

1993

Mary Day v. The State of Utah : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

IN THE UTAH COURT OF APPEALS
UTAH
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MARY DAY, :
Plaintiff-Appellant, :
v. :
STATE OF UTAH, :
et al., :
Defendants-Appellees. :

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DOCKET NO. 930135-CA

Case No. 930135-CA
Priority No. 15

APPELLEES' SUPPLEMENTAL BRIEF

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

APR 08 1994

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APPELLEES' SUPPLEMENTAL BRIEF

Pursuant to this Court's order dated March 29, 1994, the State and City Appellees submit the following joint brief in response to Points I and II of Day's Reply Brief.

ARGUMENT

POINT I

DAY'S CONSTITUTIONAL CHALLENGE TO THE
GOVERNMENTAL IMMUNITY ACT FAILS BECAUSE SHE
SEEKS A REMEDY AGAINST THE STATE WHICH IS
UNPROTECTED BY THE OPEN COURTS CLAUSE

Day seeks a remedy against the state that is unprotected by the open courts clause; therefore, her constitutional challenge to the Utah Governmental Immunity Act (the "Act") fails. Day challenges section 63-30-7(2) of the Act, which she contends deprives her of a statutory remedy against the state that was provided as a "substitute" for a common law remedy she claims existed against Trooper Colyar. This challenge fails for several reasons. First, as discussed in detail in Point II below, the

premise that Day had a common law remedy against Trooper Colyar is erroneous. However, this Court need not reach the issue of the common law immunity of Trooper Colyar because, as discussed in Point I.A. below, the alleged "substitute" remedy Day seeks against the state never in fact existed. Furthermore, as discussed in Point I.B. below, even if such a "substitute" remedy existed, the open courts clause affords no protection of the remedy Day seeks against the state.

A. The So-Called "Substitute" Remedy Day Seeks Against The State Never Existed Under The Utah Governmental Immunity Act.

Day's open courts challenge to section 63-30-7(2) fails because her premise that the Governmental Immunity Act previously provided a remedy against the state for her injuries is incorrect. As discussed at pages 24-25 of the State's opening brief, section 63-30-7 was originally enacted in 1965 as part of the original Utah Governmental Immunity Act.

As originally enacted, sections 63-30-3 and 63-30-7 of the Act retained governmental immunity for the operation of emergency vehicles. Utah Code Ann. §§ 63-30-3 & -7 (1968). Original section 63-30-3 provided: "Except as may be otherwise provided in this act, all governmental entities shall be immune from suit for any injury which may result from the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function." Original section 63-30-7 provided:

Immunity from suit of all governmental entities is waived for injury resulting from the negligent operation

by any employee of a motor vehicle or other equipment while in the scope of his employment; provided, however, that this section shall not apply to the operation of emergency vehicles as defined by law and while being driven in accordance with the requirements of Section 41-6-14, Utah Code Annotated 1953, as amended by Chapter 86, Laws of Utah, 1961.

Utah Code Ann. § 63-30-7 (1968) (emphasis added). See 1965 Laws of Utah 139, attached as Addendum A. Since the waiver of immunity provided under section 63-30-7 did not apply to injuries caused by the operation of emergency vehicles, the general immunity provision of section 63-30-3 did apply. Thus, under the original Act, governmental entities were immune from liability for injuries caused by the operation of emergency vehicles such as the injuries for which Day seeks recovery in this case.

In 1990, section 63-30-7 was amended to add subsection (2), which provided as follows:

(2)(a) All governmental entities employing peace officers retain and do not waive immunity from liability for civil damages for personal injury or death or for damages to property resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he is being or has been pursued by a peace officer employed by the governmental entity in a motor vehicle.

(b) Enactment of this subsection does not state nor imply that this immunity was ever previously waived or this liability specifically or implicitly recognized.

