

1993

Mary Day v. The State of Utah : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

IN THE UTAH COURT OF APPEALS

MENT

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

Plaintiff/Appellant, :

v. :

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

Defendants/Appellees. :

DOCKET NO. 930135-CA

Case No. 930135-CA

Priority No. 15

REPLY BRIEF OF APPELLANT

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

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FILED
Utah Court of Appeals

MAY 4 1993


Mary T. Noonan
Clerk of the Court

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REPLY TO DEFENDANTS' STATEMENTS OF FACTS

In their respective Briefs, both the State and City Defendants have set forth their own versions of the facts of this case. Plaintiff's Statement of Facts in her Appellant's Brief clearly and concisely sets forth the relevant facts of this case, with appropriate references to the record on appeal. The State and City Defendants have restated the facts, and inferences to be drawn therefrom, in a light most favorable to the Defendants, not the Plaintiff.

The Defendants' attempts to skew the facts in favor of their arguments are inappropriate and contrary to clear Utah law regarding the standard of appellate review to be applied by this Court upon review of the summary judgments granted for the Defendants. The facts must be considered by this Court as contended by Plaintiff, as if they were the only credible evidence before the Court. (See Standards of Appellate Review set forth on pp. 1-2 of Appellant's Original Brief).

In addition, the Defendants inappropriately include conclusions or beliefs of Trooper Colyar and Steven Floyd as "facts" regarding whether or not the respective Defendants were negligent in this case. The Defendants have used their Statements of Facts to inappropriately argue jury questions.

After reading the State's version of the facts of this case, this Court might conclude that the high-speed chase of the Floyd vehicle by Trooper Colyar was merely routine, went smoothly, and did not endanger the public. Nothing could be further from the truth. The truth is that this high-speed chase was totally out of control and endangered the lives and property of all members of the

general public on or near the roads and highways utilized in the chase. Indeed, the most tragic and sobering fact of all is that Plaintiff's husband was killed and Plaintiff was seriously and permanently injured as a direct result of this high-speed chase.

DETERMINATIVE CONSTITUTIONAL PROVISIONS,

STATUTES AND RULES

Any relevant text of constitutional provisions, statutes or rules determinative of or pertinent to the issues presented in this appeal is contained in Plaintiff's original Brief, the body of this Reply Brief, or in the Addendum to this Reply Brief.

ARGUMENT

POINT I

APPLICATION OF FORMER U.C.A. § 63-30-7(2) (AMENDED 1990 AND REPEALED 1991) TO PLAINTIFF VIOLATES THE OPEN COURTS PROVISIONS OF THE UTAH CONSTITUTION.

The Defendants, particularly the State Defendants, have misconstrued, mischaracterized, and apparently misunderstood Plaintiff's constitutional arguments in regard to why former U.C.A. § 63-30-7(2) violates the open courts provisions of Article I, Section 11 of the Utah Constitution if applied to Plaintiff's causes of action. The Defendants argue Plaintiff had no remedy at common law and therefore former Section 63-3-7(2) did not eliminate an existing common law remedy in violation of Article I, Section 11.

The State specifically argues it was absolutely immune from tort liability at common law, and even the proprietary/governmental

function distinction did not apply to the State.¹ Even if the proprietary/governmental function distinction is applied, the State argues that Trooper Colyar was engaged in a governmental function in the high-speed chase. Thus, the State argues, the State is totally immune because the State would have been immune at common law for injuries resulting from the pursuit. The conclusion of the State's argument is since Plaintiff had no remedy against the State under common law at the time of statehood, Plaintiff had no remedy or right to recover protected by the open courts provisions of Article I, Section 11 of the Utah Constitution.

The Defendants have completely missed the boat in regard to the thrust of Plaintiff's constitutional argument regarding violation of Article I, Section 11. As will be demonstrated below, the open courts violation occurs because the common law right to sue individual governmental employees for their negligent acts was eventually taken away by the Governmental Immunity Act, and former U.C.A. § 63-30-7(2) then took away the substitute remedy against governmental entities for the negligent acts of their employees. When this occurred, Plaintiff's constitutional right under the open

¹ The State points out that the arguments made in the State's Brief essentially reiterate, in abbreviated form, the arguments made by the Appellants and the State in Hipwell v. Sharp, Supreme Court No. 920218, which has been argued orally and is currently under advisement by the Utah Supreme Court. In Hipwell, as in the instant case, the State is arguing that the Utah Supreme Court erred in Condemarin v. University Hospital, 775 P.2d 348 (Utah 1989), by applying the proprietary/governmental function distinction to a state entity under early common law. This argument is a "red herring" and inapposite to the instant case. Plaintiff's constitutional arguments do not depend at all on the proprietary/governmental distinction or the State's common law tort liability.

courts provisions of the Utah Constitution to redress of her injuries in the courts was violated.

A. Governmental employees were liable for their negligent acts at common law.²

Commentators have recognized that under the early common law there was no distinction between the liability of public officials and ordinary citizens for negligence. See, e.g., W. Gellhorn and C. Byse, Administrative Law, § 8 at p. 335-36 (6th Ed. 1974); G. Bermann, Integrating Governmental and Officer Tort Liability, 77 Columbia L.Rev. 1175-78 (1977); J. Flemming, Tort Liability of Governmental Units and Their Officers, 22 U.Chi.L.Rev. 610, 635 (1955). For example, Professor Bermann wrote in the Columbia Law Review cited above:

The restlessness of the courts on the question of officer immunity reflects conflicting policy considerations. On the one hand, wrongdoing seems worth deterring or punishing whatever hat the wrongdoer happens to wear. Moreover, there is something anomalous about denying relief to a tort victim simply because he had the added misfortune of being injured by a public official rather than a private citizen. Thus, the common law traditionally did not distinguish between public officials and private individuals for purposes of determining the scope of personal tort liability. In fact, courts that drew such a distinction often imposed a stricter standard of care on officials than on private individuals, holding them personally liable for the consequences of simple non-negligent mistakes.

