

1985

# Matthew Fenn Hilton v. Marvin D. Borthick : Brief of Appellant

Utah Supreme Court

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## Recommended Citation

Brief of Appellant, *Hilton v. Borthick*, No. 198520040.00 (Utah Supreme Court, 1985).  
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1985 20040

IN THE SUPREME COURT OF THE STATE OF UTAH

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MATTHEW FENN HILTON, et al.,	:	
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Plaintiffs/	:	
Appellants,	:	
	:	Case No. 20040
v.	:	
	:	
MIRVIN D. BORTHICK, et al.,	:	
	:	
Defendants/	:	
Respondents.	:	

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Clerk, Supreme Court

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APPELLANTS' REPLY BRIEF

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ARGUMENT

POINT I

AN EXAMINATION OF THE APPLICATION AND RATIONALE UNDERLYING THE COMMON LAW IMMUNITY FOR "DISCRETIONARY" FUNCTIONS DEMONSTRATES THAT THE DISCRETIONARY WAIVER TO GOVERNMENTAL IMMUNITY SHOULD BE CONFINED TO THOSE BASIC DECISIONS AND ACTS OCCURRING AT THE "BASIC POLICY MAKING LEVEL AND NOT EXTENDED TO THOSE ACTS AND DECISIONS TAKING PLACE AT THE OPERATIONAL LEVEL."

The discretionary function exception to the waiver of governmental immunity is based upon the principle of separation of powers rather than the rule of sovereign immunity. For this reason, it must be limited to actions where a coordinate branch of government is engaged in making basic policy decisions.

This court recognized in Little v. Utah State Division of Family Services, 667 P.2d 49 (Utah 1983), that:

Where the responsibility for basic decisions has been committed to one of the branches of our tri-partite system of government, the courts have refrained from sitting in judgment of the propriety of those decisions.

The United States Supreme Court, in the case of Owen v. The City of Independence, 445 U.S. 622, 648 (1979), noted

that the common law doctrine protecting the state from "discretionary decisions--was not grounded on the principle of sovereign immunity but on a concern for separation of powers." (Id., at 648)

The Supreme Court in Owen further noted that for a court or jury in a tort suit to review the reasonableness of a municipality's judgment on matters of policy would "be an infringement upon the powers properly vested in a coordinate and co-equal branch of government." The U.S. Supreme Court cited the case of Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352 (1968), wherein that court stated "immunity for discretionary activities serves no purpose except to assure that courts refuse to pass judgment on policy decision in the providence of coordinate branches of government." The discretionary function exception to the waiver of governmental immunity must therefore be limited to those occasions when a coordinate branch of government is acting in its legislative or basic policy making levels.

Finally, in Owen, the United States Supreme Court noted that many, if not all, of a municipality's activities would seem to involve at least some measure of discretion, but the courts in the United States had carved out an exception so that, while a municipality retained its immunity for decisions as to whether the public interest required acting in one manner or another, once any particular decision was made, the city was fully liable for any injuries incurred in the execution of its judgment.



An understanding of the rationale underlying the common law immunity for discretionary functions explains why that doctrine cannot serve as a foundation for governmental immunity in the case at bar. In their complaint, the appellants basically claim that the respondents breached their duty to the appellant class when the respondents failed to make certain statutorily required inspections of Grove Finance Company. The Utah Department of Financial Institutions is part of the executive branch of government in the State of Utah. The Utah State Legislature, and not the Department of Financial Institutions, in §7-3-3 U.C.A., determined which financial institutions came under the jurisdiction of the Department of Financial Institutions. The legislature, in §7-1-8 U.C.A., set the policy requiring the Commissioner of the Department of Financial Institutions to examine certain financial institutions at least once a year. The same statute set forth in great detail exactly which institutions were to be examined and the manner and extent of the examination. Section 7-1-8, Utah Code Ann. provides as follows:

The bank commissioner, or an examiner, shall visit and examine every bank, savings bank, every loan and trust corporation, every building and loan association, every industrial loan company, every small loan business, every cooperative bank, at least once a year. At every such examination, careful inquiry shall be made as to the condition and resources of each institution examined, the mode of conducting and managing its affairs, the official actions of its directors and officers, the investment and disposition of its funds, the security afforded its members, if any, and to those by whom its engagement are held, whether or not it is violating any provisions of law regarding to corporations or to the business of the institution examined, whether or not it is

complying with its articles of incorporation and bylaws, and as to such other matters as the commissioner may prescribe.