Utah Code Ann. § 63-30-7(2) (Supp. 1990) (emphasis added). As stated in subsection 2(b), the 1990 amendment of section 63-30-7 was expressly not intended to change the existing law concerning the state's liability for injuries caused by collisions with vehicles under police pursuit. In fact, the 1990 amendment was intended merely to clarify the legislature's original intent in the

face of a perceived legal trend in California to assert claims for injuries arising from such collisions. See Senate debate, Senator Richard J. Carling, S.B. 194, February 14, 1990.

Therefore, contrary to Day's contention, the state has always been immune from Day's claims and no remedy against the state has ever been provided -- as a "substitute" for a common law remedy against government employees or otherwise -- for Day's claims.

This Court should therefore reject Day's contention that she was unconstitutionally deprived of such a substitute remedy and affirm the judgment of the district court dismissing Day's claims.

B. The Open Courts Clause Does Not Protect The Remedy Day Seeks Against The State

1. *The open courts clause does not require the state to create a substitute remedy*

Even if such a substitute remedy for Day's injuries ever existed against the state under the Act, it would not be protected by the open courts clause.¹ While the open courts clause may invalidate a statute that abrogates a common law remedy, and an open courts challenge to a statute may be defeated by a showing that an adequate substitute or alternative remedy exists, the open

¹As discussed in Point VII of the State's opening brief, absent an open courts violation, the constitutionality of section 63-30-7 must be measured under a minimum scrutiny test and the burden remains on Day to demonstrate the unconstitutionality of section 63-30-7. See McCorvey v. Utah State Dep't of Transp. 225 Utah Adv. Rep. 3, 6 (Utah November 11, 1993) ("Because no right existed at common law . . . , the legislature is free to limit the state's liability in that area without implicating the open courts clause and its concomitant heightened scrutiny."). Day has not analyzed section 63-30-7 under a minimum scrutiny test in either her opening or reply brief. Therefore, her due process and equal protection claims should also be rejected.

courts clause does not, as Day would have it, require the legislature to provide such a substitute remedy.

As first set forth by the Utah Supreme Court in Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985), a two-part analysis applies to challenge to a statute under the open courts clause:

First, section 11 [the open courts clause] is satisfied if the law provides an injured person an effective and reasonable alternative remedy "by due course of law" for vindication of his constitutional interest. . . .

Second, if there is no substitute or alternative remedy provided, abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.

Id. at 680. If neither an adequate substitute remedy nor a sufficient justification for the abrogation of the original remedy is found, then the statute abrogating the original remedy is invalid. Thus, in Berry, the Utah Supreme Court held the product liability statute of repose unconstitutional where no substitute remedy was provided for the existing remedy abrogated by the statute and where no adequate justification existed for the abrogation of the existing remedy.

Conversely, where a substitute for a pre-existing remedy is available, no open courts violation can be established. Thus, in Payne v. Myers, 743 P.2d 186, 190 (Utah 1987), the Court rejected the plaintiffs' open courts challenge to section 63-30-4(4) of the Governmental Immunity Act where the Act provided a remedy against the state for their negligence claim and the plaintiffs had failed to file a notice of claim against the state.

Under the Berry analysis, the "constitutional interest" or "existing remedy" protected by the open courts clause in this case is Day's claimed common law remedy against Trooper Colyar. The only provision of the Act which would affect such a remedy is section 63-30-4(4), which limits the personal liability of government employees to circumstances involving fraud or malice. Utah Code Ann. § 63-30-4(4) (1993).

Under Berry, if section 63-30-4(4) abrogated an existing common law remedy against Trooper Colyar, and if (1) no adequate substitute remedy were provided by the Act and (2) no sufficient justification existed for the abrogation of the existing remedy, then section 63-30-4(4) would be unconstitutional under the open courts clause.² In those circumstances, aside from any question of the severability of section 63-30-4(4) from the Act, Day's pre-existing common law remedy against the law enforcement officers would in effect be reinstated.