77 Columbia L.Rev. at 1178-79 (emphasis added).

Professor Bermann's article goes on to state that "more recently" courts have applied the discretionary/ministerial

² The arguments under Subpoint A of Point I of this Reply Brief substantially reiterate and/or expound upon arguments made by the Plaintiffs/Appellees in Hipwell v. Sharp, supra.

distinction to governmental employees in determining their personal liability. Id.

Professor Flemming expounded upon this issue in his article in the University of Chicago Law Review as follows:

The Anglo-American tradition did not include a theory of immunity from suit or from liability on the part of public officers. It was the boast of Dicey, often-quoted, that "[w]ith us every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." . . . [H]e was liable in very much the same way as a private individual, including the employee of a private business, would be. Thus, were an officer, authorized by statute to seize undried leather, mistakenly but in good faith seized what turned out to be dried leather, he was liable as a trespasser.

22 U.Chi.L.Rev. at 635 (emphasis added).

The common law on this issue in effect at the time of the adoption of the Utah Constitution in 1896 is well illustrated by Justice Holmes' decision in Miller v. Horton, 26 N.E. 100 (Mass. 1891). In that case, the town commissioners determined that the plaintiffs' horse had a contagious disease and ordered the Board of Health to destroy the animal. The trial court found that the horse did not in fact have the contagious disease, but held that the defendants were nevertheless protected from liability. Justice Holmes held that the man who killed the horse was not protected from liability by the fact that he had been ordered to do so by the commissioners if the horse did not have the contagious disease, and was fully liable for his wrongful act in destroying the horse. See also, Lowe v. Conroy, 97 N.W. 942 (Wis. 1904); Davie v. Regents of University of California, 227 P. 247 (Cal. 1924).

The Utah Supreme Court has also commented on this issue in the fairly recent case of Payne ex rel. Payne v. Myers, 743 P.2d 186 (Utah 1987), in which the Court stated that doctors as governmental employees had no immunity from suit for their simple negligence at common law. 743 P.2d at 188. The Court further stated as follows: "Generally, at common law, one who suffers injury to his person or property because of the negligence of another has a right of action in tort. 65A C.J.S. Negligence § 175, at 305 (1966)." (emphasis added). Id.

The discretionary ministerial distinction with respect to the liability of governmental employees appears to have its roots in the principle that judicial officers were absolutely immune from liability in discharging their functions. This principle was later expanded to quasi-judicial officers and then to administrative employees as well. W. Gellhorn and C. Byse, Administrative Law, supra, at p. 337-38. However, it does not appear that the discretionary/ministerial distinction immunizing governmental employees for discretionary acts gained much acceptance until the 1920's and 1930's, well after Utah became a state in 1896. See, e.g., Wasserman v. Kenosha, 258 N.W. 857 (Wis. 1935); Gottschalk v. Shepperd, 270 N.W. 573 (N.D. 1935).

B. The Utah Governmental Immunity Act has taken away the common law right to sue individual governmental employees for their negligent acts.

When the Utah Governmental Immunity Act became effective in 1966, it had no provisions regarding the immunity of governmental officials and employees. Its function was confined to governmental entities. Frank v. State, 613 P.2d 517, 520 (Utah 1980). In 1978, Section 63-30-4 of the Act (Addendum 1) was amended to provide that

governmental employees could only be personally liable for their gross negligence, fraud or malice. Thus, the common law right to sue individual governmental employees for simple negligence was first abrogated in 1978. Subsequently, in 1983, Section 63-30-4 was again amended to provide that a governmental employee could only be personally liable for fraud or malice, thus eliminating even the gross negligence cause of action (Addendum 2).

Pursuant to Section 63-30-4, the trial court in the instant case ruled that Defendants Ken Colyar, Brad James and Ed Asay (the pursuing police officers) must remain as parties to the lawsuit in a representative capacity only, but no personal liability can attach to these individual Defendants as a result of their representative status (R. 80-82, 345-346, 525-526).

Therefore, Plaintiff's common law right to sue said individual Defendants, and other as-yet unnamed governmental employees for their negligent acts and omissions, has been taken away by the Utah Governmental Immunity Act and the trial court's Orders applying the Act to Plaintiff's causes of action.

C. The Act, both prior and subsequent to the time former U.C.A. § 63-30-7(2) was in effect, has substituted a reasonably equivalent remedy against governmental entities.

In 1978, when the Act first took away the right to sue individual governmental employees for simple negligence, and again in 1983, when the Act further took away the right to sue even for gross negligence, the Act had substituted a reasonably equivalent remedy against a governmental entity employing the individual governmental employee. Sections 63-30-7 and 63-30-10 continued to provide a remedy against the governmental entity for the negligent acts and omissions of governmental employees.

Specifically in regard to Plaintiff's causes of action for negligence in the instant case for the high-speed pursuit, Section 63-30-7 waived immunity from suit of all governmental entities for injury resulting from the negligent operation of motor vehicles by governmental employees until 1990. Thus, the Act continued to offer a substitute remedy against governmental entities when it took away the right to sue individual governmental employees for simple negligence in 1978 and even gross negligence in 1983.