The respondents have claimed that this statute does not apply to Grove Finance Company. (Respondents' Brief, pp. 35-43) In its memorandum decision in this case, the Third District Court refused to rule what statutory standard applied in this case (R. 963) and that matter is not before the court in this appeal. The appellants, however, have alleged in their complaints that this statute does apply and this court should accept that as the fact in determining whether the state is immune from suit pursuant to the Utah Governmental Immunity Act.

It is clear, however, that it is totally proper for the courts to determine whether or not agents of the executive branch have complied with statutory requirements placed upon them by the legislature.

## POINT II

THE DISCRETIONARY FUNCTION AS DEFINED BY THIS COURT LIMITS GOVERNMENTAL IMMUNITY TO THOSE DECISIONS AND ACTS OCCURRING AT THE BASIC POLICY MAKING LEVEL.

In their brief, the respondents decry the "blanket test that discretionary immunity only applies to basic policy making decisions" (Respondent's Brief, p. 23). The fact of the matter, however, is that this is precisely the standard which has been established by this court.

In Carroll v. State Road Commission, this court recognized that almost all acts require some degree of discretion, and observed that "the exception to the waiver set forth in the

Governmental Immunity Act should be confined to those decisions and acts occurring at the basic policy making level and not extended to those acts and decisions taking place at the operational level." Carroll v. State Road Commission, 27 Utah 2d 384, 496 P.2d 888 (1972), Frank v. State, 613 P.2d 517 (Utah 1980).

In Morrison v. Salt Lake City Corp., 600 P.2d 553 (1979), this court stated:

A discretionary function has been defined by this court as one that requires a basic policy decision essential to the realization or accomplishment of some basic governmental policy, program or objective. Any decision which does not require the exercise of basic policy evaluation, judgment, and expertise is not discretionary but operational and is not protected.

Most recently, in Little v. State of Utah Division of Family Services, this court set forth a four-part test in determining whether an act or omission could be considered discretionary for the purposes of the Utah Governmental Immunity Act. Under this test:

To be purely discretionary, an act by the state must be affirmed under four preliminary questions:

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program or objective?

(2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program or objective as opposed to one which would not change the course or direction of the policy, program or objective?

(3) Does the act, omission or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

(4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

The appellants allege that the omissions of the Commissioner of the Department of Financial Institutions complained of in appellants' complaints fails tests 3 and 4 listed above.

A. THE OMISSION OF THE COMMISSIONER OF THE DEPARTMENT OF FINANCIAL INSTITUTIONS DID NOT REQUIRE THE EXERCISE OF BASIC POLICY EVALUATION, JUDGMENT OR EXPERTISE.

In their complaints, the appellants allege that the Commissioner of the Department of Financial Institutions and his agents failed to inspect Grove Finance Company as required by §7-1-8. As previously noted above, the basic policy evaluation and judgment was exercised by the state legislature in setting forth the specific institutions to be examined, requiring the commissioner to perform an annual examination, and in setting forth in detail the mode and manner of all examinations. A failure to perform this required examination cannot be held to require the exercise of basic policy evaluation.

This exact issue was determined by the Missouri Supreme Court in State ex rel. Funk v. Turner, et al., 42 S.W. 2d 594 (Mo. 1931), where the Missouri Supreme Court considered the responsibility of a bank examiner under a statute virtually identical to §7-1-8 U.C.A. In that case, the court stated as follows:

The difficulty arises in the classification of the duties of the bank examiner, whether discretionary or ministerial. To solve this question, we must refer to §11 689 R.S.Mo. 1919. This section makes it mandatory that every bank

be examined at least once a year. Additional examinations may be made when deemed necessary in the judgment of the commissioner. The section further provides: "On every such examination inquiries shall be made as to the condition and resources of such corporation or banker, the mode of conducting and managing its affairs, the actions of its directors or trustees if a corporation, the investment of its funds, the safety and prudence of its management, the security afforded to those by whom its engagements are held, and whether the requirements of its charter and the law have been complied with in the administration of its affairs; and as to such other matters as the commissioner may prescribe . . . ." By the provisions of this section, the commissioner must make at least one examination each year. This duty is not a discretionary one, but is ministerial; he has no alternative or choice in the matter. The same section leaves it to the judgment of the commissioner to make additional examinations . . . . We are also of the opinion that the section makes it a mandatory duty of the officer who conducts the examination, to inquire into the various matters set out in the statute. Since it is mandatory, it becomes a ministerial duty, the examiner must make the inquiry with reference to the various matters set forth in the statute.