Rather than pursuing any remedy against Trooper Colyar personally, however, Day apparently prefers the deep pocket of the state. Thus, Day contends that the open courts clause obligates the legislature to retain an alleged substitute remedy against the state. This argument is a radical departure from any existing open courts case law and is unsupported even by dicta from any such case

²Because Day does not challenge the constitutionality of section 63-30-4(4), defendants do not address here the validity of that provision under the open courts clause.

law.³

Contrary to Day's contention, the Utah Supreme Court has explicitly recognized that "[a]rticle I, section 11 does not guarantee a right to sue the state when it acts in a governmental function." McCorvey v. Utah State Dep't of Transp., 225 Utah Adv. Rep. 3, 6 (Utah 1993) (Stewart, J., concurring and dissenting). See also id. at 6 ("Because no right existed at common law to recover from the state for injuries arising out of the state's maintenance of public roadways, the legislature is free to limit the state's liability in that area without implicating the open courts clause and its concomitant heightened scrutiny."); Condemarin v. University Hospital, 775 P.2d 348, 372 (Utah 1989) (Stewart, J., concurring) ("The [governmental function] test also identifies where the constitutional right of a person to have a remedy for personal injury begins under Article I, section 11 of the Utah Constitution as against a governmental agency, and where the governmental right to immunity from such lawsuits stops.")

As conceded by Day, Trooper Colyar was engaged in a governmental function in pursuing and continuing to pursue Floyd. Thus, the open courts clause in no way limits the legislature's power to define the state's liability under the circumstances of this case. Where Day cannot gain access to the taxpayers resources through the front door, her attempt to obtain such access through

³It is precisely because this novel argument is such a radical departure from any previous open courts analysis seen by the State that the State could not have reasonably anticipated it from the mere fact that Day raised an open courts clause challenge to the Act in her opening brief.

the back door should be rejected.

2. *To require the legislature to provide a substitute remedy would usurp the legislative function*

Moreover, to require the legislature to provide a substitute remedy against the state, even under the authority of the open courts clause, would be to usurp legislative power and violate the principles of judicial restraint and separation of powers. The Utah Constitution provides that "[t]he Legislative power of the State shall be vested . . . [i]n a Senate and House of Representatives which shall be designated the Legislature of the State of Utah." Utah Const., art. VI, section 1. The Constitution further expressly provides that "[t]he powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." The principle of separation of powers is a cornerstone of our system government at both the federal and state levels and the source of the doctrine of judicial restraint. See State v. Bell, 785 P.2d 390, 397-98 (Utah 1989); Jensen v. Matheson, 583 P.2d 77, 79 (Utah 1978); Rampton v. Barlow, 23 Utah 2d 383, 464 P.2d 378, 380-81 (1970).

Here, even under Day's theory of the case, the legislature has clearly expressed its desire not to provide a statutory remedy against the state. It is far outside the realm of judicial power to require the legislature to provide otherwise.

3. *The exception to the state's immunity provided by section 63-30-7 is inseverable from the remainder of the Act*

Furthermore, even if this Court were to hold that section 63-30-7(2) violates the open courts clause as urged by Day, that provision is inseverable from the remainder of the Utah Governmental Immunity Act. Where part of an enactment is unconstitutional, the severability question is primarily answered by determining legislative intent. Berry, 717 P.2d at 687; Salt Lake City v. International Ass'n of Firefighters, 563 P.2d 786, 791 (Utah 1977). To do so, the court must ask whether the balance of the enactment, other than the portion struck down, can stand alone and serve its legitimate legislative purpose. Utah Technology Fin. Corp. v. Wilkinson, 723 P.2d 406, 414 (Utah 1986); Berry, 717 P.2d at 687; State v. Green, 793 P.2d 912, 917 (Utah Ct. App. 1990).

