

1993

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

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

IN THE UTAH COURT OF APPEALS

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MARY DAY,	:	50
	:	.A10
Plaintiff-Appellant,	:	DOCKET NO. <u>930135-CA</u>
v.	:	Case No. 930135-CA
	:	Priority No. 15
STATE OF UTAH,	:	
et al.,	:	
Defendants-Appellees.	:	

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RESPONSE TO PETITION FOR REHEARING

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

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**FILED**  
Utah Court of Appeals

OCT 28 1994

Marilyn M. Branch  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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MARY DAY,	:	
Plaintiff-Appellant,	:	
v.	:	Case No. 930135-CA
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IN THE UTAH COURT OF APPEALS

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et al.,	:	
Defendants-Appellees.	:	

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RESPONSE TO PETITION FOR REHEARING

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Pursuant to this Court's request dated October 6, 1994, the Appellees submit the following response to Day's Petition for Rehearing.

ARGUMENT

POINT I

**THIS COURT CORRECTLY HELD THAT TROOPER COLYAR  
WOULD HAVE BEEN IMMUNE AT COMMON LAW FROM  
DAY'S CLAIMS**

This court should deny Day's petition for rehearing because Day has failed to show that the court incorrectly ruled that Trooper Colyar would have been immune at common law from Day's claims. In her petition, Day posits that "the common law . . . has always held that peace officers are liable for their negligent acts without regard to any discretionary/ministerial distinctions." Petition for Rehearing at 2. This postulate is incorrect. Although much police work was classified at common law as ministerial, numerous cases refute the notion that there was a

general rule of police liability for even discretionary conduct.

For example, in Clinton v. Nelson, the territorial Utah Supreme Court affirmed a judgment of nonsuit in an action for false imprisonment and cruel treatment against the United States Marshall for the territory by a prisoner who claimed a deputy marshall improperly detained him in the federal penitentiary and that the "treatment of the prisoner was so maliciously cruel as to entitle him to damages." Clinton v. Nelson, 2 Utah 284, 290 (1877-80).

The court rejected the prisoner's claim that the deputy improperly held him in the penitentiary, stating, "The law requires the marshall to safely keep such prisoners, and to do so he must have a reasonable discretion as to where he shall do so within his district." Id. The court further rejected the prisoner's claim of cruel treatment: "The warrant being regular, and the court having jurisdiction to issue it, the officer is not liable, says Hilliard, without proof of express malice. Hill. on Torts, 184, 3d ed. . . . No such malice has been shown." Id.<sup>1</sup> See also Marks v. Sullivan, 9 Utah 12, 33 P. 224, 227 (1893) (dismissing claims against constable for assault and battery and false imprisonment where arrest warrant was valid on its face, even though plaintiff alleged constable knew warrant was void).

Nearly half a century later, the Utah Supreme Court again recognized that in some circumstances, a police officer could

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<sup>1</sup>The court also relied on the alternative rationale that "a ministerial officer, in performing his duties, if he acts in good faith, is only liable for compensatory damages for injuries against the law, and is not liable for exemplary damages." Clinton v. Nelson, 2 Utah at 290-91.

assert good faith or the absence of malice in defense of a claim of wrongful official conduct. In Roe v. Lundstrom, the court held a city police officer liable in trespass for acting outside the scope of his authority by interfering with an unlicensed retailer's sale of merchandise. Roe v. Lundstrom, 89 Utah 520, 57 P.2d 1228, 1332 (1936). In so holding, the court stated:

The defendants allege . . . that whatever they did was done in good faith and in the exercise of their best judgment as officers in the enforcement of the ordinances of Logan City . . . . The question of motive may be material in some cases as where the conduct is of such a character as to be qualifiedly privileged, or as involving the right to recover punitive damages.

Id.

Indeed, common law liability was generally not imposed on police officers for false arrest, false imprisonment, actions taken under process valid on its face, or for injury to persons to whom no official duty was owed. See William L. Prosser, Prosser on Torts §§ 25 & 108(d) (1941). All of these privileges and immunities<sup>2</sup> were ultimately grounded in notions of judicial and quasi-judicial immunity. They are simply specific applications of the broader common law rule of immunity for official discretionary decisions. See Louis L. Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209, 219 (1963).