A haphazard examination by an examiner into the matters required by the statute is not sufficient. Where a statute requires an act to be done, it must be performed with reasonable degree of diligence, care and prudence. Failure to so perform that duty is in the law of negligence.

Id., at 598 (emphasis added).

In determining that the acts of a bank examiner in performing an annual statutorily required examination were ministerial and not discretionary, the Missouri Supreme Court examined the terms of the statute which is virtually identical to §7-1-8 Utah Code Ann. Rather than following the Funk v. Turner cited above, the respondents, in their brief, would have this court follow Gormley v. State, 54 Ga. App. 843, 189 S.E. 288

(1936), which the respondents claim to be squarely on point. The Gormley case has a fact situation which is nearly identical to the case at bar in that the superintendent of banks failed to examine an institution because, in his opinion, it was not a bank and therefore not subject to his supervision. The plaintiff in that case lost her savings when it was discovered that the institution was insolvent and sued the superintendent for negligence in failing to examine the institution. In Gormley, the court decided that based on Georgia statutes, the banking commissioner was involved in a discretionary function in determining which corporations in the State of Georgia came within his jurisdiction as banking commissioner. Although factually this case appears to be on all fours with the case at bar, the Georgia statutes are quite different from the statutory scheme of the State of Utah. As pointed out in the case of Vickers v. Motte, 109 Ga. App. 615, 137 S.E. 2d 77 (1964), the Georgia statutory scheme provided that the superintendent of banks was to annually make up a list of all banks subject to his jurisdiction. In another section of the same act, the term bank was defined as:

Any monied corporation authorized to do named acts, which shall include incorporated banks, savings banks, banking companies, trust companies and other corporations doing a banking business and expressly excluding building and loan associations or other associations or corporations.

Id., at 80. The banking commissioner of the State of Georgia therefore had different duties than those of the commissioner of financial institutions in Utah. The Georgia banking commissioner was to make up annually a list of those banks which he felt came

within his jurisdiction. Also, the Georgia statutes, in defining those businesses under the jurisdiction of the banking supervisor, allowed some exceptions. Therefore, the Georgia banking superintendent had to exercise his judgment in determining whether an institution was a bank or fell within the exception. To the contrary, §7-3-3 of the Utah Code is clear and specific in its application and has no statutory exceptions. Clearly, what Gormley establishes is that whether a duty of a public official is mandatory or discretionary depends upon the language of the statutes imposing the duty upon the public official. Appellants submit that the case of Funk v. Turner which interprets a nearly identical statute to that of the State of Utah should carry more weight than Gormley v. State which interprets an entirely different statutory scheme.

B. THE COMMISSIONER OF THE DEPARTMENT OF FINANCIAL INSTITUTIONS WAS NOT STATUTORILY AUTHORIZED TO VIOLATE THE LAW.

Further, the appellants claim that the governmental agency did not possess the requisite statutory authority to make the challenged omission. A state employee has no "discretion" to violate state law. Its dictates upon the state employee are, absolute and imperative. When a court passes judgment on whether a state employee has complied with state law, it does not seek to second guess the reasonableness of the employee's decision nor interfere with the coordinate branch of government's resolution of competing policy considerations. Rather, it looks only to whether the state employee has conformed to the requirements of the state statutes. This same result was reached in Owen v. City

of Independence, 445 U.S. 622, 649 (1979), which held that a city was not immune from suit under the discretionary function exception where the city had violated Federal statutes and the U.S. Constitution.

To hold that the respondents in this case are shielded by the discretionary exception to the waiver of governmental immunity would be to hold that a state employee has the "discretion" to violate state law.

### POINT III

THIS COURT SHOULD NOT EXPAND THE DOCTRINE OF GOVERNMENTAL IMMUNITY.