However, when subsection (2) to Section 63-30-7 was enacted and became effective in 1990, it provided for complete and total immunity for all governmental entities for injury resulting from the collision of a pursued vehicle in high-speed police pursuits. After an effective period of one year and six days, subsection (2) was repealed by the legislature, and a new subsection (15) was added to Section 63-30-10, which in effect reinstated the substitute remedy against governmental entities which had been in effect for the 24-year period from 1966 to 1990.

- D. Former U.C.A. § 63-30-7(2) violates the open courts provisions because it took away the remedy against governmental entities without providing any substitute remedy whatsoever.

During the one-year-and-six-day period that Section 63-30-7(2) was in effect, the open courts provisions of Article I, Section 11 of the Utah Constitution were violated because the substitute remedy of suing governmental entities for the negligent acts of their police officers involved in high-speed chases was eliminated. Thus, during this period of time, no remedy whatsoever was provided to an injured plaintiff for the common law right to sue for negligence. The Utah Supreme Court has consistently ruled that the failure of the legislature to provide a reasonably equivalent

remedy when it abrogates a common law right of action constitutes a violation of the open courts provisions of Article I, Section 11 of the Utah Constitution.³

E. Plaintiff's causes of action seek to vindicate rights protected by the open courts provisions of Article I, Section 11.

In Berry ex rel. Berry, supra, the Utah Supreme Court stated the following: "Article I, section 11 of the Utah Constitution is part of the Declaration of Rights. It declares that an individual shall have a right to a 'remedy by due course of law' for injury to 'person, property or reputation.'" 717 P.2d at 674. The Court in Berry goes on to define the term "rights" as it is used with reference to Article I, Section 11:

The term "rights" when used with reference to section 11, is used loosely. Section 11 protects remedies by due course of law for injuries done to the substantive interests of person, property, and reputation. What section 11 is primarily concerned with is not particular, identifiable causes of action as such, but with the availability of legal remedies for vindicating the great interest individuals in a civilized society have in the integrity of their persons, property, and reputations.

717 P.2d at 677, n. 4 (emphasis added).

Plaintiff's causes of action in the instant case seek remedies by due course of law for the negligent acts and omissions of the named Defendants and as-yet unnamed defendants if Plaintiff is

³ See Masich v. United States Smelting, Refining & Mining Co., 113 Utah 101, 191 P.2d 612, appeal dismissed, 335 U.S. 866 (1948); Berry ex rel. Berry v. Beach Aircraft Corp., 717 P.2d 670 (Utah 1985); Condemarin v. University Hospital, 775 P.2d 348 (Utah 1989); Payne ex rel. Payne v. Myers, 743 P.2d 186 (Utah 1987); Sun Valley Waterbeds of Utah, Inc. v. Herm Hughes & Son, Inc., 782 P.2d 188 (Utah 1989). All of these cases, with the exception of Masich, are discussed in Point II.A of Plaintiff's original Brief. Masich is discussed in detail by the Utah Supreme Court in Berry.

allowed her day in court. The vindication of Plaintiff's common law right to recover for injuries proximately caused by the negligent acts or omissions of others is clearly allowed under Utah law and indeed guaranteed by the Utah Constitution in Article I, Section 11.

Obviously, Plaintiff's particular, identifiable causes of action in the instant case would not have arisen in 1896 at the time of statehood, since motor vehicles had not yet been invented and there was no such thing as a high-speed chase. However, as clearly pointed out by the Utah Supreme Court in Berry, this fact is irrelevant. The important fact is that the open courts provisions protect remedies by due course of law for injuries to persons and property. Plaintiff's negligence causes of action clearly fall within the scope of the rights and remedies protected by Article I, Section 11.

The Defendants in their respective Briefs erroneously argue that Plaintiff's negligence claims are not recognized or remediable under Utah law, regardless of any application of the Utah Governmental Immunity Act. The Defendants seek to define the issues in this case as whether or not the pursuing police officers had a duty to protect innocent third parties from the fleeing driver's negligence or recklessness, and whether or not this would make the Defendants insurers of the acts of any such fleeing suspects.

The Defendants have completely misstated the issues and the nature of Plaintiff's negligence claims. Plaintiff does not seek a single penny from any of the Defendants for the negligence or recklessness of Steven Floyd, the fleeing driver. Plaintiff only seeks the opportunity for her day in court to present her negli-

gence claims to a jury to determine whether the Defendants should be held accountable for their own negligence. Indeed, the trial court has already entered an Order joining Steven Floyd as a party Defendant for purposes of comparing his negligence to that of the Defendants pursuant to U.C.A. §§ 78-27-38 through 78-27-41 (R. 528-529). Thus, it will be for the jury to determine what percentage of negligence responsible for Plaintiff's claims should be attributable to Floyd, the fleeing driver, and what percentage should be attributable to the various Defendants.

Plaintiff will not reiterate here the extensive case law cited in Point II.B of her original Brief, which establishes the clear legal duty of pursuing police officers to innocent third parties in high-speed chases and the validity of negligence causes of action in such cases. A legal duty of due care is clearly imposed by Utah law on police officers engaged in high-speed pursuits, both under U.C.A. § 41-6-14 and under the common law irrespective of any statutory obligation.⁴ Plaintiff also pointed out to the Court in her original Brief that at least thirty-five cases from jurisdictions outside Utah have held that a legal duty exists in high-speed chase cases analogous to Plaintiff's case and that the plaintiffs in each of these thirty-five cases had valid causes of action.⁵

The State makes a specious argument and attempts to summarily dismiss the holdings of the Utah Supreme Court in Cornwall v. Larsen, supra. Plaintiff would point out to the Court that

⁴ See the discussion of the following cases on pp. 24-26 of Plaintiff's original Brief: Howe v. Jackson, 421 P.2d 159 (Utah 1966); Cornwall v. Larsen, 571 P.2d 925 (Utah 1977); and Malan v. Lewis, 693 P.2d 661 (Utah 1984).

