1970

Connie Wilcox, Don Wilcox And Connie Wilcox, As Guardian Ad Litem For Phillip Wilcox, A Minor v. Salt Lake City Corporation : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

CONNIE WILCOX, DON WILCOX and CONNIE WILCOX, As Guardian ad Litem for PHILLIP WILCOX, a minor,

Plaintiffs and Appellants,

—vs.—

SALT LAKE CITY CORPORATION, a municipal corporation,

Defendant and Respondent and Third Party Plaintiff,

—vs.—

Q. B. CORAY and ANGUS K. WILSON,

Third Party Defendants.

Case No. 12[illegible]

BRIEF OF APPELLA[illegible]

Appeal from the Judgment
of the Third Judicial District C[illegible]
Salt Lake County, State of U[illegible]
Honorable James S. Sawaya, J[illegible]

J. DENNIS FRED[illegible]
KIPP AND CHRISTI[illegible]
520 Boston Building
Salt Lake City, Utah 84[illegible]
Attorney for Appellants

ROGER F. CUTLER
101 City and County Building
Salt Lake City, Utah 84111
Attorney for Defendant and Respondent and Third Party Plaintiff

TABLE OF CONTENTS

Cases Cited

TABLE OF CONTENTS (continued)

Papers and Treatises Cited

Statutes Cited

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—vs.—

Q. B. CORAY and ANGUS K. WILSON,

Third Party Defendants.

Case No. 12246

BRIEF OF APPELLANTS

NATURE OF CASE AND DISPOSITION IN THE LOWER COURT

This is an appeal by the Plaintiffs/Appellants, Connie Wilcox, Don Wilcox and Connie Wilcox, as Guardian ad Litem for Phillip Wilcox, a minor, from a Summary Judgment granted in favor of the Defendant/Re-

spondent, Salt Lake City Corporation, a municipal corporation, and further from a denial of the Plaintiffs/Appellants' Motion for Leave to Amend Complaint by the Third District Court in and for Salt Lake County. The Honorable James S. Sawaya, Judge, granted the Summary Judgment in favor of the Defendant/Respondent on the 1st day of September, 1970, and denied the Plaintiffs/Appellants' Motion for Leave to Amend Complaint on the 1st day of September, 1970.

The Summary Judgment was granted apparently on the grounds and for the reason that based on the pleadings and depositions on file, the Complaint of the Plaintiffs/Appellants failed to state a claim against Salt Lake City Corporation. The denial of the Motion for Leave to Amend the Complaint was also apparently based on the failure of the Complaint of Plaintiffs to state a claim against Dr. Q. B. Coray and Dr. Angus K. Wilson, Third Party Defendants, whom Plaintiffs were moving to name as parties defendant.

RELIEF SOUGHT ON APPEAL

Plaintiffs/Appellants seek to have the decision of the District Court granting the Summary Judgment against them on behalf of Salt Lake City Corporation reversed and the matter remanded for trial. Further Plaintiffs/Appellants seek to have the denial of the Motion for Leave to Amend the Complaint naming Drs. Coray and Wilson as parties defendant reversed.

STATEMENT OF FACTS

Connie Wilcox, one of the Plaintiffs in this action, is a waitress at the Hotel Temple Square Coffee Shop and has been since 1962. Each year, all persons dealing in food services in Salt Lake City are required to obtain a "Food Handler's Permit" which entails an annual tuberculin skin test pursuant to Sections 18-6-51, et seq., Revised Ordinances of Salt Lake City, 1965. If the tuberculin skin test is positive, the Salt Lake City Department of Health requires the applicant to take chest x-rays to determine the presence or absence of tuberculosis.

