its rulings as set forth in the foregoing arguments of this Petition.

DATED this 29 day of Sept., 1994.


LARRY B. KELLER


CRAIG L. BOORMAN

Attorneys for Plaintiff/Appellant Mary Day

¹⁹ The Court is referred to Point VI of Mrs. Day's Opening Brief, and Point IV of her Reply Brief. Of particular importance and direct relevance are Brown v. City of Pinellas Park, 557 So.2d 161 (Fla.App. 2 Dist. 1990); Boyer v. State, 594 A.2d 121 (Md. 1991); Fiser v. City of Ann Arbor, 339 N.W.2d 413 (Mich. 1983). These three cases are cited and discussed on pp. 43-44 of Mrs. Day's Opening Brief.

CERTIFICATION OF COUNSEL

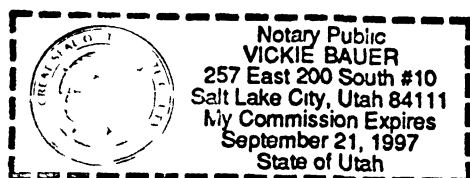
The undersigned counsel for Plaintiff/Appellant Mary Day, pursuant to Rule 35 of the Utah Rules of Appellate Procedure, hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

DATED this 29th day of Sept., 1994.


LARRY R. KELLER


CRAIG L. BOORMAN

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this 29th day of September, 1994, by Larry R. Keller and Craig L. Boorman.



(Notary Stamp)


NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing to be mailed, by first class U.S. postage prepaid, this 29th day of Sept., 1994, to:

Jan Graham
Utah Attorney General
Carol Clawson
Solicitor General
Debra J. Moore
Assistant Attorney General
330 South 300 East 2nd Floor
Salt Lake City, UT 84111
Attorneys for Department of
Public Safety, Highway Patrol
and Colyar

Allan L. Larsen
Anne Swensen
Snow, Christensen & Martineau
10 Exchange Place #1100
PO Box 45000
Salt Lake City, UT 84145
Attorneys for Salem City, Spanish Fork,
James and Asay