⁵ See pp. 26-30 of Plaintiff's original Brief.

Cornwall has been cited with approval by the Utah Supreme Court in the subsequent cases of Frank v. State, 613 P.2d 517, 520 (Utah 1980), and Condemarin v. University Hospital, 775 P.2d 348, 351, 382 (Utah 1989). It is surprising that the State would attempt to simply disregard the interpretation of U.C.A. § 41-6-14 by the Utah Supreme Court in Cornwall.

It is also somewhat surprising that the State would make the tenuous argument that Section 41-6-14 does not impose a legal duty of due care on emergency vehicle operators, when the express language of said statute clearly imposes such a duty. The State also vainly attempts to distinguish Section 41-6-14 from the virtually identical statutes of other states which have held that this statute clearly imposes a duty of care on police officers involved in high-speed chases. The fact of the matter is that all of these emergency vehicle statutes have the same origin and are all virtually identical. The State's attempt to point out one or two words which are different in the various statutes is an argument totally without merit.

The State also erroneously relies on recent amendments to Section 41-6-14, contained in S.B. No. 79, passed in the 1993 general session of the Utah Legislature (Addendum 3). S.B. No. 79 was signed and approved by the Governor on March 12, 1993, and has an effective date of July 1, 1993. The State suggests that the amendments to Section 41-6-14 support the State's argument that this statute was not intended to impose a legal duty upon emergency vehicle operators.

Nothing could be further from the truth. In fact, exactly the opposition conclusion must be drawn from the amendments to Section

41-6-14 contained in S.B. No. 79. The amendments specifically delete the duty language contained in subsections (2)(c) and (3)(a) of the statute, thereby clearly recognizing that the deleted language imposed a statutory duty on all emergency vehicle operators to operate their vehicles so they do not endanger life or property and with regard for the safety of all persons.

The few cases cited by the Defendants in their respective Briefs are either factually inapposite to Plaintiff's causes of action in Utah because of different statutory schemes, or represent an archaic and disappearing viewpoint of a few jurisdictions; a viewpoint which is totally inconsistent and irreconcilable with the recent Utah Supreme Court decisions limiting and restricting governmental immunity as cited in Plaintiff's original Brief. In addition, many of the cases "string-cited" by the State on pp. 16-17 of the State's Brief have been overruled and/or do not support the State's arguments against Plaintiff's negligence claims under the facts of the instant case.

The Defendants rely heavily in their Briefs on the case of Thornton v. Shore, 666 P.2d 655 (Kan. 1983), for the argument that Plaintiff has no valid cause of action in the instant case. Plaintiff submits that Thornton is a poorly-reasoned, result-oriented decision which represents a dwindling minority of jurisdictions in this country. Moreover, most of the cases relied upon by the Thornton Court are either old, outdated cases; are statutorily or factually distinguishable; or have simply been reversed or overruled by subsequent case law.

For example, Chambers v. Ideal Pure Milk Co., 245 S.W.2d 589, 590-91 (Kan.App. 1952), is forty-one years old and completely

outdated by the modern trend of authority regarding negligence, pursuit cases and governmental immunity.

The Thornton Court and the Defendants herein have also cited and relied upon State of West Virginia v. Fidelity & Casualty Co. of New York, 263 F.Supp. 88 (S.D.W.Va. 1967). This case, which ostensibly applied West Virginia law in 1967, has clearly been rejected by the recent case of Peak v. Ratliff, 408 S.E.2d 300 (W.Va. 1991). In Peak, the Supreme Court of Appeals of West Virginia specifically rejected the standard set out by the Kansas Supreme Court in Thornton which gives total immunity to the pursuing officer. Moreover, the Thornton Court's conclusion that the fleeing driver is the only party responsible for the injuries arising from the collision between the pursued vehicle and that of an innocent third party was also flatly rejected. 408 S.E.2d at 306, 307.

The Defendants also heavily rely upon the case of Reenders v. City of Ontario, 137 Cal.Rptr. 736 (Cal.App. 4 Dist. 1977). This case is the only California case which supports the erroneous arguments advanced by the Defendants in the instant case. The fact of the matter is that Reenders is a sixteen-year old rogue decision which has fallen into complete disfavor, even in California, as none of the other districts have followed it. All of the other California districts of the Court of Appeals, and the United States District Court for the Central District of California (applying California law), have held that police in a pursuit of a suspect have a legal duty to drive in such a manner as to not impose on others an unreasonable risk of harm, which includes when the

motorist being pursued by the police collides with an innocent victim.⁶

The Defendants' heavy reliance on Kelly v. City of Tulsa, 791 P.2d 826 (Okla.App. 1990), is also misplaced. In Kelly, the pursuit lasted approximately one minute, for a distance of one and one-quarter miles, at a speed estimated at 60-65 miles per hour, and only two other vehicles were on the road during the pursuit. The Kelly Court specifically held that under the undisputed facts of this case, "unlike the cases relied upon by Plaintiff" the "pursuit was not so extreme or outrageous as to pose a higher threat to public safety than ordinarily incident to high-speed police pursuit." (emphasis added). 791 P.2d at 829. Thus, it is clear the Oklahoma Court of Appeals based its decision on the "routine" nature of the pursuit in that case. The Kelly case is clearly factually inapposite to the extreme, out-of-control pursuit in the instant case. Furthermore, the Oklahoma Court of Appeals in Kelly relied almost exclusively on the poorly-reasoned case of Thornton v. Shore, supra.

