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Helen C. Emery, As Guardian Ad !Item For Brent Wesley Varley, Patrick J. Varley And Mark Robert Varley And Christine Varley v. The State of Utah, A Sovereign And John Doe; Whose True Names Are Unknown, Agents And Employees of the State of Utah At The Utah State Hospital : Brief of Appellants

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IN THE SUPREME COURT OF THE STATE OF UTAH

HELEN C. EMERY, as guardian ad litem for Brent Wesley Varley, Patrick J. Varley and Mark Robert Varley, minors; and CHRISTINE VARLEY,

Plaintiffs-Appellants,

vs.

THE STATE OF UTAH, a sovereign, and JOHN DOE; whose true names are unknown, agents and employees of the State of Utah at the Utah State Hospital,

Defendants-Respondents.

Case No. 12173

BRIEF OF APPELLANTS

Appeal from a Summary Judgment, Third Judicial District, Honorable Gordon R. Hall, presiding

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Defendants-Respondents.

Case No. 12173

STATEMENT OF KIND OF CASE

This is an appeal from the entry of a summary judgment dismissing appellants' complaint. Appellants brought an action for wrongful death against the State of Utah and its agents and employees of the Utah State Hospital, wherein it was claimed that appellants' decedent died as a result of negligent and improper care and

treatment while a voluntary patient at the Utah State Hospital.

DISPOSITION IN LOWER COURT

After the filing of appellants' wrongful death action, the respondents in their answer alleged a lack of jurisdiction on the ground that the State and its agents are immune, through governmental immunity, from suit. Appellants filed a motion to strike those portions of the answer interposing this defense. The trial court denied appellants' motion to strike and granted respondents' motion for a summary judgment of dismissal.

RELIEF SOUGHT ON APPEAL

The appellants seek a reversal of the summary judgment of dismissal, and an order remanding this case to the Third Judicial District for further proceedings.

STATEMENT OF FACTS

Arta Geann Varley, the deceased daughter of appellant, Helen C. Emery, and deceased mother of appellant Christine Varley, on the 7th day of August, 1968 made application to the Utah State Hospital for treatment. The application (Exhibit 1-P) sets forth the essential facts surrounding the circumstances of her admission. Doctors R. Jan Stout and Peter L. Nielsen,

two psychiatrists in private practice in Salt Lake City, signed the application for admission.

On August 9, 1968, the decedent sustained a serious head injury while a patient at the Utah State Hospital following her admission. The nature of the injury required her transfer from her treatment facility to the medical-surgical ward of the Utah State Hospital. Early on August 10, 1968, the extent of the injury suffered by Mrs. Varley lead to her transfer to the University of Utah Medical Center at Salt Lake City. Mrs. Varley died following unsuccessful surgery on August 10, 1968. On November 14, 1968, a claim was filed with the State of Utah claiming $300,000 damages (R. 12). This claim was filed pursuant to the Utah Governmenal Immunities Act [U.C.A. 63-30-1 et. seq. (Repl. Vol. 1965)]. No action was taken by the respondents on the claim and, pursuant to the applicable statutes, appellants, having deemed their claim denied, filed a Complaint in the instant action alleging that the injuries resulting in Mrs. Varley's death were caused by the negligent, careless and wrongful activities or omissions of the agents and employees of the State of Utah. The State alleged in its answer a defense of sovereign immunity (R. 16) stating that "plaintiff's claim is barred by the provisions of Section 63-30-10(10) in that decedent was incarcerated in the Utah State Hospital."

U.C.A. 63-30-10(10) provides that immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of any

employee committed within the scope of his employment, except if the injury:

> ". . . (10) arises out of the incarceration of any person in any state prison, county or city jail or other place of legal confinement . . ."

The appellants filed a motion to strike the portion of the respondents' answer wherein the respondents claim that the action was barred by sovereign immunity (R. 18). On the 31st day of March, 1970, the attorneys for the parties appeared before Judge Hall and argued the motion to strike. In connection with the arguments, memoranda of authority were submitted by both parties (R. 29-32, 33-38). The trial court denied appellants' motion to strike and upon motion of counsel for the respondents a summary judgment was entered on the 11th day of June, 1970. This summary judgment stated that "it appears to the court upon the pleadings, admissions and arguments of the parties that the Utah State Hospital is an institution of legal confinement and that plaintiffs' decedent was confined therein at the time of the trauma which ultimately resulted in her death. The statute involved herein in such case, cannot, therefore, be construed to waive the defense of sovereign immunity; . . . " (R. 39).