In this case, the Governmental Immunity Act legislatively adopted sovereign immunity, then waived that immunity in some circumstances, subject to certain exceptions. Section 63-30-7(2) constituted one of those exceptions. Those exceptions, including section 63-30-7(2), are an integral part of the enactment and are, therefore, not severable. Salt Lake City v. International Ass'n of Firefighters, 563 P.2d at 791; Berry, 717 P.2d at 686 (striking down entire Utah Product Liability Act as inseverable where section setting forth statute of repose violated open courts clause). The waiver of immunity and the exceptions to that waiver constitute a package and are inextricably interrelated. In such a circumstance, "it is not within the scope of the court's function to select the

valid portions of the act and make conjecture the legislature intended they should stand independent of the portions which are invalid." Salt Lake City v. International Ass'n of Firefighters, 563 P.2d at 791.

In any event, the legislative history of the Governmental Immunity Act, and particularly that of sections 63-30-3 and -7 as discussed in Point I.A. above, rules out any such conjecture. The Utah legislature plainly did not intend that the waiver provision of 63-30-7(1) would apply to a plaintiff in Day's position. Standing alone, the waiver provision cannot serve the legislature's purposes in enacting the Governmental Immunity Act. Accordingly, if this Court holds section 63-30-7(2) unconstitutional, the balance of the Act must also be invalidated.

Absent any valid statutory waiver of sovereign immunity and statutory right of action, Day's ability to sue or recover from the state is controlled by the common law doctrine of sovereign immunity. Under Condemarin v. University Hospital, 775 P.2d 348 (Utah 1989) and McCorvey v. Utah State Department of Transportation, 225 Utah Adv. Rep. 3 (Utah November 10, 1993), there is no common law right of action to recover anything from a governmental entity for injuries arising out of a governmental function. Day has conceded that Trooper Colyar was engaged in a governmental function in pursuing, and continuing to pursue, Floyd. Accordingly, Day has no common law claim against the state, and the judgment of the district court dismissing Day's claims must be affirmed.

In short, there is no "substitute" remedy under the Utah Governmental Immunity Act for the common law remedy Day claims existed against Trooper Colyar. Moreover, the open courts clause does not require the legislature to provide such a substitute remedy against the state. Furthermore, such a requirement would violate the fundamental precepts of separation of powers and judicial restraint. In any event, the exception to the Act's waiver of immunity contained in section 63-30-7(2) is inseverable from the remaining provisions of the Act and any ruling that section 63-30-7(2) is unconstitutional would require striking down the entire Act. Under the common law applicable to Day's claims, Day would have no remedy against the State. Therefore, this Court must affirm the trial court's judgment dismissing Day's claims.

POINT II

DAY HAD NO COMMON LAW REMEDY AGAINST TROOPER COLYAR BECAUSE UNDER THE COMMON LAW DOCTRINE OF OFFICIAL IMMUNITY, TROOPER COLYAR WAS IMMUNE FROM DAY'S CLAIMS

In pursuing, and continuing to pursue, Floyd, Trooper Colyar was performing a discretionary function for which he was immune at common law. Therefore, notwithstanding the Utah Governmental Immunity Act, Day never had a remedy against Trooper Colyar.

At common law, under the doctrine of official immunity, courts granted public employees such as Trooper Colyar extensive immunity from liability for actions taken within the scope of their employment. See, e.g., Kendall v. Stokes, 44 U.S. 87 (1845) (holding postmaster general immune from liability for writing off debt owed to plaintiff); Hjorth v. Whittenburg, 121 Utah 324, 241

P.2d 907, 909 (1952) (holding state road commissioners immune from liability for property damages caused by decision to raise grade of road); Hicks v. Davis, 163 P. 799 (Utah 1917) (state auditor immune from liability for refusing to determine validity of claim against state); Garff v. Smith, 31 Utah 102, 86 P. 772 (1906) (holding state sheep inspector immune from liability for negligently ordering sheep quarantined under conditions that allegedly caused their death).