POINT II

APPLICATION OF FORMER U.C.A. § 63-30-7(2) (AMENDED 1990 AND REPEALED 1991) TO PLAINTIFF VIOLATES THE EQUAL PROTECTION AND DUE PROCESS PROVISIONS OF THE UTAH CONSTITUTION.

The arguments by both the State and City Defendants in opposition to Plaintiff's claims of equal protection and due

⁶ See Stark v. City of Los Angeles, 214 Cal.Rptr. 216 (Cal.App. 2 Dist. 1985); Duarte v. City of San Jose, 161 Cal.Rptr. 140 (Cal.App. 1 Dist. 1980); Gibson v. City of Pasadena, 148 Cal.Rptr. 68 (Cal.App. 2 Dist. 1978); City of Sacramento v. Superior Court, 182 Cal.Rptr. 443 (Cal.App. 3 Dist. 1982); West v. United States, 617 F.Supp. 1015 (D.C. Cal. 1985) (applying California law).

process violations rest entirely upon the erroneous argument that former U.C.A. § 63-30-7(2) did not abrogate Plaintiff's rights under the open courts provisions of Article I, Section 11 of the Utah Constitution. Based upon this faulty premise, the Defendants argue that Plaintiff has never had a valid cause of action under Utah law, and there can therefore be no equal protection or due process violation. As already established in Point I of this Reply Brief, supra, these arguments by Defendants are fallacious because Plaintiff's negligence claims in the instant case seek vindication of rights clearly protected under Article I, Section 11. Thus, the Defendants essentially have no argument left challenging Plaintiff's arguments that she has been denied equal protection and due process under Article I, Section 24 and Article I, Section 7 of the Utah Constitution.

Plaintiff will not reiterate here the equal protection and due process arguments set forth in Points III and IV of her original Brief. Plaintiff would emphasize to the Court that the "heightened scrutiny" standard applied in Condemarin v. University Hospital, supra, is the proper standard to apply in the instant case. In that case, the Utah Supreme Court applied the heightened scrutiny standard in analyzing the equal protection and due process issues and properly determined that a mere damage limitation on potential recovery from the University Hospital violated equal protection and due process, as well as the open courts provisions of the Utah Constitution. The Condemarin decision recognized that even a mere damage limitation severely restricted the important substantive right of an individual to recover for personal injuries. The Court noted that the classifications created by the statute in question

interfered with the "fundamental principle of American law that victims of wrongful or negligent acts should be compensated to the extent that they have been harmed." 775 P.2d at 354. The Court, citing a 1975 decision by the Washington Supreme Court, further observed the following:

The right to be [compensated] for personal injuries is a substantial property right, not only of monetary value but in many cases fundamental to the injured person's physical well-being and ability to continue to live a decent life. (citation omitted).

775 P.2d at 360.

In the instant case, the restriction of Plaintiff's rights is far more egregious than the damage limitation in Condemarin. Plaintiff's access to the courts for redress of her injuries has been totally eliminated by application of former U.C.A. § 63-30-7(2), not just restricted as in Condemarin. Plaintiff respectfully submits that the equal protection and due process violations are clear in Plaintiff's case, either under the heightened scrutiny standard or under the traditional rational basis standard.

As pointed out in Plaintiff's original Brief, U.C.A. § 63-30-7(2) was passed by the legislature based upon significant misinformation and untrue statements, and also upon a phantom crisis fearing a rash of "frivolous" lawsuits being filed in police pursuit situations. In the instant case, the Defendants did not present one iota of evidence indicating that a single "frivolous" lawsuit had ever been filed in the State of Utah by an innocent victim to recover from injuries incurred from a high-speed chase. Furthermore, Plaintiff believes that no such evidence exists, and

that there has never been a "frivolous" lawsuit filed in Utah in this regard.

POINT III

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

U.C.A. § 63-30-10(1) retains governmental immunity for governmental entities for negligent acts or omissions of an employee when the injury arises out of a discretionary function. Except in response to the Defendants' erroneous arguments regarding application of the discretionary/ministerial distinction, Plaintiff will not reiterate the arguments set forth in Point V of her original Brief.

However, it is necessary to point out again that the Defendants have absolutely disregarded the clear holding of the Utah Supreme Court in Cornwall v. Larsen, 571 P.2d 925 (Utah 1977). Cornwall held that a police officer responding to an emergency situation in his police car is an employee performing a ministerial act and not a discretionary act. 571 P.2d at 927. The subsequent case of Frank v. State, 613 P.2d 517, 520 (Utah 1980), cited by the State in its Brief, clearly reaffirms the holding in Cornwall. Therefore, it is simply beyond question and should be laid to rest that the pursuing police officers in the high-speed chase in the instant case were performing ministerial acts, and therefore their respective governmental employers are not immune from suit under U.C.A. § 63-30-10(1).

Plaintiff's First Amended Complaint also contains causes of action against the Defendant governmental entities for negligent training and supervision of police officers regarding high-speed

pursuits, and negligent implementation of procedures to be used in such high-speed pursuits. The Defendants mistakenly rely on Little v. Utah State Division of Family Services, 667 P.2d 49 (Utah 1983), and Doe v. Arguelles, 716 P.2d 279 (Utah 1985). Both of these cases support Plaintiff's argument that the alleged negligence of the as-yet unnamed individuals responsible for training, supervision and implementation of procedures occurred during the performance of ministerial functions.