It is from the entry of that judgment that appellants bring this appeal.

POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE UTAH STATE HOSPITAL, UNDER THE CIRCUMSTANCES OF DECEDENT'S ADMISSION, WAS A PLACE OF LEGAL CONFINEMENT AND THAT IMMUNITY FROM SUIT HAD NOT BEEN WAIVED.

ARGUMENT

The circumstances of the admission is determinative of a finding that an institution constitutes a place of legal confinement under the Utah Governmental Immunities Act.

The statutes provide five ways by which persons may be admitted to the Utah State Hospital. Two of the procedures are non-emergency in nature, while three of them are procedures of an emergency nature. Of the non-emergency procedures, U.C.A. 64-7-29 (Repl. Vol. 1968) provides for voluntary application by the individual and acceptance for treatment by the superintendent of the Utah State Hospital. That statute provides:

> "The superintendent of the Utah State Hospital may admit for observation, diagnosis, care and treatment any individual who is mentally ill or has symptoms of mental illness and who, being 16 years or over, applies therefor, and any individual under 16 years of age who is mentally ill

> or has symptoms of mental illness, if a parent or legal guardian applies therefor in his behalf." [U.C.A. 64-7-29 (Repl. Vol. 1968)].

The language of this section originates with the National Institute of Mental Health, Federal Security Agency, Draft Act Governing Hospitalization of the Mentally Ill (Public Health Service Pub., No. 51, 1951). Although the Federal Draft Act states that subject to the availability of suitable accommodations the head of a public hospital *shall admit* voluntary applicants, the change from the imperative to the permissive in Utah's case should not be determinative of the factors urged on this appeal. [See Branch, *Utah's Experience with the National Draft Act for Hospitalization of the Mentally Ill,* 109 Am. J. Psych. 336 (1952)].

The other non-emergency procedure for admitting patients to the Utah State Hospital is the standard non-judicial hospitalization procedure which, also taken from the Federal Draft Act, authorizes the hospitalization by the superintendent of persons upon the written application of individuals in specific relationship to the proposed patient. The application, however, must be accompanied by a certificate signed by two designated examiners stating that the individual is mentally ill and is either dangerous to himself or others, or that he is in need of care or treatment in a mental hospital and further, because of his incapacity, this individual lacks the insight to make a responsible application therefor. [U.C.A. 64-7-33(A) (1) (Repl. Vol. 1968)]. The three remaining procedures involve an exercise of the police

power to restrain dangerously ill individuals, not involved in the instant case.

Exhibit 1-P contains copies of the admission sheets of the Utah State Hospital which were, for the most part, filled out at the time the decedent entered the State facility. The second page of the exhibit is purported to be an "Application for Admission to the Utah State Hospital (Standard Non-Judicial Procedure, 85-7-59 (sic.) Laws of Utah, 1951)." The application form further contains the certificate of the "designated examiners", Doctors R. Jan Stout and Peter N. Nielsen. It is interesting to note that the application is signed by the decedent, Mrs. Varley.

As previously noted under the standard non-judicial procedure, any individual may be admitted to the Utah State Hospital upon written application of a friend, relative, spouse, or guardian of the individual, a health or public welfare or peace officer or the head of any institution in which such individual may be. [U.C.A. 64-7-33(A)(1) (Repl. Vol. 1968)]. This section further states that there be certification by two designated examiners.

Of the five procedures available for admission, there is only one procedure under which the persons seeking care and treatment at the hospital can themselves make application for such care and treatment. That is the voluntary procedure as set forth in U.C.A. 64-7-29 (Repl. Vol. 1968).

Notwithstanding the misleading use of a standard non-judicial procedure form for Mrs. Varley's hospitalization, and notwithstanding the completely superfluous and incomplete certification by the two Salt Lake City psychiatrists, Doctors Stout and Nielsen, it is clear that Mrs. Varley was accepted as a voluntary patient and as such was entitled to the rights and protections given her by Sections 64-7-30 and 64-7-31, U.C.A. (Repl. Vol. 1968).