Such immunity was based on the courts' recognition that a lawsuit against a governmental employee was often in effect a lawsuit against the state, and that, if held personally liable for their official judgments, responsible individuals would either be discouraged from accepting public employment or be unduly intimidated in carrying out their duties. See, e.g., Hjorth v. Whittenburg, 241 P.2d at 909 (stating public officials are immune from liability for discretionary decisions, "otherwise public officials would be fearful to act at the risk of finding themselves personally liable for acts done in good faith in the performance of their duties."); Pletan v. Gaines, 494 N.W. 2d 38, 41 (Minn. 1992) (en banc) ("[T]he community imposes a duty on its governmental bodies and law enforcement officials to provide its citizens with security in person and property from lawless people, and this duty, on occasion, necessarily will involve high-speed car chases. Official immunity is provided because the community cannot expect its police officers to do their duty and then to second-guess them when they attempt conscientiously to do it. To expose police

officers to civil liability whenever a third person might be injured would, we think tend to exchange prudent caution for timidity in the already difficult job of responsible law enforcement.")

One widely-applied type of official immunity at common law was based on the distinction between discretionary and ministerial functions. (Other common law immunity doctrines included the absolute immunity granted judicial officers and the good faith immunity generally accorded prison officials. See, e.g., Sheffield v. Turner, 21 Utah 2d 314, 316-17, 445 P.2d 367, 369 (1968) (holding prison officials immune from negligence claims absent a wilful or malicious wrongful act).) Under the discretionary-versus-ministerial function analysis, an official was held liable only for ministerial acts, but not for acts which required the exercise of discretion or judgment. See Fleming James, Jr., Tort Liability of Governmental Units and Their Officers, 22 U. Chi. L. Rev. 610, 643 (1955) ("The rule of immunity of officers for discretionary acts, and its extension, represent a judgment that the benefits to be had from the personal liability of the officer (especially since the prospect of actual compensation to the victim from that source is slight) are outweighed by the evils that would flow from a wider rule of liability.").

For example, in Hjorth v. Whittenburg, 121 Utah 324, 241 P.2d 907, 909 (1952), the court held members of the state road commission immune from liability for property damage caused by an allegedly negligent decision to substantially raise the grade of

state highway 89. In Connell v. Tooele City, 572 P.2d 697, 699 (Utah 1977), on the other hand, the Utah Supreme Court held a district court clerk liable for failing to properly docket the payment of a fine, which resulted in the issuance of a bench warrant against and arrest of the plaintiff.

Contrary to the suggestion in Day's reply brief at page 6, the doctrine of official immunity for discretionary acts was not a development of the 1920's and 1930's. Rather, the doctrine was well-developed and fully applied around the time of Utah's statehood in 1896. Just twelve years after statehood, for example, in Garff v. Smith, 31 Utah 102, 86 P. 772 (1906), the Utah Supreme Court held a state sheep inspector immune from liability for negligently ordering sheep quarantined under conditions that afforded insufficient food and pasture and allegedly resulted in their death. In so holding, the court stated:

All the authorities agree that a public officer, acting judicially, or in a quasi judicial capacity, cannot be made personally liable in a civil action, unless the act complained of be willful, corrupt, or malicious, or without the jurisdiction of the officer. But, if the duties of the officer are merely ministerial, he is liable in a civil action when, in the performance of them, he acts negligently. These principles of law, of course, are conceded by [the sheep owner].

31 Utah at 107. Rejecting the sheep owner's argument that the inspector's actions were ministerial in nature, the court went on to state:

It has been well said that:

Official duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and

defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion. Official action is ministerial when it is the result of performing a certain and specific duty arising from fixed and designated facts. (People v. Bertels et al., 138 Ill. 322, 27 N.E. 1091 [(1891)] .)

It has also been defined as follows:

A ministerial act is one which a public officer is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning the priority or impropriety of the act to be performed. (State ex rel. v. Meier, 143 Mo. 439, 45 S.W. 306 [(1898)] .)