Prior to August, 1966, Connie Wilcox in an effort to obtain her Food Handler's Permit had a tuberculin skin test which was positive; thereafter, she was required by the Salt Lake City Department of Health to submit to a chest x-ray. After the x-rays were examined and reported normal, she was issued a renewed Food Handler's Permit. Again in August, 1967, in an effort to renew her Food Handler's Permit, Connie Wilcox returned to the Salt Lake City Department of Health to obtain her tuberculin skin test. The Department of Health again reported a positive skin test and required a repeat x-ray. In August of 1967, she went to the Salt Lake City Department of Health and had a chest x-ray taken to determine the presence or absence of tuberculosis. After this x-ray was examined by either Dr. Angus K. Wilson or Dr. Q. B. Coray, the two radiologists whom the Department of Health hired for examination of these x-rays, the x-ray was reported normal and the Food Handler's Permit

was issued. In the early winter of 1967, Connie Wilcox's health began to deteriorate, and she lost weight and felt generally weak. This condition became exaggerated and on the 1st of August, 1968, Connie Wilcox went to David D. Christensen, M.D., specialist in internal medicine and hemotology of the Granger Medical Center, for an examination. Dr. Christensen took x-rays and conducted a complete examination of Connie Wilcox and diagnosed her malady as tuberculosis; he further informed her that due to the advanced state of the disease, she had had tuberculosis as of the date of the taking of the x-ray by the Salt Lake City Department of Health in August, 1967. Dr. David Christensen thereafter examined the x-ray taken by the Salt Lake City Board of Health in August, 1967 and confirmed his diagnosis that the disease was present in 1967 and was shown in the x-ray taken by the city. (Deposition, David D. Christensen, M.D., Pages 15, 17, 23 and 24.)

In September, 1969, Ralph L. Tingey, M.D., F.C.C.P., a specialist in internal medicine and chest diseases, conducted a complete examination of Connie Wilcox and examined the x-ray taken by the Salt Lake City Department of Health in August of 1967. Dr. Tingey confirmed the diagnosis that Connie Wilcox had atypical tubercle bacilli (a type of tuberculosis) and that the condition had existed in August, 1967, and was shown in the x-ray taken by the city. (Deposition, Ralph L. Tingey, M.D., Pages 6, 7, 9 and 10)

From August 6, 1968 to August 12, 1968, Connie Wilcox was confined to the isolation ward at Valley West

Hospital; she lost weight from 117 pounds to 103 pounds from the winter of 1967 to the date of seeing Dr. Christensen in 1968; she missed work from August 4, 1968 through September 9, 1968; and she has suffered great emotional upset and concern by the exposure of her husband and minor son to this disease.

ARGUMENT

POINT I.

A GOVERNMENTAL AGENCY WHICH UNDERTAKES THE FUNCTION OF DIAGNOSING THE PRESENCE OR ABSENCE OF TUBERCULOSIS MUST PERFORM THAT FUNCTION NON-NEGLIGENTLY.

It is the Plaintiffs/Appellants position that the Defendant/Respondent, Salt Lake City Corporation, or its agents, failed to either properly examine or evaluate the x-ray taken in August of 1967 and notify plaintiff, Connie Wilcox, of the results of the same, all to her damage. Once the Salt Lake City Department of Health assumed the obligation of holding itself out to the public as an agency capable of diagnosing tuberculosis, it must thereafter carry out this assumed duty in a non-negligent manner, namely: The Department of Health must conduct the tuberculosis examination in a non-negligent manner and inform the persons examined that they either do or do not have tuberculosis. The failure of the Salt Lake City Department of Health to inform Plaintiff/Appellant, Connie Wilcox, that she had tuberculosis as of August 17, 1967, the date the x-ray was taken, which fact was and is revealed by the x-ray taken by the Salt Lake City Department of

Health according to the testimony of both Drs. Christensen and Ralph Tingey, was a negligent omission in the duty of said Department of Health to notify persons taking the tuberculosis test of the proper results thereof.