That broader immunity rule applied to all public officials,

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<sup>2</sup>These doctrines were variously called privileges and immunities. For example, in his 1941 hornbook, Professor Prosser classified both the discretionary function immunity and the privilege to arrest with a warrant as both privileges and immunities. See William L. Prosser, Prosser on Torts § 25(c) & (d) (privileges) and § 108(c) (immunities) (1941).



including police officers in their quasi-judicial role. See William L. Prosser, Prosser on Torts § 108(c), at 1063 & 1075 (1941) (discussing immunities from liability for arrest and execution of process under general category for discretionary function immunity for public officers); 57 C.J. Sheriffs and Constables § 184 ("While the general rule of liability above stated applies always to breaches by a sheriff or constable of his ministerial duties, no liability can arise out of what he has done when acting in a judicial capacity, even though he has acted corruptly, unless he has maliciously deprived some person of his rights."); 70 Am. Jur. 2d Sheriffs, Police, and Constables § 158 (1987) ("The limited immunity for discretionary conduct extended to public officials generally also applies to the acts of police officers.").

Contrary to Day's suggestion, police officers were categorized as "public officials" at common law. See 47 Am. Jur. Sheriffs, Police, and Constables § 5 (1943) ("Peace officers are generally classed as public officers."). Moreover, their dual status as ministerial officers and discretionary or quasi-judicial officers was recognized. See 22 R.C.L. Public Officers § 25 (1918) ("The same person may act both as a judicial and a ministerial officer. For example, a sheriff with an execution against the property of a particular individual acts in executing it only as a ministerial officer. But the same officer when he is authorized by law to suppress a mob has more or less of discretionary authority intrusted to him."); 24 R.C.L. Sheriffs § 15 (1919) ("Under special

acts a sheriff may be authorized to act judicially in certain matters, and where he so acts, the rule applies that no judicial officer, however, low his grade as such, is responsible for mere error of judgment committed by him in the regular discharge of the duties of his office.")

None of the Utah cases Day cites in her petition are inconsistent with the above principles. None expressly address immunity for police officers. More importantly, none impose liability on a police officer for negligent performance of a discretionary act within the scope of the officer's authority.

For example, in Geros v. Harries, the court held a county sheriff's deputy liable for shooting a restaurant owner who fled the restaurant during the execution of a search and seizure warrant. Geros v. Harries, 65 Utah 227, 236 P. 220, 221 (1925). In so ruling, the court relied upon the common law rule that a police officer had authority to use force in effecting an arrest only when the suspect was a felon:

[I]t must be remembered that if the [restaurant owner] was guilty of any crime it was at most a mere misdemeanor, and hence the defendants were not justified in shooting him, although he made or would have made his attempted escape effective. The law in that regard is clearly and correctly stated by the Supreme Court of Mississippi in Brown v. Weaver. It is there said: "An officer has no right to shoot at a person who is merely running away from him, without committing any violence, when under arrest for a misdemeanor. The wrongful shooting by a deputy sheriff of a prisoner attempting to escape from arrest for a misdemeanor is an official act which creates a liability on the sheriff's bond."

Geros, 236 P. at 224 (citing Brown v. Weaver, 23 So. 388 (Miss. 1898)). Thus, the court imposed liability because the deputy

exceeded his authority, not because of any general rule that police officers were liable for even their discretionary acts.<sup>3</sup>

That the Geros holding rests on the unlawful nature of the shooting, rather than on a general principle of police officer liability as Day contends, is further supported by the language of the Colorado Supreme Court in a similar case around the time Geros was decided. In Corder v. People, the court held a deputy sheriff liable for shooting and injuring a Halloween prankster. Corder v. People, 287 P. 85 (Colo. 1930). In affirming a judgment for the injured boy, the court noted that the deputy had also been criminally tried and convicted of the shooting. Id. at 87. After determining that the shooting had been an official act, making his surety liable on its bond, the court concluded as follows: "The defendant, as the jury found, was guilty of an unlawful act in shooting the [prankster]. For the lawful act of a peace officer, of course, no liability attaches. It is only for unlawful acts

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<sup>3</sup>The A.L.R. annotators also apparently viewed the case as hinging upon the deputy's lack of authority to use force under the circumstances. They placed the court's statement that "an officer, when he offends, stands precisely upon the same footing as the citizen" under the West topic on public officers in general with a citation to the legal encyclopedia Ruling Case Law. See 39 A.L.R. 1297, 1298 (headnote 8). That reference is to an article on "Public Officers," which states: "Public officers are not as a rule personally liable for acts performed by them in the line of their duties . . . . But the protection extends only to acts done in the line of official duty. Therefore if an officer, even while acting under color of his office, exceeds the power conferred on him by law he cannot shelter himself under the plea that he is a public agent. In the eye of the law his acts then are wholly without authority. It is even a doctrine of the common law that if a public officer abuses the process conferring authority on him to act he may render himself a trespasser ab initio." 22 R.C.L. Public Officers § 152, at 478-79 (1918).

that legal liability and damages are imposed." Id. at 89.