The respondents, in their brief, seek to have the court expand the principle of governmental immunity to cover all regulatory activities of state government. On page 15 of their brief, respondents cite United States v. Varig Airlines, 467 U.S. \_\_\_\_\_, 104 S. Ct. 2755 (1984), for the proposition that:

Whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the government in acting in its role as a regulator of the conduct of private individuals. Time and again the legislative history refers to the acts of regulatory agencies as examples of those covered by the exception . . .

Respondents have reviewed all of the cases rendered by this court concerning the discretionary exception to the waiver of governmental immunity and this court has never extended the discretionary function to encompass all regulatory functions of state government. In support of this position, the respondents cite Dalehite v. United States, 364 U.S. 15 (1953), which held that the United States was immune from suit on a decision to



implement a fertilizer export program notwithstanding its failure to determine the fertilizer's explosive capability. In that case, the court stated that the "discretionary function":

Includes more than the initiation of programs and activities. It also includes the determinations made by executives or administrators in establishing plans, specifications or schedules of operations.

Note how the Dalehite decision runs exactly contrary to the decision of this court in Andress v. State, 541 P.2d 117 (Utah 1975), where this court determined that:

The decision to build the highway and specifying its general location were discretionary functions, but the preparing of plans and specifications and the supervision of the manner in which the work was carried out cannot be labeled as discretionary functions. (Id., at 1120)

Rather than following the lead of the Dalehite case, this court has consistently drawn the line between those functions ascribable to the policy making level and those ascribable to the operational level. (Little v. State Division of Family Services, supra.)

The United States Supreme Court, in a footnote to its opinion in Owen v. City of Independence, supra., noted that:

In this country, the sovereign or governmental immunity doctrine holding that the state, its subdivisions and municipal entities may not be held liable for tortious acts, was never completely accepted by the courts, its underlying principle being deemed contrary to the basic concept of the law of torts that liability follows negligence, as well as foreign to the spirit of the constitutional guarantee that every person is entitled to a legal remedy for injuries he may receive in his person or property. As a result, the trend of judicial decisions was always to restrict rather

than to expand the doctrine of the municipal immunity. (Note on pp. 645, 646)

The appellants submit that the analysis of the U.S. Supreme Court is correct; the concept of government immunity is contrary to basic principles upon which our society is founded, i.e., that liability follows negligence and that every person is entitled to a legal remedy for injuries to his person or property. It would be improper for this court to expand the concept of governmental immunity as the respondents argue to include all regulatory activities of the government whether or not such regulatory activities occur at the basic policy making level or at the operational level.

#### POINT IV

HOLDING THE STATE LIABLE FOR ITS NEGLIGENCE AND THAT OF ITS AGENTS WILL NOT MAKE THE STATE AN INSURER OF ALL DEPOSITS IN FINANCIAL INSTITUTIONS IN THE STATE.

In Respondent's Brief, respondents repeatedly warn the court that to hold the state liable for its negligence in this case would inevitably lead to the state becoming "an insurer or guarantor for every dollar invested in every financial institution." (Respondent's Brief, p. 26) This argument assumes, of course, that the state department of financial institutions is acting with such negligence in its regulation of the financial institutions of this state that in every case where a depositor loses his money, he will be able to establish that the state had a duty--that the duty was breached and that the breach was the proximate cause of his injury.

If the state is indeed acting with such negligence, perhaps it ought to be held liable for every dollar lost by a depositor. If the state is not acting with such negligence, then the respondents' argument is meaningless.

Both the states of Arizona, in State v. Superior Court of Maricopa County, 123 Ariz. 324, 599 P.2d 777 (1979), and Illinois, in Teherepnin v. Franz, 570 F.2d 187 (7th Cir. 1978), have allowed depositors in financial institutions to sue the state for its negligent inspection of those financial institutions. Since all the elements of negligence must be established, neither state has become an insurer or guarantor for every dollar invested in every financial institution nor has either state been forced into bankruptcy.

#### POINT V

THE FEDERAL CASES CITED BY RESPONDENTS, IN THEIR BRIEF, DO NOT SUPPORT THEIR CLAIM THAT THE COMMISSIONER OF THE DEPARTMENT OF FINANCIAL INSTITUTIONS SHOULD BE IMMUNE FROM SUIT IN THE CASE AT BAR.