The last cited section states:

> "A voluntary patient who requests his release or whose release is requested, in writing, by his legal guardian, parent, spouse, or adult next-of-kin, *shall be released forthwith* except that,
>
> (1) If the patient was admitted on his own application and the request for release is made by a person other than the patient, release may be conditioned upon the agreement of the patient thereto, and . . .
>
> (3) If the superintendent of the hospital, within 48 hours from the receipt of the request, files with the District Court or a judge thereof a certification that in his opinion the relase of the patient would be unsafe for the patient or others, release may be postponed on application for as long as the court or judge thereof determine to be necessary for the commencement of proceedings for judicial hospitalization, but in no event for more than five days, provided that judicial proceedings for hospitalization shall not be commenced with respect to a voluntary patient unless release of the patient has been requested by himself or the individual who applied for his admission." (Emphasis added.)

Nothing is contained in the record indicating a request from Mrs. Varley for her release nor is there an indication that any other person had requested her release or, that even assuming such a written request, that the superintendent of the hospital, in a timely manner, filed a certificate to postpone Mrs. Varley's release.

The decedent, Arta Geann Varley, voluntarily admitted herself to the State Hospital and was accepted for care and treatment. By virtue of the statutes governing the procedures at the Utah State Hospital Mrs. Varley could have, at her written request, been released forthwith.

The problem then becomes one of discovering the true intent and meaning of the legislative words withholding jurisdiction for an injury which " . . . arises out of the incarceration of any person in any state prison, county or city jail, or other place of legal confinement . . . ". [U.C.A. 64-30-10(10) (Repl. Vol. 1968)]. It must be presumed that the legislative waiver of sovereign immunity in point here was the result of thoughtful consideration and that the exceptions to the waiver reflect legislative policy.

By the nature of government, a state must engage in activities which by their nature create large amounts of risk. Operating jails and prisons is that type of activity. Clearly the legislature has not waived its immunity in cases arising out of the assault of one inmate upon another at the State Prison. [*Sheffield vs. Turner*,

21 U.2d 314, 445 P.2d 367 (1968)]. Cases such as prison stabbings, riots, and similar circumstances are clearly within the exception created by subparagraph 10 of U.C.A. 63-30-10; however, it is only reasonable to regard certain institutions as having multiple uses and multiple characteristics for the purposes of interpreting that subparagraph. The appellants here urge that the Utah State Hospital is of such a character that depending upon the circumstances of admission and circumstances of continued custody and treatment an individual may or may not be in a place of legal confinement. The clear case of the State Hospital being a place of legal confinement would be the individual serving a commitment to the state prison at the Utah State Hospital pursuant to the transfer procedures provided in the Utah Code. These procedures provide that the Division of Corrections may order the transfer to the Utah State Hospital of any person who has been committed to the state prison, or upon order of the Governor, when an evaluation of the treatment needs of such a person, given the available facilities at the Utah State Hospital, indicate that such transfer would be in the interest of such person. Any person transferred pursuant to those provisions remains under the jurisdiction of the Utah State Prison with the Utah State Hospital acting solely as the agent of the prison. [U.C.A. 64-9-2 (Repl. Vol. 1968)] as amended U.C.A. 64-9-3.1 (Supp. 1969)]. Those circumstances as contemplated by the above cited statute are completely alien to the activities, to the intent, and to the circum-

stances of the decedent's admission. Mrs. Varley entered the Utah State Hospital of her own volition, signed the application, and submitted herself to the care and treatment of the state personnel at the hospital as one would in any private medical facility or hospital. Mrs. Varley certainly enjoyed the status of one who could be released upon her application. To argue that the superintendent of the State Hospital was empowered by statute to resist and postpone this release would be to engage in speculation outside the ambit of the record in this case.