The decision in Jackson v. Harries, also cited by Day, is similarly explained. There, three deputy sheriffs "used unusual and unnecessary force" in raiding a home to execute a search and seizure warrant. Jackson v. Harries, 65 Utah 282, 236 P. 234, 236 (1925). The occupant of the home sued for "great pain and mental anguish." Id. at 235. Upholding a judgment for the home occupant, the court stated, "Officers, like others, will be protected only so long as they act within the law." Id. at 236. Accordingly, as in Geros, the deputies' liability in Jackson was based on the fact that their conduct exceeded their authority, not the classification of the conduct as ministerial or the application of a general rule of police liability.

In short, the Utah cases cited by Day are consistent with the ministerial-discretionary function distinction applied at common law to all public officials.<sup>4</sup> For all public officials, the common

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<sup>4</sup>The other cases Day cited in which the Utah court imposed liability on a police officer are inapposite because the conduct involved was clearly a ministerial function and the question of immunity was neither raised nor discussed on appeal. In Snell v. Crowe, for example, a constable was held liable in damages for seizing personal property of a third party under a writ of attachment against the property of a debtor. Snell v. Crowe, 3 Utah 26, 5 P. 522, 523-24 (1881). But execution of civil process was regarded at common law as a ministerial function. See William L. Prosser, Prosser on Torts § 25, at 154 (1941).

Similarly, in Benally v. Robinson, a police officer was held liable for fatal injuries sustained by an intoxicated detainee who fell through an open door down some stairs in the booking area of the jail. Benally v. Robinson, 14 Utah 2d 6, 376 P.2d 388, 389-90 (1962). On appeal, the officer argued that he had no duty to protect an intoxicated person from injury and the court rejected that argument, holding that once the officer took the detainee into custody, the officer assumed the duty to use due care to protect the detainee from harm. Id. at 390. The issue of immunity was not

law immunity for discretionary functions applied only to acts within the scope of the official's authority. Absent such authority, the official had no power to commit the act at all, whether or not the act involved discretion or judgment. See, e.g., Roe v. Lundstrom, 89 Utah 520, 57 P.2d 1228, 1131 (1936) (holding three city commissioners liable in trespass, stating, "[A public officer] may not . . . claim immunity for the commission of an act entirely outside the scope of his official duties).

Moreover, the treatises and articles Day cites do not generally support her claim of an all-inclusive rule of police liability. Most merely recite specific categories of police conduct which have been classified as ministerial, none of which apply to Day's claims against Trooper Colyar. For example, Professor Jaffe's 1963 law review article states that

there are areas, notably actions against police officers for false arrest, battery, and trespass . . . where recovery has long been allowed, despite the exercise by the officer of more than a "merely ministerial" function. This is particularly clear in the case of police officer, who are called upon to make extremely difficult factual choices, and important, if unarticulated, policy decisions: for example, whether to regard certain conduct or certain appearances as sufficient evidence to arrest or search.

Jaffe, supra, at 218-19. Professor Jaffe goes on to say, however,

In fact the law recognizes the discretionary element here

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raised on appeal, nor does it appear to have been a valid defense since in booking a detainee into jail the officer was performing a standard police function that was not even arguably discretionary. Thus, Benally is consistent both with the general common law rule of official liability for ministerial functions and the common law classification of most police functions as ministerial; it does not rest on any general principle of police officer liability for negligence acts.

when in its definition of the power to arrest it immunizes certain "reasonable" judgments of the officer. However, the officer's immunity is limited to his reasonable actions; it is not that total immunity usual in an area classified as discretionary.

Id. at 219. To the extent that any of the secondary authorities cited by Day appear to state a general rule of police liability, they can be explained as implicitly limited to ministerial police functions. Moreover, whatever the law elsewhere, the existence of a general rule of police liability in Utah must be seriously doubted in light of the decisions in Clinton v. Nelson, 2 Utah at 290, and Roe v. Lundstrom, 57 P.2d at 1332. Given the unique history of this state, this court cannot validly assume that the decisions of other American common law courts at or near the time of Utah's statehood signify what the Utah court would have decided at that time. See generally, Jerrold S. Jensen, The Common Law of England in the Territory of Utah, 60 Utah Historical Quarterly 4 (Winter 1992) (discussing general suspicion and even hostility of early Utah courts toward common law tradition).

In deciding that Trooper Colyar would have been immune from Day's claims under early Utah common law, this court noted that "the parties have not cited any Utah caselaw from near the time of statehood which addresses immunity for police officers, and we have not found any." Day v. State, 247 Utah Adv. Rep. 19, 22 (Utah Ct. App. 1994). In her petition for rehearing, Day still has not cited any Utah case law expressly addressing police officer immunity at common law. On the other hand, Clinton v. Nelson, 2 Utah at 290, and Roe v. Lundstrom, 57 P.2d at 1332, appear to recognize a

discretionary function immunity for police officers in Utah near the turn of the nineteenth century.