In Little, the Utah Supreme Court held that the failure of the Division of Family Services to properly evaluate a foster home, supervise a child's placement, and protect her from harm constituted a breach of conduct implemental in nature and thus properly held actionable when found to be negligent. 667 P.2d at 52. In Doe, the Utah Supreme Court held that the negligent supervision of a juvenile released into the community on probation was not protected as a discretionary function. The Court stated that: "A decision or action implementing a preexisting policy is operational in nature and is undeserving of protection under the discretionary function exception." (emphasis added). 716 P.2d at 283.

The training and supervision of police officers and the implementation of procedures to be used in high-speed pursuits are operational in nature and merely implement the preexisting policy of the Department of Public Safety to identify and apprehend violators of the criminal law, utilizing pursuit driving when necessary. Therefore, Plaintiff's negligence claims regarding training, supervision and implementation of procedures are based upon the ministerial functions of the various responsible employees.

POINT IV

QUESTIONS REGARDING CAUSATION AND NEGLIGENCE OF THE DEFENDANTS ARE QUESTIONS OF FACT FOR THE JURY TO DETERMINE.

A. Summary judgment was improperly granted for the State Defendants.

Plaintiff has fully briefed the causation and negligence issues presented by the instant case in Point VI of her original Brief, and will not reiterate those arguments here. Suffice it to say that clear Utah law and the overwhelming weight of authority from jurisdictions throughout the country provide that issues of proximate causation and negligence are questions of fact to be determined by the finder of fact, and cannot be resolved as a matter of law on motions for summary judgment.⁷

Surprisingly, the State actually puts forth the specious argument that summary judgment was properly granted against Plaintiff even under a gross negligence standard, rather than a simple negligence standard. The State completely ignores decisions of the Utah Supreme Court and mistakenly relies entirely on a few factually inapposite decisions from other jurisdictions. Furthermore, the Utah Supreme Court has flatly stated that the ordinary

⁷ The Utah case law is set forth on pp. 40-43 of Plaintiff's Original Brief. Although there are no Utah appellate cases directly dealing with high-speed pursuit situations such as presented in the instant case, the Utah Supreme Court has consistently held that issues of proximate cause and negligence are factual issues and cannot be resolved as a matter of law on summary judgment. On pp. 43-45 of her original Brief, Plaintiff cites twenty-one cases from jurisdictions outside of Utah which have held summary judgment on the issues of negligence (breach of duty) and proximate cause is inappropriate in cases involving high-speed pursuits where the pursued vehicle causes injury to a third person.

reasonable care standard applies to operators of emergency vehicles and all motor vehicles in general.⁸

Moreover, the State Defendants, apparently disregarding the fact that they were the prevailing parties on their motions for summary judgment, inappropriately attempt to skew the facts of this case in their favor by claiming that the "danger involved in the pursuit did not clearly exceed the legitimate need to immediately apprehend Floyd, who Colyar reasonably suspected of having engaged in conduct considerably more serious than a speeding violation." This statement is clearly contrary to the facts of this case. The facts are that Colyar had absolutely no reason whatsoever to suspect Floyd of having engaged in conduct any more serious than a speeding violation, and the pursuit clearly exceeded the legitimate need to apprehend Floyd. Moreover, Plaintiff is entitled to have all facts and inferences drawn therefrom viewed by this Court in a light most favorable to Plaintiff, not the State.

The State also argues it was not foreseeable that Floyd would "act so recklessly as to run a red light" and strike another vehicle, and "the risk involved in this pursuit was no greater than the risk ordinarily involved in a high-speed pursuit." The truth of the matter is the facts of this case compel the opposite conclusion. Floyd was exceeding 120 miles per hour, running cars off the road, and in fact crashed into a semi-truck on the on-ramp to I-15 from Spanish Fork towards Provo and still proceeded to try to outrun the pursuing officers. Furthermore, whether or not it was

⁸ See Howe v. Jackson, 421 P.2d 159, 161-62 (Utah 1966); Cornwall v. Larsen, 571 P.2d 925, 928-29 (Utah 1977); Malan v. Lewis, 693 P.2d 661, 673 (Utah 1984); all cited and discussed, supra.

"foreseeable" that Floyd would injure an innocent third party is precisely the proximate cause issue which the Utah Supreme Court has directly held is a question of fact which precludes summary judgment.

B. Summary judgment was improperly granted for the City Defendants.

For the same reasons that summary judgment was improperly granted for the State Defendants, it was also improperly granted for the City Defendants. The City Defendants' entire argument rests on the proposition that Officers James and Asay were not the initial pursuing officers, and since they were in pursuit behind Trooper Colyar they cannot be negligent as a matter of law. Plaintiff submits that this is an untenable argument.

Whether or not the fleeing driver, Steven Floyd, ever saw Officers James or Asay in his rear-view mirror, or whether or not James or Asay might have been able to "leap frog" past Trooper Colyar during the chase, are simply not the relevant issues in this case. According to the theory of the City Defendants, if James or Asay had been able to pass Trooper Colyar and be the lead chase car behind Floyd, then they would have been liable, and not Colyar. The fact that Floyd may have only seen Colyar in his rear view mirror is irrelevant, as the important issue is whether James and Asay contributed to the "zone of danger" created by the high-speed pursuit, and whether it was foreseeable that Floyd might injure an innocent third party. These are clearly questions of fact to be decided by the finder of fact, and preclude summary judgment for the City Defendants in the instant case. It is the province of the jury to apportion the negligence among the various pursuing police

officers and governmental entities. The trial court usurped the function of the jury by granting the City Defendants' motion for summary judgment.

POINT V

SOUND PUBLIC POLICY DEMANDS JUDICIAL ACCOUNTABILITY FOR HIGH-SPEED PURSUITS WHICH INJURE OR KILL INNOCENT BYSTANDERS.