31 Utah at 107-08 (additional citations omitted).

Under the principles applied in Garff v. Smith, Trooper Colyar's pursuit of Floyd was clearly discretionary in nature. Therefore, under principles of the common law at the time of statehood, Trooper Colyar was immune from liability for Day's claims.

These same common law principles were recently applied by the Minnesota Supreme Court in holding a city police officer immune from liability in a high-speed chase of a shoplifter that resulted in the death of a seven-year old schoolboy who was struck by the fleeing car. Pletan v. Gaines, 494 N.W. 2d 38 (Minn. 1992) (en banc). In so holding, the court noted that "[t]he discretion involved in official immunity is different from the policymaking type of discretion involved in discretionary function immunity afforded governmental entities. Official immunity involves the kind of discretion which is exercised on an operational rather than

a policymaking level, and it requires something more than the performance of 'ministerial' duties." Id. at 40 (footnote omitted). Rejecting the parents' claim against the officer, the court reasoned:

The decision to engage in a car chase and to continue the chase involves the weighing of many factors. How dangerous is the fleeing suspect and how important is it that he be caught? To what extent may the chase be dangerous to other persons because of weather, time of day, road, and traffic conditions? These and other questions must be resolved under emergency conditions with little time for reflection and often on the basis of incomplete and confusing information. It is difficult to think of a situation where the exercise of significant, independent judgment and discretion would be more required.

Id. at 41.

Based on the same reasoning, this Court should reject Day's contention that she had a common law remedy against Trooper Day and affirm the judgment of the trial court dismissing Day's complaint.

The case of Frank v. State, 613 P.2d 517 (Utah 1980), relied upon by Day in oral argument before this Court, is not to the contrary. First, Frank was decided long after the adoption of the Utah Governmental Immunity Act and thus does not represent the common law of Utah at the time of statehood. As stated by Justice Stewart in holding the product liability statute of repose unconstitutional in Berry v. Beech Aircraft Corp., 717 P.2d 670, 676 n. 3 (Utah 1985), "To some extent . . . , the common law at the time of statehood provides a measure of the kinds of legal remedies that the framers must have had in mind (at least in scope if not in form) for the protection of life, property, and reputation." Thus, Day cannot rely on changes in the common law that occurred long

after statehood to establish a claim protected by the open courts clause.

The holding of Frank that a state-employed psychologist was subject to liability in malpractice represented a major departure from the earlier common law of official immunity. In so holding, the court adopted and applied as a matter of common law the definition of a discretionary function used to determine the liability of governmental entities under the Utah Governmental Immunity Act. 613 P.2d at 520. ("There thus appears no reason to apply a different legal standard to the individual than that applied to the government employer, even though the latter is governed by statute and the former by common law principles . . .

It is contrary to reason to deny governmental immunity to a public employer and then grant it to the very employee allegedly causing the injury.") Therefore, although the court recognized that the Act did not directly apply to claims against government employees, 613 P.2d at 520, the court's holding was strongly influenced by the Act.

In interpreting the "discretionary function" exception of the Utah Governmental Immunity Act, the Utah Supreme Court has followed the lead of cases interpreting section 2680(a) of the Federal Tort Claims Act. See Doe v. Arguelles, 716 P.2d 279, 282-83 (Utah 1986); Little v. Div. of Family Serv., 667 P.2d 49, 51 (Utah 1983); Frank v. State, 613 P.2d 517, 519 (Utah 1980). The difference in the meaning of the term "discretionary" under the FTCA and the common law was expressly recognized in Estate of Burks v. Ross, 438

F. 2d 230 (6th Cir. 1971). In Burks, the court rejected the argument that a Veterans' Administration hospital administrator and psychiatrist should be held liable for negligently permitting the escape of a mental patient, stating:

Appellant urges that "discretion" means the same thing in the context of executive privilege as it does under the Tort Claims Act, where the government has been held liable for negligence in the treatment or custodial care of patients.