Appellants urge that these voluntary procedures were instituted because it is felt that patients who enter treatment facilities voluntarily, and are permitted to regulate their time of treatment, come to the facility with attitudes which lend themselves to more successful relationships between the patient and staff. As stated in a Utah Law Review article:

> "Regarding release of patients admitted voluntarily, the Utah statute provides that upon the patient's own request, he is to be released "forthwith" subject to certain exceptions. The most important exception is the power of the hospital superintendent to apply to the district court for a delay of release and commencement of judicial commitment proceedings if the superintendent thinks that discharge would be dangerous for the patient or for others. It seems plausible that to encourage the use of voluntary procedures, patients need reassurance that they will be released upon their own demand. On the other hand, the hospital staff may be unhappy about lenient dis-

> charge provisions since the patient, for possibly irrational reasons, may decide to cease treatment which the doctor feels he should have. A cooling-off period would reduce this possibility. Moreover, there is some chance that under the liberal procedure a dangerous individual could be returned to society if the hospital authorities hesitated too long in initiating involuntary commitment proceedings. However, it is questionable how real this danger is, and to be consistent, it must be conceded that if an individual is sufficiently responsible to decide to enter the hospital, he should also be considered sufficiently responsible to decide to leave. Accordingly, the Utah statute offers greater protection to the rights of the individual." A. R. Thurman, *Hospitalization of the Mentally Ill in Utah*: Utah Law Review, 223 (1966).

It cannot be said that Mrs. Varley was confined as a result of any legal process. There is no indication nor has the claim been made that her stay in the Utah State Hospital was the result of adjudication upon any emergency involuntary commitment procedure, or the result of any type of apprehension, confinement or transportation by state authority. The only context under which the word "legal" enters into the circumstances of Mrs. Varley's hospitalization is in connection with the availability of the voluntary procedure which is created by state law. To say that Mrs. Varley was confined is simply to state that her stay at the hospital had to be within the keeping of the rules and regulations of the State Hospital. Mrs. Varley was a patient at will and could terminate her stay when she so desired. It might

be argued that certain procedures must be complied with prior to her release from the hospital, but the appellants simply point out that even as voluntary as a stay in a hotel might be, certain procedures must be complied with prior to leaving the hotel under penalty of law. [U.C.A. 76-31-1 (Supp. 1969)].

Appellants urge the court to find that the hospitalization of the decedent is clearly outside of the scope of activity embraced by subparagraph 10.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT THE DECEDENT WAS INCARCERATED.

The word "incarceration" is generally regarded to mean imprisonment or confinement in a prison or jail. It is rarely, if ever, used to define hospitalization, whether voluntary or not. Voluntary hospitalization, however, as in the instant case, is well beyond any accepted definition of the word "incarceration".

Black's Law Dictionary (Third Edition) at page 941 defines "incarceration" as:

> "Imprisonment; confinement in a jail or penitentiary. This term is seldom used in law, though found occasionally in statutes. When so used, it appears always to mean confinement by competent legal authority or under due legal process, whereas 'imprisonment' may be effected by a private person without warrant of law, and if un-

justifiable is called 'false imprisonment.' No occurrence of such a phrase as 'false incarceration' has been noted."

Ballentine's Law Dictionary (Third Edition, 1969) defines "incarceration" to mean:

"To imprison; to confine in a prison or jail."

The Oxford Dictionary of the English Language defines "incarceration" as the action of incarcerating or the act of being incarcerated; imprisonment. The same authority defines "incarcerate" to mean "to shut up in prison; to put in confinement; to imprison." A secondary definition is to shut up as in prison; to confine. (Oxford English Dictionary, Vol. 5, 1961 Reprint.)

Nothing has been suggested in this case to demonstrate "incarceration" as required in subparagraph 10 and notwithstanding a finding to the effect that the Utah State Hospital was a place of legal confinement, the absence of incarceration invalidates the defense of sovereign immunity.

CONCLUSION

The doctrine of sovereign immunity as it applied to the State of Utah, and its agents, was greatly modified in the Utah Government Immunities Act. It is clear that the legislative intent which gave rise to 63-30-10(10) was directed at penal institutions, or, in certain instances, having application to the Utah State Hos-

pital when it is acting as the agent of the Warden of the Utah State Prison. The appellants urge that the language of the exception has not been met by the facts of this case. The judgment of the court below should be reversed and the matter remanded to the trial court for further proceedings.

Respectfully submitted,

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