The Salt Lake City Commission exercised discretion when it established the requirement that all persons dealing in food services within the Salt Lake City limits shall be required to obtain tuberculin tests and enacted Sections 18-6-51, et seq., of the Revised Ordinances of Salt Lake City, 1965. Thereafter, any and all activities with regard to the examination of applicants for "Food Handler's Permits" were merely ministerial in nature and required no discretion in informing said applicants whether or not there is evidence of tuberculosis. It may be said that when a state or state agency, by itself or through its corporate creations, embarks on an enterprise which is commercial in character or which is usually carried on by private individuals or private companies, it is engaged in a proprietary enterprise and accordingly, should be held to the same standard of care as an individual conducting said activities. *Carroll v. Kittle*, 457 P. 2d 21 (Kansas, 1969). There is an increasing trend on the part of the courts and legislatures to limit or repudiate the immunity of governmental units and officers and may be traced in two comprehensive and perceptive papers. See Van Alstyne, *"Governmental Tort Liability: A Decade of Change"*, 1966 Illinois Law Forum, 919 to 980, and Van Alstyne, *"Governmental Tort Liability: Judicial Law Making in a Statutory Milieu"*, 15 Stanford Law Review, 163, 1963. In the *Kittle* case, supra, plain-

tiff's arm was virtually severed in an industrial accident and was replanted by doctors at a state medical hospital. In a state of post operative confusion, the plaintiff ripped off his bandages but was caught in time to prevent further self-inflicted harm. Knowing his disorientation and self-endangering state, the defendants did nothing to prevent reoccurence and forty-eight hours later, the plaintiff re-opened his wound necessitating amputation of his arm. On plaintiff's appeal from the dismissal of his petition, the Kansas Supreme Court reversed and prospectively abolished tort immunity of the state and all its agencies when engaged in proprietary activities. The court further held that in the operation of the University of Kansas Medical Center and its hospital, the Board of Regents, a state agency, was engaged in a proprietary activity. See also the case of *Muskopf v. Corning Hospital Dist.*, 359 P. 2d 457 (Calif., 1961), wherein the plaintiff negligently was permitted to fall from a bed in a hospital operated by a state agency. The court held on appeal that the sovereign immunity of the state did not pertain where it conducted a proprietary activity and it would be held to the same standard of care as if an individual were conducting said activity.

Recent years have witnessed the judicial repudiation of municipal immunity in Alaska, Arizona, Kentucky, Indiana, Idaho, Kansas, California and Arkansas. In the case of *Massengill v. Yuma County,* 451 P.2d 639 (Ariz. App., 1969), a dismissal was reversed. The allegations of the deputy sheriff who followed but did not interfere with or arrest two minor drivers whose driving was at

excessive speed, dangerous, reckless and illegal, and who the deputy sheriff had reason to know had been drinking was held to state a cause of action against the county, the sheriff and the deputy sheriff actually involved. The court rejected the contentions that the deputy sheriff was shielded by "official immunity" and that he could not be held for "mere non-feasance." The court stated:

> "To say that an officer is responsible only to the general public is merely a correlative and conclusory way of stating that a person injured by the negligence of the officer has no remedy against him. It seems, somewhat like the distinction between 'discretionary' and 'ministerial' acts, suspiciously like a ' * * * way of stating rather than arriving at the result'. Nor do we find compelling the logic of a distinction between 'misfeasance' and 'non-feasance' as controlling the question of official and public liability in this area * * * *. [T]he distinction between 'misfeasance' and 'non-feasance', though of historical significance in the development of our law often reflects nothing more than a difference in semantic orientation .... Substance rather than semantics should control matters as serious as the rights and liabilities at issue here. It is obvious that an individual can be as badly damaged by inaction where there is a duty to act as by action where there is a duty not to act. The distinction between 'misfeasance' and 'non-feasance' in this area is criticized by Prosser in Law of Torts, Section 126 at 1017 (Third Edition, 1964), and some courts have rejected the distinction. We see nothing to be gained by giving the distinction renewed vigor in this jurisdiction. Considered in the light of these fundamental principles of the law of negligence, it seems to us that plaintiff's complaints state a cause of action. The complaints allege flagrant violations

of the law and a clear opportunity for the defendant deputy to arrest prior to the occurrence of this accident. The sufficiency of the allegations in this regard are demonstrated by comparison with those of Rubinow v. County of San Bernardino, 169 Cal. App. 2d 67, 336 P.2d 968, 1959. All the gaps noted in Rubinow are plugged by the allegations of the present complaints. Nor can we say at this stage and with only the allegations of the complaints before us that proximate causation is lacking as a matter of law."

In the case of *Harold D. Cooper v. U.S.A.,* .....F. Supp. ....., (Dist. of Nebr., Civil No. 02446, June 3, 1970), the United States District Court for the District of Nebraska held in a federal tort claims case that the failure of the defendant's medical agents at the Veteran's Administration Hospital, to diagnose brucelloses, a disease developed by the plaintiff because of his working over a period of years in a packing plant with dead animals, was more than error of judgment and did constitute actionable negligence. In that case, the plaintiff had suffered for some twelve years from brucelloses prior to admission to the Veteran's Administration Hospital, and the latter took a complete history, including the plaintiff's contact with dead animals. The V.A. Hospital failed to culture for the brucelloses organism and took only one agglutination test. After an extended stay for about fifteen months in the V.A. Hospital which failed during that period to diagnose the plaintiff's chronic brucelloses, the plaintiff voluntarily left the hospital. His physical condition having greatly deteriorated during said fifteen months V.A. hospitalization, he went to the Mayo Clinic

where a positive diagnosis of brucelloses was promptly made. The court held that the failure of the V.A. doctors to culture for the brucelloses organism and the failure to have more than one agglutination test constituted unacceptable and substandard medical practice. Moreover, the failure of the defendant's medical agents to have formal and even informal consultation where as here the diagnosis is obscure constitutes substandard practice. The court went on to state that the defendant had control over and was responsible for the plaintiff at a critical time when the disease created or reached its height and was capable of and did the majority of the damage. The court stated:

> "For that reason, it is the decision of the court that the defendant is liable for a very substantial part of the damage of the plaintiff's body, past and future pain and suffering and medical, hospital and surgical expense occurring after release from the V.A. on or about September 1, 1965, and those to be incurred in the future."

Compare also *Steves v. U.S.,* 294 F. Supp. 446 (Dist. of S.C., 1968); *Hicks v. U.S.,* 368 F.2d 626 (4th Cir., 1966); *Price v. Nayland,* 320 F.2d 674 (D.C. Cir. 1963). In the case of *Cooper v. U.S.A.,* supra, Chief Judge Robinson, writing a majority opinion, stated that although mere error of judgment may not be actionable, a failure to diagnose may very well be found to be causal negligence where there is no or only inadequate laboratory or clinical testing. Failure to perform proper tests leading to faulty or failed diagnoses is actionable.

The State of Idaho has recently abolished state and sovereign immunity from tort liability in four cases. In the case of *Hopper, et al v. State of Idaho,* .....P.2d (Idaho, No. 10315, April 27, 1970), Justice Donaldson held:

> "Because the notion expressed by the adage 'The Kind can do no wrong', offends our sense of justice and because the doctrine of sovereign immunity runs contrary to the basic concept underlying the entire field of tort law that liability follows negligence and that individuals and corporations are responsible for the negligent acts of their agents and employees acting in the course of their employment, this Court shall evaluate the doctrine of sovereign immunity in the light of reason, logic and the actions, functions and duties of our state in this twentieth century. The following statement made by Justice Cardozo in 1921 is even more pertinent in 1970:
>
> > 'If judges have woefully misinterpreted the *mores* of their day or if the *mores* of their day are no longer those of our's, they ought not to tie in helpless submission, the hands of their successors.' Cardozo, The Nature of the Judicial Process, p. 152 (Yale University Press, 1921)

The court in the proper performance of its judicial function is required to examine its prior precedents. When precedent is examined in the light of modern reality and it is evident that the reason for the precedent no longer exists, the abandonment of the precedent is not a destruction of stare decisis but rather a fulfillment of its proper function. * * * [W]hile legislative reform of sovereign immunity might provide a more comprehensive and appropriate solution than judicial