We cannot agree that "discretion" can be read so narrowly as it is now under the Federal Tort Claims Act, which has been liberally interpreted to provide a remedy against the government. The Act's liberal construction ought not to be extended to limit the immunity of federal employees. Liability of the government itself for wrongs committed by its employees will not have the same inhibiting effect on governmental operations as the personal liability of an official. The Tort Claims Act seeks to bar only those suits where the "discretion" is that involved in the formation of policy, rather than its operation.

Id. at 234 (emphasis added). Accordingly, the court held the hospital director immune and stating, "[w]hile Doctor Ging [the treating psychiatrist] had less discretion, nevertheless in her diagnoses and treatment of patients and in her supervisory powers over other employees she was vested with discretion. She is entitled to immunity from suit." Id. at 235. See also Pletan v. Gaines, 494 N.W.2d at 40 (en banc) (observing distinction between the discretion involved in official immunity and the policymaking type of discretion involved in discretionary function immunity afforded governmental entities in holding police officer immune from liability for child's death resulting collision with fleeing shoplifter in high-speed chase).

Accordingly, the scope of the discretionary function exception

as applied to governmental entities under the both the FTCA the Utah Governmental Immunity Act was far narrower than the common law immunity for discretionary functions accorded government employees. Indeed, contrary to the result in Frank, courts generally found government physicians immune at common law for medical malpractice and similar claims. See Estate of Burks v. Ross, 438 F. 2d at 235; see also Martinez v. Schrock, 537 F.2d 765 (3d Cir. 1976) (Army surgeons immune from allegedly negligent performance of gall bladder operation on civilian); Taylor v. Glotfelty, 201 F.2d 51 (6th Cir. 1952) (prison psychiatrist immune from liability for allegedly defamatory diagnosis of patient's mental condition).⁴

Therefore, Frank effected a substantial change in the common law of official immunity as it was applied before the enactment of the Utah Governmental Immunity Act. Day's reliance on Frank to establish the existence of a remedy protected by the open courts clause is accordingly misplaced.

Neither does the case of Cornwall v. Larsen, 571 P.2d 925 (Utah 1977), support Day's claim of a common law remedy against Trooper Colyar. Cornwall involved a claim against a deputy sheriff

⁴Cf. Brown v. Northville Regional Psychiatric Hospital, 395 N.W.2d 18 (Mich. Ct. App. 1986) (medical decisions are discretionary and protected by governmental immunity); but see Jackson v. Kelly, 557 F.2d 735 (10th Cir. 1977) (adopting Federal Tort Claims Act definition of discretionary in holding Air Force physician liable on medical malpractice claim). As Jackson demonstrates, the interpretation of discretionary function under the FTCA also influenced the subsequent development of the law of federal official immunity. On the federal level, the issue of official immunity has been largely resolved by an amendment to the FTCA which expressly immunizes federal employees. See Federal Employee Liability Reform & Tort Compensation Act of 1988, 1988 Amendment to 28 U.S.C. § 2679.

whose vehicle collided with the plaintiff's car. At the time of the collision, the deputy was traveling to the scene of an emergency, but contrary to section 41-6-14 of the Utah Code, failed to use his siren. The plaintiff alleged the deputy's conduct in failing to use either his vehicle lights or siren was "reckless, wilful, unlawful and in excess of his authority." Id. at 926. The court held that these allegations "appear[] to meet the criteria of wilfulness set forth in Sheffield v. Turner." Id. at 927 (citing Sheffield v. Turner, 21 Utah 2d 314, 316-17, 445 P.2d 367, 369 (1968) (holding prison officials immune from negligence claims absent a wilful or malicious wrongful act)).

The court also stated that the deputy was performing a ministerial act. Id. at 927. Because the court held that the plaintiff's allegations satisfied the Sheffield standard of wilfulness or maliciousness, however, this statement was mere dicta. Even if the statement concerning ministerial acts were not dicta, however, it would not determine the issue here. First, the court's opinion in Cornwall was authored by former Chief Justice Hall, who also authored the opinion in Frank. Like Frank, Cornwall was decided long after the Utah Governmental Immunity Act was enacted and therefore does not represent the common law of Utah near the time of statehood. Justice Hall's statement in Cornwall simply presaged the holding three years later in Frank. As discussed above, that holding represented a substantial departure from the common law of official immunity near statehood.