Since Plaintiff's deceased husband, Boyd Day, was killed on March 18, 1991, at least three other totally innocent people have died in Utah as a direct result of high-speed chases in which the fleeing driver killed an innocent victim. In all four of these cases, the initial justification for the pursuit involved a minor misdemeanor traffic violation. Indeed, statistics show that approximately seventy-two percent (72%) of all chases stem from traffic violations. Panic by the suspected offender, often times involving a fear of losing a drivers license, is the common reason for attempting to outrun the police. In addition to the four innocent people killed in the past two years or so, several innocent people have been severely injured, including Plaintiff; and at least two fleeing suspects themselves have been killed in high-speed chases.⁹

Because of these deaths caused by high-speed police pursuits, Chief Ruben Ortega of the Salt Lake City Police Department announced a new policy in January of 1993 for high-speed pursuits. Noting that six people had been killed in Salt Lake County during

⁹ All of the above information is taken from a newspaper article: Norma Wagner, Police Chases: Deadly Force at High Speed, Salt Lake Tribune, Sunday, November 22, 1992, at A1 and A10-11. Plaintiff would refer the Court to this article which takes approximately two full newspaper pages for a detailed analysis of high-speed police chases in Utah.

the past two years as a result of police pursuits, Chief Ortega stated the Salt Lake City Police can no longer afford to pursue those suspected of misdemeanors and traffic violations. Consequently, Chief Ortega and the Salt Lake City Police Department adopted a new policy which now limits pursuits to suspects of violent crimes such as robbery, rape, burglary, and homicide.¹⁰

The Defendants argue in their respective Briefs that "sound public policy" weighs against imposing any liability whatsoever for police pursuit of fleeing violators, regardless of the risk created to the general public. The trial court in its Minute Entry Ruling and Orders Granting the Defendants' Motions for Summary Judgment also ruled that the appropriate public policy in Utah is to completely insulate police officers and their governmental employers from any liability for high-speed chases (R. 530-535, 545, 548).

Plaintiff respectfully submits that sound public policy demands judicial accountability of police officers and their governmental employers for high-speed pursuits which injure or kill totally innocent bystanders. There is simply no justification for high-speed chases of drivers suspected of minor traffic violations. Plaintiff's response to the argument of the Defendants and the trial court that a fleeing suspect can evade police by driving at a high rate of speed into a congested traffic area is "so be it." Is the life of a totally innocent human being worth the necessity to apprehend a fleeing driver suspected of a minor traffic

¹⁰ All the above information is taken from a newspaper article: Chris Jorgensen, Salt Lake Police Hit Brakes on Pursuit Policy, Set Up Review Boards, Salt Lake Tribune, January 30, 1993, at C1.

violation? Plaintiff submits that sound public policy must answer this question strongly in the negative.

If various police agencies continue to insist on engaging in high-speed pursuits involving suspected minor traffic violators, the only way to hold such agencies accountable is to ensure they are liable for their own negligence in any such chases. Police officers and their governmental employers cannot be given carte blanche authority and immunity in regard to the pursuit of minor traffic violators. Such high-speed pursuits create inherently dangerous and unnecessary risks to the general public which cannot be justified.

CONCLUSION

For all the foregoing reasons and those set forth in Plaintiff's original Brief, it is respectfully submitted that the judgment of the trial court should be reversed in its entirety, and Plaintiff should be allowed to proceed to trial on her First Amended Complaint.

DATED this 4 day of MAY, 1993.

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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 4 day of May, 1993, to:

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ADDENDUM 1

Section 1. Section amended.

Section 63-30-2, Utah Code Annotated 1953, as enacted by Chapter 139, Laws of Utah 1965, as amended by Chapter 103, Laws of Utah 1973, is amended to read:

63-30-2. Definitions.

As used in this act:

(1) The word "state" shall mean the state of Utah or any office, department, agency, authority, commission, board, institution, hospital, college, university or other instrumentality thereof;

(2) The words "political subdivision" shall mean any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or any other political subdivision or public corporation;

(3) The words "governmental entity" shall mean ~~[and include]~~ the state and its political subdivisions as defined herein;

(4) The word "employee" shall mean ~~[and include]~~ any officer, employee or servant of a governmental entity including student teachers certificated in accordance with section 53-2-15, educational aides, volunteers and tutors;

(5) The word "claim" shall mean any claim brought against a governmental entity or its employee ~~[as permitted by this act]~~ for which the entity may be liable;

(6) The word "injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, or estate, that would be actionable if inflicted by a private person or his agent.

Section 2. Section amended.

Section 63-30-3, Utah Code Annotated 1953, as enacted by Chapter 139, Laws of Utah 1965, is amended to read:

63-30-3. Immunity of governmental entities from suit.

Except as may be otherwise provided in this act, all governmental entities ~~[shall be]~~ are 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]~~ results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility.

Section 3. Section amended.

Section 63-30-4, Utah Code Annotated 1953, as enacted by Chapter 139, Laws of Utah 1965, is amended to read:

*** 63-30-4. Act provisions not construed as admission or denial of liability—
Effect of waiver of immunity—Exclusive remedy—Joinder of

employee—Limitations on personal liability.

Nothing contained in this act, unless specifically provided, is to be construed as an admission or denial of liability or responsibility in so far as governmental entities are concerned. Wherein immunity from suit is waived by this act, consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person.

The remedy against a governmental entity or its employee for an injury caused by an act or omission which occurs during the performance of such employee's duties, within the scope of employment, or under color of authority is, after the effective date of this act, exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless the employee acted or failed to act through gross negligence, fraud, or malice.

An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment or under color of authority, unless it is established that the employee acted or failed to act due to gross negligence, fraud or malice.