In Respondent's Brief, after noting that Utah's Governmental Immunity Act was patterned after the Federal Tort Claims Act and noting that "this court has consistently applied a substantially identical standard as federal cases construing that act, and determining the meaning of 'discretionary function,'" the respondents claim that the "federal cases in which issue has arisen have unanimously held that regulation of financial institutions is a discretionary function under the Federal Tort Claims Act, for which regulatory agencies are immune from suit." (Respondents' Brief, pp. 10-11) A close examination of the

federal cases cited by respondents in their brief, clearly show that the cases cited do not deal with the issues set forth in the case at bar and do not support the respondents' position. In Emch v. United States, 630 F.2d 523 (7th Cir. 1980), the Seventh Circuit Court, rather than applying a blanket conclusion that the government is immune from all suits concerning the regulation of financial institutions, specifically considered the distinction between policy and planning as opposed to the operational level. In this regard, the court stated as follows:

This policy or planning as opposed to the operational level distinction has served as the primary test for applicability of §2680(a) since Dalehite. . . The existence of a discretionary function, and thus the potential for governmental liability under the Federal Tort Claims Act ultimately rests upon the characterization of the challenged behavior as "policy" or "operations."

Further, the court in Emch specifically recognized that there may be times when federal agencies charged with the regulation of banking institutions would be liable for losses of the financial institutions if the negligence occurred at the operational level on the part of the federal agencies. In re Franklin National Bank Securities Litigation, 445 F. Supp. 723 (E.D.N.Y. 1978) stands as an example of federal agencies acting on the operational level in regulating financial institutions and therefore being liable for their negligence. It should be further noted that the issue in Emch was not a failure to examine as in the case at bar, but rather a complaint against the government for committing numerous mistakes, errors and omissions in the

course of the bank examination. Such is clearly not the issue in the case at bar.

In First Savings and Loan Association v. First Federal Savings and Loan Association, 531 F. Supp. 251 (1961), cited by the respondents in their brief on pages 13 and 34, an action was brought by First Savings and Loan Association alleging that First Federal Savings and Loan Association had acted in concert with the government to place First Savings and Loan Association in receivership and sell its assets. This was a claim for an intentional tort and is not in any way similar in the case at bar.

In First Savings and Loan Association v. First Federal Savings and Loan Association of Hawaii, 542 F. Supp. 988 (1982), the plaintiffs' claim was dismissed due to the failure of the plaintiffs to file a claim with a federal agency within two years from the time the claim first accrued. Again, this action cited by the respondents on page 13 of their brief has no relevance to any of the issues before the court in the case at bar.

In Magellsen v. Federal Deposit Insurance Corp., 341 F. Supp. 1031 (1972), cited by respondents on page 13 of their brief, an action was brought against the Federal Deposit Insurance Corp. for failure to act upon an application for insurance and for discrimination against the individual who had submitted the application. This case also bears no similarity to any of the issues presented in the case at bar.

In Davis v. Federal Deposit Insurance Corp., 369 F. Supp 277 (1974), an action was brought against the Federal Deposit Insurance Corp. for the failure to disclose to the public the insolvency of a particular bank. In that case, the court held that the Federal Deposit Insurance Corp. had no duty to disclose the insolvency to the general public. Davis would be relevant to the case at bar if the appellants, as claimed by the respondents on page 33 of their brief, were making a claim against the Department of Financial Institutions for failing to disclose the insolvency of the bank. In making this claim, the respondents are merely setting up a straw man so that they can knock it down again. The appellants have made it clear in their pleadings and in the record that they make no such claim. (R., at 665 and 666) Rather, the point being made by the appellants is that, after issuing the cease and desist order prohibiting Grove Finance from accepting additional monies on deposit, the defendants totally failed to enforce such order to the damage and detriment of the appellants.