Moreover, in the absence of Utah cases on point from the relevant era, this court must "simply [make its] best assessment of what a court during that era would have ruled if the issue had arisen." Day, 247 Utah Adv. Rep. at 23. As this court noted, in recent decisions courts have declined to impose liability on police officers under the circumstances of this case. Day v. State, 247 Utah Adv. Rep. at 23 (citing Tice v. Cramer, 627 A.2d 1090, 1108 (N.J. 1993) and Thornton v. Shore, 666 P.2d 655, 665 (Kan. 1983)); see also Pletan v. Gaines, 494 N.W.2d 38, 41 (Minn. 1992) (en banc). As numerous commentators have noted, the application of the ministerial-discretionary function distinction has always been essentially a policy determination. See, e.g., Jaffe, supra, at 291. While high speed vehicles are relatively new, "the need to encourage the pursuit and apprehension of lawbreakers" is timeless. See Day, 247 Utah Adv. Rep. at 24. Thus, absent controlling precedent, this court may properly rely on the policy determinations of contemporary decisions in assessing what the Utah court would have decided if it had addressed a similar case around the turn of the last century.

In any event, if this court has any serious doubt whether Trooper Colyar would have been held liable for Day's claims at common law, it must reject Day's claim that the Utah Governmental Immunity Act violates the open courts clause. "The party attacking the constitutionality of a statute has the burden of affirmatively

demonstrating that the statute is unconstitutional." Kennecott Corp. v. State Tax Comm'n, 858 P.2d 1381, 1384 (Utah 1993). Unless Day can affirmatively establish that the Utah Supreme Court would have sustained her claim nearly a century ago, she cannot establish the existence of any right shielded by the open courts clause. Day, 247 Utah Adv. Rep. at 23.

## POINT II

### DAY HAS WAIVED THE ISSUE OF TROOPER COLYAR'S COMMON LAW LIABILITY BY FAILING TO ADEQUATELY ADDRESS THE ISSUE IN EITHER HER OPENING OR REPLY BRIEF

Day has waived her arguments concerning the common law liability of police officers by failing to assert them at any time before filing her petition for rehearing. This court has held many times that it will not consider issues inadequately briefed either in the trial court or on appeal. See, e.g., State v. Scott, 860 P.2d 1005, 1007 n. 3 (Utah Ct. App. 1993) (declining to consider inadequately briefed state constitutional issue).

Moreover, as noted in Point I above, "[t]he party attacking the constitutionality of a statute has the burden of affirmatively demonstrating that the statute is unconstitutional." Kennecott Corp. v. State Tax Comm'n, 858 P.2d 1381, 1384 (Utah 1993). Thus, in asserting her claim under the open courts clause, it was incumbent upon Day to adequately demonstrate that her claim implicated a right protected by the open courts clause.

Despite numerous opportunities to do so, Day never briefed her claim that she had a common law remedy against Trooper Colyar until



she filed her petition for rehearing. As initially noted in the State's opening brief in this appeal, Day never cited any authority in her opening brief for the proposition that she had a legal remedy for her injuries at common law at the time of statehood. Brief of State Appellees, at 30. That deficiency was not corrected in Day's reply brief on this appeal. Nor in her letter to the court filed under Rule 24(j) after oral argument was held in this case, did Day cite any of the authorities she now cites in her petition for rehearing. See Letter from Craig L. Boorman to Clerk of the Court dated May 17, 1994 (responding to State's Rule 24(j) citations). The remaining arguments Day raises in her petition for rehearing also come too late.

Day's theory of liability has shifted with each successive filing in this case. It continues to shift even now. See Motion to File Supplement to Appellant's Petition for Rehearing dated October 27, 1994. This court should apply its well-established waiver doctrine and deny Day's petition for rehearing.

#### CONCLUSION


This court should deny Day's petition for rehearing because Day has failed to show that Trooper Colyar would not have been protected under early Utah common law by discretionary function immunity. Contrary to Day's claim in her petition for rehearing, near the turn of the nineteenth century, the Utah court recognized police immunity for discretionary conduct. The Utah cases cited by Day are inapposite because they concern police conduct outside the

scope of authority -- conduct for which any public official would have been liable.

In any event, Day has waived her argument concerning Trooper Colyar's common law liability by failing to raise it before now. The other arguments raised in Day's petition have similarly been waived.

RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of October, 1994.

JAN GRAHAM  
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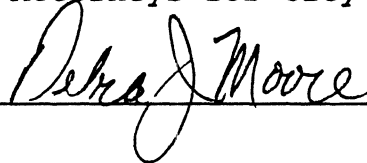
  
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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing **Response to Petition for Rehearing** were mailed this 28<sup>th</sup> day of October, 1994, postage prepaid, to:

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