Section 4. Section amended.

Section 63-30-5, Utah Code Annotated 1953, as enacted by Chapter 139, Laws of Utah 1965, as amended by Chapter 189, Laws of Utah 1975, is amended to read:

63-30-5. Waiver of immunity as to contractual obligations.

Immunity from suit of all governmental entities is waived as to any contractual obligation and actions arising out of contractual rights or obligations shall not be subject to the requirements of sections 63-30-11, 63-30-12, 63-30-13 or 63-30-19 of this act.

Section 5. Section amended.

Section 63-30-11, Utah Code Annotated 1953, as enacted by Chapter 139, Laws of Utah 1965, is amended to read:

63-30-11. Claim for injury—Notice—Claimant's petition for relief—Service—Legal disability effect.

Any person having a claim for injury to person or property against a governmental entity or its employee ~~[may petition said]~~ shall, before maintaining an action under this act, file a written notice of claim with such entity for ~~[any]~~ appropriate relief including ~~[the award of]~~ money damages. The notice of claim shall set forth a brief statement of the facts and the nature of the claim asserted, shall be signed by the person making the claim or such person's agent, attorney, parent or legal guardian, and shall be

(5) ~~[The word "claim" shall mean]~~ "Claim" means any claim ~~[brought]~~ or cause of action for money or damages against a governmental entity or ~~[its]~~ against an employee ~~[for which the entity may be liable]~~:

(6) ~~[The word "injury"]~~ "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, or estate, that would be actionable if inflicted by a private person or his agent:

(7) "Personal injury" means an injury of any kind other than property damage:

(8) "Property damage" means injury to, or loss of, any right, title, estate, or interest in real or personal property.

Section 3. Section amended.

Section 63-30-4, Utah Code Annotated 1953, as last amended by Chapter 27, Laws of Utah 1978, is amended to read:

*** 63-30-4. Act provisions not construed as admission or denial of liability—
Effect of waiver of immunity—Exclusive remedy—Joinder of employee—
Limitations on personal liability.

(1) Nothing contained in this ~~[act]~~ chapter, unless specifically provided, ~~[is to]~~ shall be construed as an admission or denial of liability or responsibility in so far as governmental entities or their employees are concerned. ~~[Wherein]~~ If immunity from suit is waived by this ~~[act]~~ chapter, consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person.

(2) Nothing in this chapter shall be construed as adversely affecting any immunity from suit which a governmental entity or employee may otherwise assert under state or federal law.

(3) The remedy against a governmental entity or its employee for an injury caused by an act or omission which occurs during the performance of such employee's duties, within the scope of employment, or under color of authority is, after the effective date of this act, exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless the employee acted or failed to act through ~~[gross negligence]~~ fraud or malice.

(4) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee ~~[shall]~~ may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment or under color of authority, unless it is established that the employee acted or failed to act due to ~~[gross negligence]~~ fraud or malice.

Section 4. Section amended.

Section 63-30-5, Utah Code Annotated 1953, as last amended by Chapter 27, Laws of Utah 1978, is amended to read:

Section 3. Section 41-6-14, Utah Code Annotated 1953, as last amended by Chapter 138, Laws of Utah 1987, is amended to read:

41-6-14. Emergency vehicles -- Policy regarding vehicle pursuits -- Applicability of traffic law to highway work vehicles -- Exemptions.

(1) The operator of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges under this section, subject to ~~[Subsection]~~ Subsections (2) through (4).

(2) The operator of an authorized emergency vehicle may:

(a) park or stand, irrespective of the provisions of this chapter;

(b) proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

(c) exceed the maximum speed limits ~~[if--the--operator--does--not--endanger--life--or--property]~~; or

(d) disregard regulations governing direction of movement or turning in specified directions.

(3) Privileges granted under this section to the operator of an authorized emergency vehicle, who is not involved in a vehicle pursuit, apply only when the operator of the vehicle sounds an audible signal under Section 41-6-146, or uses a visual signal as defined under Section 41-6-132, which is visible from in front of the vehicle.

~~[(a)--The--privileges--under--this--section--do--not--relieve--the--operator--of--an--authorized--emergency--vehicle--from--the--duty--to--operate--the--vehicle]~~

~~with-regard-for-the-safety-of-all-persons;-or-protect-the--operator--from
the-consequences-of-an-arbitrary-exercise-of-the-privileges-]~~

(4) Privileges granted under this section to the operator of an authorized emergency vehicle involved in any vehicle pursuit apply only when:

(a) the operator of the vehicle sounds both an audible signal under Section 41-6-146 and uses a visual signal as defined under Section 41-6-132, which is visible from in front of the vehicle;

(b) the public agency employing the operator of the vehicle has, in effect, a written policy which describes the manner and circumstances in which any vehicle pursuit should be conducted and terminated;

(c) the operator of the vehicle has been trained in accordance with the written policy described in Subsection (4)(b); and

(d) the pursuit policy of the public agency is in conformance with standards established by the Department of Public Safety, Division of Peace Officer Standards and Training, which shall adopt minimum standards that shall be incorporated into all emergency pursuit policies adopted by public agencies authorized to operate emergency pursuit vehicles.

[~~(b)~~] (5) Except for Sections 41-6-13.5, 41-6-44, and 41-6-45, this chapter does not apply to persons, motor vehicles, and other equipment while actually engaged in work upon the surface of a highway. However, the entire chapter applies to those persons and vehicles when traveling to or from the work.

Section 4. Section 53A-16-101, Utah Code Annotated 1953, as enacted by Chapter 2, Laws of Utah 1988, is amended to read: