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Maureen Lafin

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Ninth Circuit Praises Work of Appellate Clinic Interns

by Maureen E. Laflin and Nancy C. Luebbert

The Appellate Legal Aid Clinic of the University of Idaho College of Law received national recognition in a recent Ninth Circuit opinion. In *Frost v. Agnos*, 1998 WL 470658, the court wrote, "We commend pro bono counsel for their outstanding performance at oral argument and for their fine legal work on this case." Legal interns Nancy Luebbert and Terri Pickens, supervised by Maureen Laflin, Director of Clinical Programs, briefed and argued the case for the appellant. The Ninth Circuit reversed the district court on the issues argued by the Appellate Clinic in a pro bono prisoner § 1983 action.

In *Frost v. Agnos*, the Ninth Circuit held that the high security classification of a handicapped pretrial detainee did not relieve jail officials of the constitutional duty to take reasonable measures to provide for his physical safety. In addition, the court reversed a magistrate's denial of a jury trial. The appeals court held that the denial was not harmless error, because a reasonable jury could have found that jail officials were subjectively aware that their actions posed a risk to the detainee.

Appellant Raymond Frost, a former corrections officer, was held as a pretrial detainee for one year in Maricopa County (Arizona) jails. Frost was confined in a full leg cast and crutches the entire year. Although the jail's doctor prescribed housing Frost in a handicap ward, jail officials overruled the decision, citing Frost's high security classification. Frost was placed in an ordinary solitary cell with no handicap facilities, and jail officials provided no accommodations for his disability. As a direct result of jail officials' failure to accommodate his disability, Frost slipped and fell multiple times, Frost took outdoor recreation only thirty-five times because of the pain and difficulty of climbing four flights of stairs in his full leg cast to the recreation yard. When he did take recreation, Frost had to cling to the railing and hop up four flights while corrections officers carried his crutches. On one occasion, two officers escorting Frost to recreation even refused to carry his crutches, claiming that this posed a security risk. Without his crutches, Frost fell in the recreation area and reinjured his leg. His shattered leg eventually required bone graft surgery.

In a procedurally complex case involving multiple decisions by a magistrate judge and two district court judges, most of Frost's claims were dismissed on summary judgment. The magistrate denied a jury trial, and a bench trial was held on the claim regarding the refusal to carry the crutches. Following the bench trial, the district court entered judgment in favor of the defendants. Although the court found that the proffered security concerns of the two officers who refused to carry Frost's crutches were not credible, it held that the officers could not have been subjectively aware that their actions posed a risk to Frost's safety, and so could not be found deliberately indifferent under the standard of *Farmer v. Brennan*, 511 U.S. 825 (1994). Frost appealed both the grant of summary judgment and the judgment in the bench trial, and the cases were consolidated on appeal.

The Appellate Clinic presented three issues in its supplemental brief to the Ninth Circuit: (1) the district court misinterpreted

the *Farmer* standard for jail officials' subjective awareness of a risk posed to an inmate; (2) the court erred in denying a jury trial; and (3) summary judgment was inappropriate because jail officials failed to provide safe conditions of confinement even though readily available alternatives existed.

The Ninth Circuit reversed the district court on the issues presented by the Appellate Clinic. The court held that Frost's request for a jury trial was timely, and the error in denying the request was not harmless because a reasonable jury could have found that the two officers were subjectively aware that their actions posed a risk to Frost. The court also held that a triable issue of fact existed over whether the failure to provide Frost with adequate shower facilities violated his constitutional rights.

Terri Pickens and Nancy Luebbert briefed and argued Frost's appeal as part of the Ninth Circuit's Pro Bono Program. Under this program, the Ninth Circuit refers pro se civil and habeas corpus appeals to attorneys and law school appellate clinics for supplemental briefing and argument if the appeals present issues of first impression or complex issues of fact or law. The University of Idaho is one of seven law schools participating in the program.

The interns' involvement in Mr. Frost's case was not merely an intellectual exercise. Terri Pickens visited Mr. Frost in Arizona, and Luebbert and Pickens regularly corresponded and telephoned the client. A true attorney-client relationship was established between the interns and Mr. Frost.

As the case progressed, the interns gained a first-hand appreciation for the importance of proper pleading and complete documentation for summary judgment responses. Lacking legal counsel, Mr. Frost had omitted from his affidavit important facts that would have precluded a grant of summary judgment for the defendants. Some meritorious claims could not be argued because they were not pleaded or had been waived in the complex procedural posture of the case. Because Mr. Frost had failed to assert a claim under the Rehabilitation Act, the interns had to make a more complex argument that his Fourteenth Amendment rights had been violated. Luebbert discovered that the defendants had, in two affidavits submitted on summary judgment, misrepresented the shower facilities that were provided for Frost. This discovery led to the defendants making a settlement offer and acknowledging the misrepresentation to the Ninth Circuit.

When settlement negotiations faded, Professor Laflin and the interns traveled to San Francisco to argue before the Ninth Circuit. Pro Bono Coordinators Susan Gelmis and Julie Ronken were especially helpful in allowing the interns to familiarize themselves with the sound system, acoustics, and timing devices of the imposing marble courtroom the day before the argument, and in providing videotape materials on Ninth Circuit appeals to benefit subsequent appellate interns.

The Legal Aid Clinic's victory in *Frost v. Agnos* represented the culmination of efforts of many persons throughout the College of Law. Professor Laflin supervised the interns, brainstorming strategies, and critiquing briefs and oral arguments.

Fellow appellate clinic interns Sara Bonham, Jennifer Del Grosso, Robert Schwarz, Amy Sullivan, and Dean Thompson provided a sounding board and critiqued approaches, briefs, and oral arguments. Faculty members volunteered their time to act as judges during moot oral arguments, asking difficult questions that prepared Luebbert and Pickens for the probing questions they encountered from the bench.

The Ninth Circuit has frequently recognized the quality of legal representation provided by the Appellate Clinic. Reversing the district court's dismissal of a prisoner civil rights claim in *Vignolo v. Miller*, 120 F.3d 1075 (1997), the court noted that the appellant was "well represented" by Appellate Clinic interns Chantelle Nash and Amy Rebholtz. Likewise, two 1997 memorandum decisions, *Curnow v. WSP Medical Staff*, 110 F.3d 67, 1997 WL 154054, and *Whitfield v. Fresno County Detention Facility*, 110 F.3d 72, 1997 WL 135818, commended the representation provided by interns Stephen Noel, John Kluksdal, and Courtnie Tucker.

The recognition provided by the Ninth Circuit in *Frost v. Agnos* highlighted an active year for the Appellate Clinic. Appellate interns argued three prisoner civil rights cases before the Ninth Circuit and a medical malpractice case before the Idaho Supreme Court, as well as filing an amicus brief on an Idaho Administrative Procedure Act case before the Idaho Supreme Court. The first issue of the 1997/1998 *Gonzaga Law Review* featured Professor Laflin's article on the Appellate Clinic's philosophy and methods, "Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report." With a full slate of pro bono cases for 1999, the Appellate Clinic looks forward to another year of effective appellate advocacy.

MAUREEN E. LAFLIN is Professor and Director of Clinical Programs at the University of Idaho College of Law.

NANCY C. LUEBBERT, an Idaho attorney, received her J.D. from the University of Idaho College of Law in 1998.

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