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Paul Blackner v. The State of Utah, Department of Transporatation, and the Utah Department of Transportation and City of Alta : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

PAUL BLACKNER, Appellant, vs. THE STATE OF UTAH, DEPARTMENT OF TRANSPORTATION, and the UTAH DEPARTMENT OF TRANSPORTATION and CITY OF ALTA, Defendants/Respondents.	)	Subject to Assignment to the Utah Court of Appeals Priority No. 15 Supreme Court No.: 20000906-SC Lower Court No.: 990906368

REPLY BRIEF OF APPELLANT

On Appeal from the Third Judicial District Court
Salt Lake Department, Salt Lake County
Honorable William B. Bohling

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ARGUMENT

The Governmental Immunity Act is designed to shield the Government from liability resulting from injuries or property damage caused by natural conditions or natural phenomena on public land. Nelson By and Through Stuckman v. Salt Lake City, 919 P.2d 568, 574 (Utah 1996). This case presents a different situation. The Act, as submitted by Appellant, is not designed to protect the Government's negligent conduct in placing or permitting the public to be exposed to harm from natural occurrences. The lower court's entry of summary judgment against Appellant is, in whole, erroneous, and is squarely before this Court.

POINT I.

APPELLANT HAS ADDRESSED ALL MATERIAL ISSUES ON APPEAL

Appellees have suggested that Appellant failed to address the issue of immunity from injuries caused by a natural condition. UDOT Brief at page 9, Alta Brief at page 6. The issue on appeal whether Appellant's injuries were *"proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of, in connection with, or results from ... (11) any natural condition on publicly owned or controlled lands,..."* as codified at Section 63-30-10, U.C.A. was sufficiently raised, but is obscured by the parties' differing interpretations of statutory definitions.

The lower court concluded, as a matter of law, that **"the"** avalanche is "**a natural phenomenon, it is certainly a natural condition of the land**..."[1] Transcript of hearing on

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[1] The lower court's usage of the term "the" must be intended to relate to a specific avalanche in this case. If the court spoke in terms of the first avalanche, its legal conclusion that it was a natural disaster is erroneous. This is Appellant's assumption on appeal. If "the" is

Motions for Summary Judgment, Rec. at 294, Page 16, lines 10-11. Appellant has no dispute with the statutory definition that an avalanche is a "natural phenomenon" as defined by Section 53-2-102(8), U.C.A. It is also undisputed that Appellant was injured by a wholly separate and unrelated second avalanche. It is further without dispute that the Appellees actually directed and placed Appellant in harm's way by stopping his vehicle under a known avalanche slide area. Medara Statement, Rec. at 216. This resulted in a "disaster" of the governments' own making.

The first avalanche occurred prior to Appellant's arrival in the area, and the Governmental entities had already begun clean up efforts of the snow that spilled on the road. It is, therefore, implausible that the proximate cause of Appellant's injury ***"[arose] out of, in connection with, or results from: (11) any natural condition on publicly owned or controlled lands..."*** U.C.A., §63-3-10(11). The question is one of causation.

It does not follow that Appellant's injuries were proximately caused by a static, natural condition existing on land simply because the Government was involved in the clearing of snow from the road further ahead. The proximate cause of Appellant's injuries did not arise out of, was not connected with, and did not result from the snow in the road further ahead. This was the analysis used in Nelson, supra, where the natural condition may have been the actual cause, but not the proximate cause of the injury. Id. at 574. This case is even more compelling to impose liability, since the "natural condition" of the snow being cleared was neither the

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describing the second avalanche, the court is correct that it caused a natural disaster, but is not a proximate cause of injury under the case of Nelson, 919 P.2d 568 (Utah 1996).

proximate nor actual cause of injury to Appellant. To hold otherwise would abrogate this Court's holding in Nelson.

Appellees' argument that the issue of "natural condition" was not addressed by Appellant begs the question. It is the interpretation of these terms [natural condition, natural phenomenon, natural disaster] that is at the heart of the Governments' claim of immunity. **However, it remains that the Appellant was simply not injured by a natural condition.**

a) Natural Condition is a **static or peaceable** condition on land.

This issue was briefed and argued in the lower court and the issue is before this Court on appeal. The argument was presented, both here and below, as to what classification and state of existence applied to the first avalanche, and in light of this Court's holding in Nelson By and Through Stuckman v. Salt Lake City, 919 P.2d 568 (Utah 1996), concerning whether the child's drowning was caused by the natural condition or the Government's negligence.

Appellant has more than adequately raised the immunity issue Appellees contend was omitted on appeal as to "natural condition." The issue is obscured beneath definitional bloodshed. The simple truth is that the lower court incorrectly lumped an "avalanche" into all three statutory categories, as it concerned the first avalanche, and extended immunity without any evidence to distinguish or elevate a "condition" to "phenomenon" to "disaster."

It is illogical to classify an earthquake, storm, flood, fire, or epidemic as "natural conditions" on public lands. It is submitted that the Legislature considered "natural conditions" as "static" or peaceably existing, whereas phenomena are more "dynamic" in nature. Similarly, rocks and dirt are natural conditions on land, but become the natural phenomenon of a "landslide"

when put into motion. "Natural phenomenon" means any earthquake, tornado, storm, flood, landslide, avalanche, forest or range fire, drought, or epidemic. See §53-2-102, U.C.A. That definition does not include a snow pile on any public road. The opposite is true as well, where a phenomenon can become a natural condition. The aftermath of a landslide is rocks and dirt just as the outcome of an avalanche is placid snow. The question is, therefore, whether Appellant's injuries were caused by the first avalanche existing as a natural condition, phenomenon, or disaster.

For those reasons, as previously argued and supported by Appellant's reliance on Nelson By and Through Stuckman v. Salt Lake City, 919 P.2d 568 (Utah 1996), the lower court erred in granting summary judgment by concluding that Appellant's injuries arose out of, in connection with, or resulted from a "natural condition." This cannot be since the "natural condition" in this case was static snow on the road and could not have caused injury to Appellant who was stopped hundreds of yards away. The only remaining theory is to conjure up a "disaster" argument because a natural disaster provides immunity to the Government for the active role taken in its management. However, this requires that the definitional requirements of a "disaster" be met, and strictly so. The germane argument, therefore, becomes one of whether the Government can make the first avalanche situation fit the specific requirements of a "disaster" as the statute requires. They cannot, and the lower court's ruling to that effect is clearly erroneous.

POINT II

THERE WAS NO EVIDENCE OF WIDESPREAD THREAT OF HARM TO PROPERTY OR THE PUBLIC

To support the "management of a natural disaster" claim, Appellees spend considerable time suggesting to this Court that the issue of "threatening to cause injury," [Section 53-2-102(2), U.C.A.] is the more persuasive basis for prevailing on appeal. There are, at a minimum, three distinct reasons for the Court to reject this approach.

a. "Threat" of Injury

First, the lower court did not rule that there existed any "threat of injury" arising from the "situation" of clearing snow from the road and directing traffic. The lower court's bench ruling makes it clear that it considered:

> **... a disaster is a situation that causes widespread damage to property that results from natural phenomenon. And in the Court's view this sort of condition would follow in the description of "widespread damage" and would therefore be within the statute and would allow the immunity to the entities that are sued here as Defendants. [Emphasis added.]**

Transcript of hearing on Motions for Summary Judgment, Rec. at 294, Page 16, lines 12-18.

There is nothing in the record to suggest that the lower court formed any opinion or made any ruling that a "threat" of injury or damage existed with respect to the first avalanche [snow pile]. Appellees have read into the lower court's comments from the bench that this was a situation threatening to cause widespread damage. No such ruling exists on the record, and Appellees have no evidence that can be marshalled for that contention.

b. Widespread Injury

Second, and similarly, there is nothing stated by the lower court concerning actual or even threatened "widespread injury" (as opposed to "widespread damage"). The lower court's "findings" were limited to damage alone. There was no evidence of either perceived or threatened injury resulting from the first avalanche, which was a burden imposed on the Appellees. The Appellees merely argue that a risk of harm existed for a potential automobile accident. Such hardly rises to the level of "threatened injury or damage" as constrained by Appellees' arguments.

c. Widespread Damage

Third, there was no evidence to establish that there was any sort of "widespread damage" involved in the first avalanche. There simply was no damage or injury at all. The operative word in this setting is the term "widespread." Whether the avalanche "caused" or was "threatening to cause" injury or damage, such must be on the scale of "widespread" before any classification of a disaster can be made. The statutory definition of disaster provides:

> **"Disaster" means a situation causing, or threatening to cause, widespread damage, [widespread] social disruption, or [widespread] injury or loss of life or property resulting from attack, internal disturbance, natural phenomena, or technological hazard.** [Emphasis added, bracketed comments added].

See Sections 63-5A-2(4) and 53-2-102(8), U.C.A.

Under the above definition, any threat of damage or injury must be on a widespread level before it will be classified as a "disaster." Appellees offered no such evidence. The mere inconvenience of a few passing motorists cannot be classified as "widespread." The statute has no allowance of immunity for simple inconvenience or frustration placed on the public.

For those reasons, Appellees' suggestion that a mere threat of injury is sufficient to sustain immunity in this case is lacking, at a minimum, the requisite breadth of being on the "widespread" scale. Obviously, until the second avalanche released, there was NEVER any actual or even threatened injury or damage from the first avalanche. It is only upon suggestion of counsel that such existed, and that should not be a proper basis to expand the scope of governmental immunity beyond the mandates of the Legislature and to deprive Appellant of his day in Court.

CONCLUSION

For the foregoing reasons and legal analysis, the decision of the lower court should be reversed and the matter remanded for trial on the merits. When the facts and inferences of this case are viewed in a light most favorable to the Appellant, reversal is mandated.

RESPECTFULLY SUBMITTED.

DATED this 11 day of April, 2001.

BRAUNBERGER, BOLD & DRAPER, P.C.

By _____
Tad D. Draper
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CERTIFICATE OF SERVICE

This is to certify that the undersigned served a true and correct copy of the foregoing was delivered by mailing the same to the following on this 11 day of April, 2001, to the following:

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