> abrogation nevertheless a start must be made sometime somewhere and since it was this court which originally breathed life into the doctrine of sovereign immunity in the State of Idaho, it falls within our province to snuff it out * * * * We hereby hold that the doctrine of sovereign immunity is no longer a valid defense in actions based upon tortious acts of the state or any of its departments, political subdivisions, counties or cities where the governmental unit has acted in a proprietary as distinguished from a governmental capacity. Where the governmental unit acts in a proprietary capacity, the same rules of tort law which are applicable to private individuals will now apply to governmental units. The construction and maintenance of highways is a proprietary function and has been so held by this court * * * *."

In the *Hopper* case, the facts were starkly simple. In the course of applying a "sealer coat" to the road surface to the eastbound lane of a six mile portion of the U.S. Highway, the Idaho Department of Highways had stationed flagmen at each end of the project to warn motorists that both east and westbound traffic was being channeled into the westbound lane of the highway. During the afternoon of the accident, the flagman stationed at the easterly point of this project left his post. Upon his departure, there were no flagmen nor any signalling device nor any sign at this point to warn the deceased (approaching from the east) that the eastbound traffic was also proceeding in the westbound lane. The plaintiff's wife and her minor children were driving westerly when their car was struck by a bus then being driven in an easterly direction on the wrong side of the highway.

The wife was killed and the children injured as a result of the flagman leaving his post.

In the case of *Molitor v. Kanelane Community Unit District* No. 302, 163 N.E. 2d 89 (Ill., 1959), the Supreme Court of the State of Indiana held in overruling prior inconsistent cases that the school district was liable for burn injuries suffered by a pupil in a school bus accident and stated:

> "The whole doctrine of governmental immunity rests upon a rotten foundation."

In the case of *Willis v. Department of Conservation and Economic Development,* 264 A.2d 34 (N.J., 1970), Justice Weintraub, Chief Justice of the New Jersey Supreme Court stated in prospectively ending the rule of sovereign immunity in New Jersey:

> "It is plainly unjust to refuse relief to persons endangered by the wrongful conduct of the state. No one seems to defend that refusal as fair. There has been a steady movement away from immunity. In some jurisdictions, the change has been achieved by judicial decision. (Citations omitted) * * * and in others by statutes which consented to suit in the courts and provided for relief before an administrative or legislative body * * * * We have long entertained all types of tort actions against counties and municipalities and when relief is refused it is upon the basis of the substantive principles of law we think should apply and not upon the proposition that these agencies are immune from suit * * * * Itis time for the judiciary to accept a like responsibility and adjudicate the tort liability of the state itself."

Chief Justice Weintraub, while concluding that this reforming decision should not be applied retroactively for the reason that, "there are no appropriations to pay the obligations the courts might declare", nevertheless ruled that this progressive decision should be applied to the plaintiffs in this case, "for the practical reason that case law is not likely to keep up with the needs of society if the litigant who successfully champions a cause is left with only that distinction."

This Court, in the case of *Rice v. Granite School District,* 23 Utah 2d 22, 456 P.2d 159 (1969), cited with approval the case of *Finch v. Matthews* (Wash.), 443 P.2d 833 at 842, and stated as follows:

> " 'The legislature of this state has indicated its sovereign immunity in tort actions is no longer desirable or acceptable. (Citations omitted) The modern trend in both legislative and judicial thinking is toward the concept that the citizen has a right to expect the same standard of honesty, justice and fair dealing in his contact with the state or other political entity which he is legally accorded in his dealings with other individuals.' "

The Defendant/Respondent, Salt Lake City Corporation, after being served with a Complaint in this matter, brought two motions, one to Quash Service of Process and the other to Dismiss based on the Utah Governmental Immunity Act, Section 63-30-1, et seq., Utah Code Annotated, 1953, as amended, effective July 1, 1966, on the basis that the Complaint failed to state a cause of action. These motions were argued before the Honorable Bryant H. Croft, Judge of the Third Judicial District

Court, and on the 7th day of October, 1969, Judge Croft signed an Order denying the defendant's Motion to Quash Service of Process and Motion to Dismiss and implicitly ruled that the Complaint did state a cause of action.