Second, Trooper Colyar's decision to pursue and to continue to

pursue Floyd is clearly distinguishable from the conduct of the deputy sheriff in Cornwall in driving to an emergency scene without using his lights or siren as expressly required by the motor vehicle code. Trooper Colyar's decision was more complex, and involved a far greater degree of judgment and discretion, than that of the deputy sheriff in Cornwall. Therefore, even if the conduct of the deputy sheriff in Cornwall were regarded as ministerial, that of Trooper Colyar was still clearly discretionary. Therefore, Cornwall does not support Day's claim that Trooper Colyar would have been held liable for her injuries at common law.

In sum, the Utah Governmental Immunity Act did not deprive Day of any remedy she otherwise would have had at common law against Trooper Colyar. Under the common law doctrine of official immunity as applied in Utah at the time of statehood, Trooper Colyar's decision to pursue and to continue to pursue Floyd was a discretionary function for which he was granted immunity from liability. This Court should therefore affirm the decision below dismissing Day's claims.

CONCLUSION

In summary, Day seeks a remedy against the State that is unprotected by the open courts clause and therefore this Court should reject her constitutional challenge to section 63-30-7(2) of the Utah Governmental Immunity Act. First, as discussed in Point II above, Day had no common law remedy against Trooper Colyar personally.

Even if such a common law remedy existed, however, and that

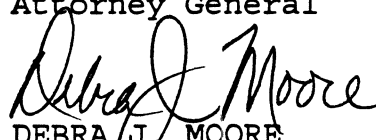
remedy was abrogated by section 63-30-4(4) of the Act, the open courts clause would not support Day's claim of a substitute remedy against the state. Contrary to Day's assertion, the Utah Governmental Immunity Act never provided such a substitute remedy; rather, the state has always been immune under the Act from liability for claims arising from the operation of emergency vehicles. Even if the Act did provide a "substitute" remedy against the state for Day's injuries, the open courts clause does not require the legislature to retain such a substitute remedy. Such a requirement would usurp the legislative function and violate fundamental notions of judicial restraint and separation of powers.

Moreover, the exception to the state's waiver of immunity provided by section 63-30-7 is inseverable from the remainder of the Act. Therefore, if this Court were to hold section 63-30-7 unconstitutional, it must strike down the entire Act. In that event, the state would be immune from Day's claims under the common law sovereign immunity principles.

For all of these reasons, the judgment below dismissing Day's claims should be affirmed.

RESPECTFULLY SUBMITTED this 8th day of April, 1994.

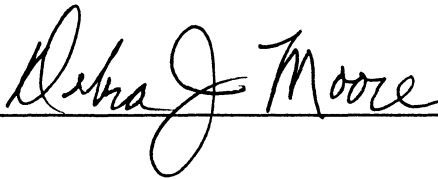
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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing Appellees' Supplemental Brief were mailed this 8th day of April, 1994, postage prepaid, to:

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ADDENDUM

1965 LAWS OF UTAH 139

Section 3. General Immunity in Exercise of Governmental Functions.

Except as may be otherwise provided in this act, all governmental entities shall be immune from suit for any injury which may result from the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function.

Section 7. Immunity Waived: Negligent Operation of Vehicle or Equipment by Agent—Exception.

Immunity from suit of all governmental entities is waived for injury resulting from the negligent operation by any employee of a motor vehicle or other equipment while in the scope of his employment; provided, however, that this section shall not apply to the operation of emergency vehicles as defined by law and while being driven in accordance with the requirements of Section 41-6-14, Utah Code Annotated 1953, as amended by Chapter 86, Laws of Utah, 1961.