In Huntington Towers Ltd. v. Franklin National Bank, 559 F.2d 863 (1977), rather than merely adopting the position urged by respondent in this case that all government regulation of banking institutions is per se a discretionary activity, the court in Huntington Towers did exactly what the appellants in this case are asking this court to do; i.e., it reviewed the language of the statute to determine if the act complained of

was discretionary or ministerial. In the Huntington Towers case, the complaints against the comptroller were as follows:

- (1) He failed to declare an insolvent bank solvent;
- (2) He declared an insolvent bank solvent;
- (3) He kept an insolvent bank;
- (4) He consented to an unlawful preference among creditors in violation of 12 U.S.C. §194; and
- (5) He failed he failed to take action to have those preferred liens declared null and avoid.

Again, this case raises none of the issues presented to this court in the case at bar.

Finally, in Dannhausen v. First National Bank of Sturgeon Bay, 538 F. Supp. 551 (1982), the opinion of the court does contain dicta that 28 U.S.C. §2680(a) precludes suits against the United States involved in the regulation and examination of banks. Although this language appears in dicta, again the issues in the Dannhausen case are not even vaguely similar to the issues set forth in the case at bar. In Dannhausen, the issue was whether the comptroller could be held liable for his refusal to give information to the plaintiffs concerning the results of a bank examination.

A close examination of the federal cases, which respondents claim unanimously hold that the governmental regulation of financial institutions is per se discretionary, fails to support the respondents' point. None of the cases deal directly with the issues presented to the court in the case at bar. Further, the Emch case primarily relied upon by the respondents specifically distinguishes between those acts performed at the policy making level and those made at the operational level.

## POINT VI

APPELLANTS SHOULD BE ENTITLED TO A TRIAL TO DETERMINE THE FACTS IN THIS CASE.

Respondents, in their brief, stated that "the respondents agree with some of the facts set forth in the appellants' statement of facts, but controvert others . . ." (Respondents' Brief, p. 2) The respondents then went on to set forth their version of the facts, many of which the appellants strenuously disagree with.

For example, on page 43 of the Appellants' Brief, appellants stated "The record now before the court attests that Grove Finance complied with all reporting requirements both as a small loan business and as a supervised lender, and that examinations by the Department of Financial Institutions indicated no U.C.C.C. violations, prior to the issuance of the cease and desist order in 1980." Nothing could be further from the truth. Rather, the appellants, in their motion for summary judgment, demonstrated to the court numerous violations of the U.C.C.C. reporting requirements by Grove Finance Company which the Department of Financial Institutions either knew or should have known of. (R. 953, 954, 955)

In a case such as this where the facts are disputed, it is appropriate for the appellants to be allowed a trial so that the facts can be determined by the court. Such a determination of the facts, however, is not necessary for this court to determine whether the respondents are immune from suit under the principles of governmental immunity. Rather, this court should consider the complaints of the plaintiffs-appellants and



the allegations contained therein should be taken as true in determining whether the state is immune from suit pursuant to the principles of governmental immunity.

#### CONCLUSION

An examination of the rationale underlying the common law immunity for "discretionary functions" demonstrates that this exception to the waiver of governmental immunity is based upon the doctrine of separation of powers rather than the doctrine of sovereign immunity. For this reason, the discretionary function exception to the waiver of governmental immunity should be confined strictly to those decisions and acts occurring at the basic policy making level and not extended to those acts and decisions taking place at the operational level. This court has followed the federal courts in making the distinction between the basic policy making level and the operational level. However, to hold that the respondents in this case are shielded by the discretionary exception to the waiver of governmental immunity would be to hold that a state employee has the "discretion" to violate the law.

This court has been asked by the respondents to extend the doctrine of governmental immunity to cover all cases where the government is performing a regulatory function whether or not it is performing on the basic policy making level or on the operational level. Since the concept of governmental immunity goes directly contrary to the well-established principles that liability follows negligence and the constitutional guarantee that every person is entitled to a legal remedy for injuries he

may receive in his person or property, this court should decline to extend the doctrine of governmental immunity as requested by the respondents.

The appellants respectfully request that the court overrule the decision of the Third District Court holding the respondents immune from suit and allow this matter to proceed forward to trial.

Respectfully submitted this 31st day of January, 1985.

KESLER & RUST

By Charles W. Hanna  
Charles W. Hanna

CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed two true and correct copies of the foregoing Appellants' Reply Brief in Case No. 20040, postage prepaid, this 31st day of January, 1985, to:

David L. Wilkinson  
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Linda M. Sundberg