The Utah Governmental Immunity Act implicitly states that a governmental agency can be sued by setting forth a specific provision to cover such situations. The statutory approach embodied in the Utah Governmental Immunity Act is the "closed-in" approach. That is to say, in performance of their governmental functions, "all governmental entities shall be immune from suit for any injury which may result"; but this immunity is a qualified one which prevails "except as may be otherwise provided in this act". Supra, 63-30-3. In short, the Legislature provided for a general system of liability subject to specified exceptional situations in which immunity is retained. Therefore, the most significant aspects of the Utah Governmental Immunity Act are the provisions retaining governmental immunity found in 63-30-10, U.C.A., 1953, as amended.

Every kind of tortious damage is potentially the basis for governmental liability and the Utah Governmental Immunity Act expressly declares that when immunity is waived, "liability of the entity shall be determined as if the entity were a private person". Ibid, 63-30-4; also c.f. Van Alstyne, *Governmental Torts in Utah: Law Reform in Action,* August, 1967, Advocati Litigare, page 1, et seq.; and c.f. Note, Utah Law Review of 1967, page 120, et seq. The pertinent language of the statute relied

on by the Plaintiffs/Appellants in asserting that a specific provision of the Utah Governmental Immunity Act allows a claim in cases such as the instant is as follows in Section 63-30-10:

> "*Waiver of Immunity for Injury Caused by Negligent Act or Omission of Employee — Exceptions.* — Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of his employment except if the injury:
>
> (1) arises out of the exercise or performance of or the failure to exercise or perform a discretionary function, whether or not the discretion is abused, * * * "

Plaintiffs/Appellants contend that the failure to identify tuberculosis bacilli in the x-rays taken in August, 1967, was not a discretionary function pursuant to subsection (1) above quoted; the only discretion that was exercised came about when the Salt Lake City Commission established a requirement that all persons dealing in food services within the Salt Lake City limits shall be required to obtain tuberculin tests, and thereafter enacted Sections 18-6-51, et seq., of the Revised Ordinances of Salt Lake City, 1965. Thereafter, any and all activities with regard to the examination of applicants for "Food Handler's Permits" were merely ministerial in nature and required no discretion in informing said applicants whether or not they did have tuberculosis.

The Utah Governmental Immunity Act is based on Sections 810, et seq., of the California Government Code

enacted in 1963, and there have been two recent cases out of the State of California specifically interpreting the comparable provision in the California Code as that quoted above, viz., *Morgan v. County of Yuba* (1964), 41 Cal. Rep. 508, and *Sava v. Fuller (1967),* 57 Cal. Rep. 312, 249 Cal. App. 2d .....

The *Sava* case was a wrongful death action involving the death of a child; her parents sued Thomas Fuller, Ph.D. a botanist employed by the state, and the state itself. Pursuant to a Judgment after an Order sustaining without leave to amend the demurrers of the defendants named in the suit, plaintiffs appealed. The principal inquiry was into the statutory meaning of the words "exercise of the discretion vested in him" as used in the Government Code, Section 820.2 of the California Tort Claims Act of 1963. The deceased, a four year old child, was suffering from bronchial pneumonia, an illness from which she died the next day; the state botanist, defendant Dr. Fuller, who was then acting within the course and scope of his employment was "retained, employed and requested" by the physician of the young girl to make an analysis of a plant "substance", the child may have ingested. It was alleged that Dr. Fuller, holding himself out to be an expert in the field of such analysis, negligently examined the plant and identified it as "toxtic", which it was not. Decedent's death was stated to have been the proximate result of the incorrect analysis because the treatment by the physician was thereafter based upon the misinformation that ingestion of the toxic

materials, rather than bronchial pneumonia, was the child's ailment.

The California Court held that the state botanist who allegedly held himself out to be an expert in the field of plant analysis and who agreed to make an analysis of the plant substance believed to have been ingested by the child assumed a duty of care and was thereafter *not* entitled to immunity from liability accorded public employees acting in the exercise of their discretion pursuant to paragraph 820.2 of the California Tort Claims Act of 1963 which reads as follows:

> "*When employees not liable: Exercise of discretion.* Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

As can be seen, the above language is very similar to that of the comparable Utah statute (§ 63-30-10(1)) previously quoted.

The court in the *Sava* case goes on to cite with approval *Morgan v. County of Yuba,* supra, wherein the California court had before it a case in which it was alleged that a prisoner had threatened the life of the plaintiff's decedent and the Sheriff had promised to give a warning if the prisoner was released on bail. The prisoner was released, the warning was not given and the decedent was killed by the man released. The defendant, citing Section 820.2 of the California Tort Claims Act

claimed it was not liable since the sheriff in failing to warn was performing a "discretionary act" even though the discretion may have been abused. The court in that case held that when the sheriff promised to act, he exercised a discretion; but that after he had promised to warn, he had exhausted the only discretion involved. In failing to give the warning he was merely negligently omitting to perform an act voluntarily assumed.

Based upon the foregoing authorities, it is the position of Appellants that there is, in fact, a duty owing from the state and/or its political subdivisions which includes the Salt Lake City Department of Health to carry out a duty once assumed under a discretionary act, in a non-negligent manner.

POINT II

THE COURT ERRED IN DENYING THE PLAINTIFFS/APPELLANTS' MOTION FOR LEAVE TO AMEND THE COMPLAINT TO NAME DOCTORS Q. B. CORAY AND ANGUS K. WILSON AS PARTIES DEFENDANT.

Pursuant to Rule 15(a) of the Utah Rules of Civil Procedure, 1953, as amended, the trial court is given liberal authority to allow amendments to pleadings when justice requires. In the instant case, justice requires that Drs. Coray and Wilson be named as parties Defendant. At the time of the bringing of the original Complaint, discovery was not adequate to reveal who as representative of the Salt Lake City Department of Health failed to properly diagnose the x-rays of Connie Wilcox and not until the deposition of the doctors had been accomplished

was this known to the Appellants. In the case of *McCord and Nave Mercantile Co. v. Glen,* 6 Utah 139, 21 Pac. 500, this Court held that especially will the court exercise the discretion to allow amendments to the Complaint where the amendment does not tend to impair the defendant's rights. The third party defendants failed to show that their being named as parties defendant would impair their rights and by the very language of the Rule above cited, a party may amend his pleadings by leave of court and leave shall be freely given when justice so requires.

It is the contention of the Defendant, Salt Lake City Corporation, that Drs. Coray and Wilson were independent contractors and that the city is not responsible for their acts or omissions. The Plaintiffs/Appellants do not argue with the factual or legal basis of their position, however, it is essential that the Doctors be named as defendants in the event the contention of the city is upheld. To hold otherwise would seriously prejudice the rights of the plaintiffs and shield the Doctors from their acts or omissions which Plaintiffs claim constitute negligence on their part.

CONCLUSION

It is submitted that once a governmental agency holds itself out to the public as an expert in the field of tuberculosis detection or undertakes the function of diagnosing the presence or absence of tuberculosis, the agency must conduct said activities non-negligently. The Utah statutes, case law and papers cited as well as the decision

of the Honorable Bryant H. Croft, Third District Court Judge, denying Respondent's Motions to Dismiss and Quash Service for failure to assert a claim, all argue for the proposition that there is indeed an obligation flowing from Salt Lake City or its subdivisions to carry out proprietary duties and functions assumed, in a non-negligent manner. It is further submitted that there is evidence that the x-ray of Connie Wilcox taken by the Salt Lake City Department of Health in August, 1967, was not examined properly and, therefore, a question of fact arises which should be resolved by a trier of fact.

Respectfully submitted,

J. DENNIS FREDERICK, ESQ.
KIPP AND CHRISTIAN
520 Boston Building
Attorney for Appellants